COMMONWEALTH OF MASSACHUSETTS
ADVISIOR BOARD OF PARDONS

Worcester, ss
Commonwealth

v.

Benjamin LaGuer

In the Matter of Ben LaGuer's Request For Executive Clemency

Ben LaGuer, 51, petitions for executive clemency for the crime he stands convicted on the basis of actual innocence. He is sentenced for the term of his life. The public prosecutor admitted to the Parole Board in April 2010 that the jury verdict is not free of racial bias. In 2007, the Supreme Judicial Court held: "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." The jury's verdict firmly rest on the alter of a single eyewitness. The prosecutor does not dispute the credibility or significance of newly discovered evidence that prior to trial the victim was administered antipsychotic not disclosed to the defense until the fall of 2006, or that prior to the trial she had falsely accused other black man of the assault LaGuer was convicted. Despite enormous state resources, the prosecutor cannot find a single forensic expert to affirm under his or her oath that the specimens used in a 2000-2002 DNA analysis did not contaminate the DNA test results. The prosecutor's refuses to ask the State Police Crime Laboratory to undertake a review of the procedural handling of the forensic specimens used to obtain the test result, even though the prosecutor has admitted in her court papers that other specimens are mislabeled. In accordance to Executive Clemency guidelines promulgated by Governor Deval Patrick 21 May 2007 section IV(6)(a) "as part of the exercise of his constitutional discretion," the governor may "request petition to undergo medical, forensic, psychological or psychiatric examinations under circumstances and in a setting to be established by the Governor." In other words, the governor has within his constitutional powers the discretion to order a "forensic" evaluation of the DNA analysis by competent experts of the forensic science community. (LaGuer herby submits to aid His Excellency a length memorandum in support of his petition)

Moreover, LaGuer could have been released from prison if only he had admitted guilt to the parole board 1988. He could have been released in 1985 had he accepted to pretrial plea bargain offered to him. (On the basis that the trial prosecutor left no notes and has no current memory of a plea, the public prosecutor today denies the plea offer. But LaGuer attorney swears under oath that he conveyed to LaGuer the plea offer made to him not on the basis on memory; he actually has contemporaneous notes of the plea offer.)

In accordance to Executive Clemency guidelines, this petition presents "rare and exceptional circumstances." LaGuer hereby request that His Excellency waive any provision of section IV(2) which mandates that if "the Governor does not disapprove or does not take any other action with respect to the

adverse recommendation within 90 days after the date of its submission to the governor, it shall be presumed that the governor take more time than 90 days to review and weigh these "race and exceptional" facts. The material in this case is quite voluminous. The governor may choose to assign independent consultants.

I am not seeking, nor will I accept, a pardon. See. Burdick v. United States, 236 U.S. 79, 94 (1915) ("A grant of a pardon carries an imputation of guilt; acceptance of a pardon a confession of it.") Also see. Commissioner of the Metropolitan District Commission v. Director of Civil Service, 348 Mass. 184 (1964) ("Everybody knows that the word 'pardon' naturally connotes guilt as a matter of English." In order to further the interest of justice, LaGuer requests that his petition for executive clemency be considered in light of Herrera v. Collins, 506 U.S. 390 (1993), the United States Supreme Court legal precedent affording criminal defendants asserting claims of factual innocence a secondary avenue for relief.

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"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. 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. Patrick contributed $5,000 to a defense fund that paid for DNA tests intended to exonerate LaGuer. ... 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, who also corresponded with LaGuer in the late 1990s, 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 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

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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.

technician, Mark T. Grant, who's own lab notes shown that he was handling and testing LaGuer's underclothes at the same time as he was testing the hospital specimens from the victim, 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]

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]

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

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

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."[8] 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."

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If I am an honest man, for which I no doubt am, I must confess upfront that 30 years ago I started on a journey to vindicate my father's name under a delusional haze. I am an American. I had no reason to disbelieve that popular axiom, "and the truth shall set you free". While truth has set my soul free, given me a kind of peace that music lovers find in Bach, truth is not strong enough to blast through concrete walls, steel bars, or wired fences. Truth is not strong enough to rip apart the seals of the verdict slip. Truth is the lawyer's enemy, because it demands the labor of patience and reconciliation. In Herrera v. Collins, the US Supreme Court announced that judges in this country "sit to ensure that individuals are not imprisoned in volition of the Constitution, not to correct errors of fact." For the innocent in prison sitting between four walls and eternal hope, this legal notion feels like a giant foot pressing on your rib cage. It siphons the soul of hope and fills it with doubt.

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.[9]

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."[10]

"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. He accused then District Attorney John J. Conte of planting the evidence used in the DNA comparison.[11] An Appeals Court ruling bludgeoned James R. Lemire, the trial prosecutor, for not disclosing 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." [12] (Judge Lemire is currently Chief Regional Justice.)

"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

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[8] Commonwealth's Memoranda in Opposition to Defendant's Motion to Dismiss, 18 August 1985, p3.
[9] Boston Herald, judge in rape trial set to be victim's ex-lawyer by J.M. Lawrence 6 November 2004
[10] Affidavit of Peter L. Ettenberg April 29, 2010.
http://www.benlaguer.org/documents/Affidavit%20Of%20Peter%20Edenberg.pdf
[11] Zamiska, Nicholas. Boston Globe. Silber fights for convict's freedom. 13 June 2003. Wedge, Dave. Silber backs rapist. Boston Herald. 13 June 2003.A3. Bruun, Natt. Telegram. Parole plea for LaGuer 13 June 2001 Al.
12 65 Mass. App. Ct. 623 (2006)

LaGuer," Telegram columnist Clive McFarlane said.[13] In January 2007, DA Early added, "I am concerned about the chain of custody" issues.

In March 2002, LaGuer found no law enforcement agency willing to investigate his claim that the evidence used in the DNA comparison came from his own apartment, not crime scene evidence. In 2004, with the urging of state representative Ellen Story, a number of forensic experts from academia and private sector agreed to review the case file free of charge. LaGuer shared all these independent reviews with prosecutors. After DA Early still refused to order a review, then claiming that the 1984 guilty verdict had been reached without DNA evidence, a new twist, Governor Patrick ordered Public Safety to audit of the DNA test to ensure its validity.[14] It is said that Lt. Governor Tim Murray, a Worcester-based politician with close ties to District Attorneys Conte and Early, intervened to cut off the forensic audit at its knees.

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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 the victim's name multiple times in his memoranda. Lennice Mae Plante died in 1997. Her only daughter, Elizabeth Barry, voluntarily allowed her name to be broadcast on the PBS public affairs program Greater Boston.[15] Barry also allowed her image to be photographed by photographer Robert E. Klein for the Boston Globe and photographer Paul Kapteyn for the Telegram and Gazette. Moreover, she appeared at a public press conference in Worcester, supporting gubernatorial candidate Kerry Healey.[16] Barry's husband and daughter also allowed themselves to be photographed by a Boston Globe photographer 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.

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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

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[13] McFarlane, Clive. DA quickly dismisses LaGuer, Telegram & Gazette Wednesday 10 January 2007.

[14] Letter to Ben LaGuer from Executive Office of Public Safety of 12 July 2007 ("in acknowledgment of your letter regarding the State Police DNA Crime Lab which was forwarded to us by Governor Patrick for response. Please be advised that your letter has been forwarded to the below name [State Police Superintendent Colonel Mark F. Delaney] and addressed for response."); Letter to Ben LaGuer from Executive Office of Public Safety of 11 July 2007 ("please be assured that EOPS is reviewing this matter. Once all of the facts surrounding this issue have been determined, we will work toward a reasonable and just resolution."); 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.")

[15] Elizabeth Barry, Television Interview, Greater Boston, Hosted by Emily Rooney, WGBH July 12, 2003

[16] 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

Safety Committee, in a letter to Dr. Carl Selavka of the Massachusetts State Police crime lab.[17] This case remains one of enormous legal, scientific and political consequences.[18]

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 span nearly two decades of LaGuer's nonstop attempts to reverse the verdict. These entries included a grand jury indictment on four counts of criminal mischief, an arraignment, pretrial motions, discovery request, pretrial conferences, judicial rulings and seven prior defense bids for a new trial and government counterclaim papers and other filings. By the time Forensic Science Associates (FSA) congregated a less than 0.03 nanogram stain of male DNA in a petri dish, in August 2001, prosecutors had cause the clerk's docket to spike north of 150 entries. Defense attorney James C. Rehnquist's new motion for a new trial, based on the government's withholding of exculpatory fingerprint evidence and perjured testimony was still two years in future. In spite of 11 epic courtroom battles over access to the DNA evidence, not once was analyst Grant asked to explain the discrepancy between his examination of "underclothes from suspect" and Carignan's trial testimony that no such fabrics existed. Prosecutors had accused the defense early of breaching a litany of chain of custody rules. Analyst Grant, the only person familiar with the evidence other than Carignan, whom died in 1988, was never asked about his prior 1989 testimony that he had received a parcel of "underclothes from suspect" after Carignan had asked him to examine a partial of biological specimens from Plante and other physical evidence from her sanguinary studio. The district attorney's office was far more interested in concealing the true DNA provenance. Siegel was unprepared to challenge the origin of certain "unspecified slides" that prosecutors had sent to FSA had for DNA extraction. These slides were not part of the court order. In fact, these "unspecified slides" are microscopic slides of hairs from LaGuer's jersey.

When Attorney Siegel petitioned the court for DNA analysis in January 2000, was beyond his depth in understanding the characters and evidence. Siegel failed to advice the court in advance of testing that eight tube socks, underclothes, a jersey and other fabrics in the evidence collection had been illegally taken in a police raid of LaGuer's apartment. Defense lawyer Peter L. Ettenberg prior to trial had asked the prosecutor for a "copy of the search warrant and affidavit which was utilized to obtain certain evidence from my client's apartment."[19] On May 22, 1989, prosecutors released a box "… of the evidence that was not actually introduced during the course of the trial." (Tr.130) Assistant State Police Chemist Mark T. Grant admitted in his May 22, 1989 testimony that he ran tests of evidence taken from Plante and her residence together with fabrics first seen on LaGuer and his residence.[20] FSA's use of samples previously enmeshed with hairs, tube socks, underpants and other fabrics from LaGuer, including "unspecified" [21] samples, to create a genotype of the presumptive culprit risked contamination. Analyst Grant said "everything was bagged together in one box."[22]

"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."[23] Instead of asking FSA to preclude microbial contamination, as Reilly had requested, Siegel did not alert FSA. In May 2001,

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[17] Letter, J. Barrios to C. Selavka of 15 July 2004.
[18] 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/
[19] 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.
[20] Testimony of Mark T. Grant 22 May 1989. (Tr. 68, 74)
[21] FSA Report 2, 4 February 2002, pp. 6-7
[22] Testimony of Mark T. Grant 22 May 1989. (Tr. 68, 74)
[23] ADA Joseph J. Reilly, III, 15 May 2000 pg 17,19

more than a year after the defense requested DNA testing, Siegel bitterly complained that “most of the things they [prosecutors] want to test aren’t things that they’ve established authentication of.”[24] In fact, the first public response of prosecutors to LaGuer’s request for DNA testing was that the “[…] evidence may well have been contaminated beyond the point of obtaining valid test results.”[25] In September 2001, Blake said, “This is very difficult evidence, there’s no question about it.” He added, “We haven’t made any progress in being able to provide genetic information about a bad guy.” Even if FSA combined the DNA with other samples, Blake warned: “Quite candidly, I have my doubts if that’s going to be adequate.” The DNA stain was less than 0.03 nanograms.[26] (“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.”)[27] 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.”[28] In March 2002, as evidence that FSA was totally in the dark, Blake said contamination was never an issue until LaGuer heard the damaging result.[29] “The time to make those claims was on Day One,” Blake angrily said. “If this is some concocted thing, why did we spend all this time and effort on concocted evidence? It’s only concocted because Mr. LaGuer didn’t like the result of the testing. If this ‘frame job’ was evidence in the police reports, why he wasted the good will of all the people who supported him with money? Why did he waste my time? Why did he waste David Siegel’s time for three years? Nothing could be more transparent.”

On May 11, 2000, the State Police found several slides of different hairs wrapped in a paper towel. One slide consisted of hairs extracted from a "yellow pullover," a different name for a "yellow jersey" which LaGuer was donning when arrested. On November 28, 2011, prosecutors said, no less than nine times in a single filing, that the "yellow pullover" in Grant's benchnotes is the “yellow jersey” described in all other reports.[30] The hair slides were sent for DNA extraction, sequencing and comparison on August 2001. Grant's benchnotes also indicate that he analyzed the “interior crotch” of LaGuer's underpants. In November 28, 2011, prosecutors admitted that certain fabrics were "incorrectly"[31] labeled.

Analyst Grant’s pretrial analysis revealed that the vaginal and rectal swabs had no semen or seminal fluid.[32] 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.”[33] Despite FSA’s prediction, the swabs had no male DNA. “Since no spermatozoa and no male DNA was recovered from the Plante

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[24] 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."

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

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

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

[28] 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.

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

[30]Æommonwealth’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)

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

[32]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.”)

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

vaginal/rectal swabs, this evidence is not relevant to the genetic information of Plante's assailant."[34] The Q-Tip swab used to transfer her pubic hairs yielded no blood or sperm fractions.[35] The absence of such blood was particularly probative. 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.

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In October 1983 Detective 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 a bloodtype that analyst Grant had drawn from the culprit's recovered tube sock. But LaGuer was convinced that Carignan was a bad actor. Ettenberg had sent his client the transcript of Carignan's grand jury testimony. Reading that material only hardened LaGuer's resolve to resist a frame up. LaGuer had already spent three months in twenty-three hour lockdown, in a protective custody unit full of inmates off antipsychotic drugs. He had begun to wonder why Carignan wanted a saliva sample for a blood test. Not understanding the forensic technique, he grew paranoid. It is said that LaGuer, afraid that Carignan would only complete his scheme to pin on him Plante's assault, switched his saliva with another prisoner. The serology was inconclusive. Assistant District Attorney Lemire could have requested a second specimen. But Lemire was far from interested in pursuing this forensic investigation. He had found a fatal error in the state police serology. It was serious enough that he never put analyst Grant on any prospective witness list. After examining a heap of fabrics from Plante's sanguinary studio, Lemire noticed that not a single droplet of blood matched Lennice Mae Plante, a known secretor of O-Type antigents. The absence of her blood in analyst Grant's report was frighteningly fatal to the credibility of Lemire's narrative. Unfortunately, the difficulty Carignan had created by his poor handling of the evidence would only get worst when LaGuer sought DNA forensic identification evidence two decades in the future. While prosecutors could not guarantee that the evidence had not been handled, altered by natural forces or deteriorated over the past three decades, they engaged in a cover up of epic proportions. At the time of the criminal police investigation, trial and conviction, the gathering, handling and storage of forensic evidence was not sophisticated. Precautions against contamination were rare, especially at, during and after trial.

In August 2000, as illustrated earlier, a state police supervisor documented her examination of three sets of microscopic slides, which she had found wrapped in a brown paper towel. This fibrous towel is identical to the wad Detective Carignan had used to collect a sample of LaGuer's saliva prior to trial. One of the slides had hairs whose provenance show had derided from a jersey LaGuer had three days after the crime. In this case, the district attorney has not shown that the DNA profile was created from evidence on Lennice Mae Plante. The source of the male DNA used to create a DNA profile, constructively derived from the extraneous wad of LaGuer's saliva or hairs from his own recovered jersey. These hairs had male DNA in infinitesimal quantity. The brown paper wad, which was used to wrap LaGuer's jersey hairs together with hairs from Plante, is pivotal in a case of inadvertent contamination. Parenthetically, the fact that only LaGuer's DNA appears in the congregated cellular stain, a petri dish, suggest that any charge that LaGuer contaminated the evidence with another inmates saliva must be reexamined. His confession before the state's Parole Board, when he was bartering for his freedom under a coercive environment, is not untainted evidence of a bad act. If LaGuer had actually provided Detective Carignan the saliva of David Patridge, a client of Ettenberg then in the same cellblock, then why his DNA profile is conspicuously not shown in the genetic data. The absence of any such genetic profile discredits the saliva swapping affair and risks relegating LaGuer to a miscarriage of justice.

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

[35] 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.")

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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."[36]

After FSA's final report became public, incorrectly relating 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 FSA creating a genotype with specimens taken from his apartment.

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."[37] In 2004 Judge Hillman, the ex-lawyer to Plante's family and who had overseen the DNA analysis, denied LaGuer a new trial based on prosecutors withholding fingerprint evidence, specifically said he "would be remiss if [he] did not take into account the results of [LaGuer's] DNA test."[38] 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 probably spoke for the silent majority when he asked attorney Rehnquist "Isn't this some academic exercise, since the DNA evidence is going to sink LaGuer on retrial?"[39]

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Ben LaGuer's request to perform DNA testing on certain evidence envisage that his known DNA genotype would not match male DNA in the rape kit. Or, male DNA extracted from physical evidence in her G2 studio. Plante's account that a man had forced her to engage in coitus for eight hours emboldened defense forensic consultants to believe strongly that the rape kit specimens alone had enough DNA to create a genetic profile. But her vaginal and rectal Qtip swabs, the bulk of her rape kit specimens, had no evidence of spermatozoa. "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."

As a post-menopausal woman, depleted of a natural vaginal lubricant estrogen, the eight hour assault she related would have left blood fractions in copious amounts on her vaginal and rectal swabs, evidence of injuries to her rectal and vaginal epithelium cavities. Her blood should have been detected even with the pretrial antiquated serology used in this case. The absence of her blood on these probative swabs is a scientific fact that not only contradicts the account of a psychotic witness admittedly "off" of antipsychotics. If a jury credits the DNA evidence, relating proof that Lennice Mae Plante could not have been raped for eight continuous hours, then one cannot say that the genomic data is un-meritable. The DNA evidence create doubts not only about the eyewitness identification, which is heavily reliant on the assumption that Plante had faced LaGuer raping her for eight hours in adequate lighting, but cast

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

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

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

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

substantial doubts on whether she was assaulted in a manner prescribed by law and required for a jury to find LaGuer guilty of aggravated rape, and eligible for a life sentence. While Lennice Mae Plante suffered from an assault & battery, as well as the petty thief of a purse, LaGuer is not convicted nor sentenced to life because he victimized her of these minor offenses. LaGuer has spent the past thirty years in prison because an all-white twelve man jury only saw an interracial sexual assault and a white trial judge accepted the verdict to protect society.

In his summary to the jury, Assistant District Attorney Lemire said "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 with a reporter, 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."[40]

Ben LaGuer's request to perform DNA testing on certain evidence envisage that his known reference genotype would not match the presumptive culprit, that LaGuer's genotype would not match male DNA expected to be found in the rape kit Burbank Hospital recovered upon the admission of Lennice Mae Plante, or male DNA extracted from physical evidence in her G2 studio. Plante's account that a man had forced her to engage in coitus for eight hours emboldened defense forensic consultants to believe strongly that the rape kit specimens alone would produce more than enough DNA to create a genetic profile. But her vaginal and rectal Q-tip swabs, the bulk of her rape kit specimens, had no evidence of spermatozoa. "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."

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

physician Edmund C. Meadows concluded that Lennice Mae Plante's "anus showed no blood, abrasions, or lacerations"[41] is contemporaneous medical evidence that corroborates the highly probative and exculpatory DNA evidence affirming that she had no injuries consistent with her likely fictitious narrative. "I am now familiar with the sequence of events that led to the DNA mishap," says former Superior Court Judge Isaac Borenstein. "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."[42]

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While Ed Blake is the public face of his boutique DNA testing and consulting firm, the actual task of extracting, sequencing and comparing DNA data 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 often affords no possibility for the unintended consequences of false positives associated with 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

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[41] Burbank Hospital records of July 1983.

[42] 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

experts that included Eric S. Lander,[43] 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. He brought his considerable credentials to challenge Blake's analysis. Blake had artificially paired a number of genes and deduced an inculpating 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 Virginia 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?

The Laboratory and Analytical Pitfalls of DNA Evidence

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."[44] The poor condition of many crime scene samples rendered interpretation of a crime scene sample a highly subjective task.[45]

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.[46] At least three individuals subsequently exonerated by DNA tests were first wrongly convicted based on faulty DNA testing or analysis.[47] 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.[48] 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.[49]

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.[50] Similarly, studies have shown that machine washing can transfer spermatozoa onto "clean" articles of clothing.[51] In view of the sensitivity of DNA testing, contamination

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[43] http://www.broadinstitute.org/history-leadership/scientific-leadership/core-members/eric-s-lander
[44] District Atty's Office for the Third Judicial District V. Osborne, 557 U.S. 52, 80—81 (2009(Alito, J., concurring).
[45] 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 abilities, processes of elimination, subjective judgment calls, and inferences; it is not a mathematically certain, objective enterprise.") (2013 Westlaw 476046)
[46] See. William C. Thompson, The Myth of Infallibility, in Genetic Explanations: Sense and Nonsense 232 (Sheldon, Krimsky & Jeremy Gruber eds., 2012)
[47] See. Brandon L. Garrett, convicting the Innocent: Where Criminal Prosecutions Go Wrong (2011)
[48] See. Thompson, The Myth, supra. at 228.
[49] 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)
[50] 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.
[51] E. Kafarowski et al., The Retention and Transfer of Spermatozoa in clothing by Machine Washing, 29 Canadian Soc. Forens. Sci. J. 7 (1996)

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."[52] 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.[53]

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 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.")[54]

While assistant MSPCL chemist Kellie Bogosian observed witness the extraction process on behalf of prosecutors, she had no knowledge of the Leominster Police Department's policy on evidence collection. She was never provided the evidence chain of custody. She earned credits on DNA techniques Online and attended a DNA seminar at Quantico's FBI Academy.

On May 19, 2004, Assistant District Attorney Sandra L. Hautanen and Joseph J. Reilly III argued that LaGuer's DNA was "found on cotton swabs used to obtain evidence from the victim's vaginal, rectal, and oral cavities." False. The rape kit held no inculpatory DNA.[55] In fact, no swab from her "oral cavity" was collected. Judge Hillman denied a new trial because LaGuer's DNA "matched the male profile found in the 'pooled sperm,' including 'sperm fractions' taken from the victim's vaginal, rectal, and oral cavities." False. Hautanen argued that a "preparation of 'pooled sperm' was used to get the 100 sperm needed to generate a DNA profile." In fact, there is not a single reference on any FSA report to 100 sperm.

Considering the amount of blood on the fabrics, the assailant's jogging outfit or matching tube sock should have been those with her secretions. In fact, the recovered sock had O-Type perspiration. (Ben LaGuer is a secretor of B-Type.) Jose O. Gomez, the third party culprit, is also a secretor of O-Type: this is a major link in the culprit's identity. Analyst Grant was asked to examine LaGuer's fabrics for

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[52] 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).
[53] 4 Mod Sci. Evidence § 31:13, at 148
[54] Spuervisor 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)
[55] 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.");

inculpating evidence, that is whether any of his suspicious clothing observed in his bedroom had blood or other secretions belonging to Lennice Mae Plante. While Grant testified in May 1989 that the eight socks then on display in court were the same eight Carignan had asked him to examine, these socks were not in his pretrial report. Thus, the defense could never have figured out that Carignan had indeed raided LaGuer's bedroom, and secretly carried out a pile of his clothing.

The MSPCL benchnotes are exculpatory, and should have been provided to the defense prior to trial, because the absence of urine or blood on the soles of his socks disproved that he had stepped on her stained floors. Carignan deprived LaGuer of evidence critical to the reliability of his investigative methodology and, more importantly its integrity.

Charles Alan Keel of FSA also examined the DNA evidence of Cy Young legend Roger Clemens in his federal perjury trial.[56] Clemens was exonerated partly due to Keel's DNA analysis. Brian McNamee, a former trainer, alleged he injected Clemens with human growth hormones. He kept the syringe and other medical waste inside a beer can for six years before turning it over to the feds. Mr. Keel admitted that Clemens' DNA might owe its presence to contamination.[57] Both cases exposed major flaws. FSA disclosed LaGuer's evidence had been compromised: "A few dozen epithelial cells from Mr. Keel were inadvertently deposited on these slides while speaking near or over them."[58] Mr. Keel had a motley mixture of pilfered items from LaGuer and his apartment. "I am indeed no more guilty of rape on the basis that my sperm was found mixed with epithelial cells than Mr. Keel might be solely on the basis that his DNA was also found tied in with Plante's," LaGuer said.[59]

"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.[60] "As you probably know, the DNA that was performed on Ben LaGuer's specimen was not correct: it was outrageously mishandled."

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)[61] A LexisNexis search of "D. Kim Rossmo" yielded no result.

At trial, in their effort to dispute that her assailant lived in the tenancy, the defense elicited testimony that Lennice Mae Plante had never described to police an assailant who was totally nude except for a pair of tube socks when he entered her studio. She further denied a police report relating that she had seen her assailant in the apartment next door, a salient fact Carignan used to obtain a search warrant and grand jury indictment. Plante provided police no distinctive features of this man. She did not notice a severe stutter that LaGuer had since childhood despite allegedly speaking with him for eight hours. 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 the

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[56] Wall Street Journal, Clemens Cleared In Steroid – Lies Case by Devlin Barrett 19 June 2012
[57] Boston Globe, Clemens DNA Linked To Needle by Joseph White (A.P. 26 May 2012)
[58] FSA Report 2, 4 February 2002, p. 12
[59] Telegram, LaGuer DNA A Match by Matt Bruun, 23 March 2002
[60] 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
[61] Commonwealth's Response To Defense Motion For New Trial 23 November 2011, 20-21p, Exhibit 18.

Polaroid of LaGuer shone in court does not depict him as very dark. While Carignan had gathered a photographic array of nine dark skinned males for her to select, when asked on cross examination to describe each individual Polaroid, Plante testified that eight appear to be Caucasian. She selected LaGuer's photograph, by Carignan's own account, once he 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 stitched on her bathroom light bulb to urinate, suggesting strongly that the larger room where she was allegedly assaulted, was substantially less luminated. She denied once about 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. There is no evidence of social service agencies assisting he in this epoch. The ER physician heard her rambling over unrelated topics. She related that her assailant had jumped on her chest, albeit she had no medical signs of the massive internal injuries that she would have incurred. In spite of the very particular allegation that Plante was continuously penetrated for eight hours, both vaginally and rectally, her physical examination revealed that she had no blood, lacerations, or abrasions on her anus. She had a confirmed "rare yeast" infection and evidence of scabbing, which suggest strongly a preexisting affliction that included her scratching herself. She was on antipsychotics at the time she testified. Her escorting nurse says Plante had indiscriminately accused colored men on the street of the assault en route to LaGuer's trial. 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. (Tr. 2, 27, 66, 139, 149, 160, 161, 167, 172, 173, 178, 181, 213, 371, 372, 373)

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."[62]

If the intent in skewing her psychosis narrative was to permanently deprive LaGuer's use of that material to assail Lennice Mae Plante's cognitive skills, then one can logically infer that Assistant District Attorney had no incentive to subsequently reveal the true nature of her disabilities. After Judge Mulkern made his ruling, even though based on incomplete and misleading information Lemire had provided, defense and prosecution lawyers alike would blame the impervious trial judge. In other works, the real culprit in this case is not a trial judge for making an incorrect ruling, but a prosecutor whom deliberately fabricated a story from whole cloth in the first place. His false assertion that Plante had been "off" antipsychotics and "cured" of schizophrenia for more than two years (Tr. 3, 314) is a fact that prosecutors even to this day will not concede, as such admission would be a maiming shadow pressing down on Lemire and Carignan's un-representable bad character. Today, the district attorney's office remains in Deaf-Com alertness to protect the verdict and all its agents, most prominent of course among the legion of agents is Lemire, whom is currently the chief justice of the Worcester county courts. In 2003, Barry said her womanizing father beat her mother and locked her in closets whenever he left the house.[63]

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[62] Editorial, New York Times. A Check on Bad Eyewitness Identification. 6 December 2012.
[63] Elizabeth Barry, Television Interview, Greater Boston, Hosted by Emily Rooney, WGBH July 12, 2003

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.[64]

Officer Monahan asked the emergency room physician, Dr. William C. Siegel,[65] if her injuries might be the result of self-abuse because Barry had probably made reference to prior false rape accusations. According to his report, Monahan avers 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."[66] The difference for Monahan between a rape and self abuse pivots on the presence of semen. But any claim of a "semen" nanostain in 1983 is suspect. "Twenty years ago," Blake said, "scientists would not have been able to detect this evidence." The MSPCL cellular assessment referred to sperm as merely the "presumed fluid" in this rape case. Cellmark, a world leader in assessing forensic specimens, could not confirm that the stain was even semen: "Unknown stain, morphology of cellular material not recognized for identification."[67] There are no hospital records of testing for semen.[68] 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. It is further recommended that the inside of the hairs be extracted and DNA testing attempted."[69] Carignan furnished Grant his police narrative.[70] It can be inferred that Grant falsely confirmed sperm,[71] in a practice known as "dry labbing" samples, so his report would match the police narrative.[72] The fraudulent sperm report was a decisive factor in precluding that Plante had no more than a fight a third-party suspect, Jose Orlando Gomez. Ettenberg never asked Siegel if he had made the sperm observation. Ettenberg never requested Grant's benchnotes.

Plante's account of eight hours is a critical timeframe because Lemire argued that the length of time strengthened the reliability of her eyewitness: "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 she dies." (Tr. 567) "It's a question of who you believe. I believe her. If I was in a room with

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[64]"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)

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

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

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

[68] Burbank Hospital records of July 1983.

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

[70] 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

[71] 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

[72] 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.

somebody for that length of time," juror Stephen J. Martin said, "I think I'd remember the person. She was very, very emphatic."[73]

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?"[74] 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.[75] 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.[76]

Assistant District Attorney James R. Lemire made no effort to obtain a state police fingerprint report that was available less than 19 hours of LaGuer's arrest. Lemire did not ask that Plante's recovered purse be dusted for latent prints. While Plante identified a knife as a weapon her assailant had left behind, Lemire never asked police to dust it for prints either. LaGuer was charged with unarmed robbery. Lennice Mae Plante did not sign a release for Herbert Lipton Mental Health clinic to disclose her medical and psychiatric histories and ADA Lemire never produce a single shred of evidence to corroborate his dubious assertion that she had been "cured" of schizophrenia and taken "off" antipsychotics three years prior to trial. ADA Lemire did not independently request a copy of the state police fingerprint analysis indicating that four fingerprints, presumed to have been those of the culprit, did not match LaGuer's reference print card. He did not tour the crime scene, thus failed to recognize that lead detective Carignan had miscalculated the height of Plante's windows, far less than the twenty feet he testified. Such error affected the jury's determination on whether the assailant had fled through her window or exit her studio through the door. Whether her assailant lived in the building was a major disputed issue. Moreover, Lemire did not request the result of a latent print analysis of the hairdryer, whose cable was used to tie up feet, despite evidence of latent print dust powder over its entire surface. He did not request the fingerprint analysis on the partial print off the aluminum Pepsi can, a piece of evidence that Carignan must have believed her assailant had possibly drank from. Lemire did not inquire why LaGuer was charged with unarmed robbery, considering Plante's statement to police that her assailant had a knife that a police commander observed on the night table.

Lemire never gave a reason for why every officer who stepped in Plante's studio had to provide his blood type, as if the prosecution had undertaken a forensic problem solving exercise to reconcile the recovered microbial evidence against the conclusions of the state police analyst. Lemire made no effort to ascertain the identity of certain latent prints Carignan and Lt. Arthur Cassie collected the morning after the Leominster District Court, had arraigned LaGuer. Trooper Arthur Martin of the state police latent print Unit notified Carignan on Saturday morning that four latent 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.

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[73] Bruun, Matthew. Telegram. Jurors Mixed On Recent Findings In LaGuer Case. 13 December 2001. B1.
[74] http://www.suffolk.edu/sjc/archive/2007/SJC_09765.html
[75] 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."
[76] 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.

Tucker found no evidence that Lemire had withheld Plante's psychiatric pharmaceutical charts or engaged in a deception to cover up that fabrics from LaGuer's apartment, which ended up added to the less than 0.03ng male DNA stain. Lemire would soon become Judge Tucker's immediate supervising justice, which Tucker knew or should have known was a pending matter in office politics. Robert Mulligan, the state's trial court department chief justice, had been considering most seriously associate justice James 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 met with Lemire after a 9 September hearing, albeit Lemire was on a witness list that Tucker himself had endorsed. Lemire knew that a subpoena for him to answer under oath discrepancies about a secret seizure of LaGuer's clothes as well as conflicting new evidence that Plante was made reasonably lucid enough to testify with antipsychotics belie his pretrial claims that Plante had been off those pharmaceuticals for over two years. Lemire knew that LaGuer had already 118 material exhibits in support of his claim that the police had illegally taken fabrics from his apartment Plante was on antipsychotics at the time of her testimony. At Lemire's confirmation hearing for associate justice before the Governor's Council, a number of members made him explain why the Appeals Court had cited him for not disclosing a fingerprint report to the defense prior to trial. While Tucker granted LaGuer an evidentiary hearing to present his exhibits and 27 potential witnesses, his defense lawyer had less than 2 days to pull it all off. In Massachusetts, a lawyer "shall" be provided 30 days' notice of any hearing. It was a setup for LaGuer's defense to fail. In his ruling, Tucker finds that LaGuer had presented no evidence or witness in support of his claims. On appeal, LaGuer argues that Tucker denied him proper notice and time to prepare, subpoena and put on his testimonial evidence and exhibits.

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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 and simultaneously eliminating every challenger Early might have bidding for democratic nomination. 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.

"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."[77] In September 2006 trial prosecutor James R. 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

[77] Conte, J. John. LaGuer Evidence Remains Strong. Letter to the Editor. Telegram. A8. June 3, 1991

LaGuer as the perpetrator."[78] 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."[79] In a Worcester courtroom, some weeks earlier, ADA Hautanen had told a judge that former trial prosecutor Lemire had come to her office to review the case file. Lemire had told her that certain files in his trial file "aren't there anymore." Some agent or agents of the district attorney had removed certain files to obscure the DNA provenance or evidence of the illegal seizure of LaGuer's fabrics. The fact that state police officials kept an independent file, complete with raw data, chain of custody forms and benchnotes impeded LaGuer's ability to fill in a jigsaw puzzle of malfeasance and errors. Contrary to Conte's calculated effort to establish himself as a watchdog of the evidence, the Supreme Judicial Court held in March 2007 "[t]here is no question that some evidence has been lost or destroyed."[80] It is astonishing how much physical evidence with direct link to a third party culprit has vanished without a trace. The defense's ability to win a new trial relies on developing evidence that undermines the false accuser's claim that she had faced LaGuer for eight hours, that her identification of him was substantially less reliable than argued to the jury. In this case, LaGuer was entitled to a chain of custody record that revealed the fact that Carignan had illegally seized fabrics from LaGuer's bedroom. These fabrics were of particular interest because they were not mentioned in the search warrant. Neither LaGuer nor his forensic consultants or experts should have been burdened with deciphering a fraudulent chain of custody record. The description and place of origin for each piece of evidence provided for DNA analysis should have been accurate; LaGuer's defense should have been confident that the evidence prosecutors had provided was what they claimed each item to represent. For example, LaGuer would have never agreed to spent three years of his life litigating to obtain DNA evidence then spent thirty two thousand dollars in testing and laboratory fees to extract DNA on fabrics illegally removed from his own apartment.

The case file reveals an assortment of missing evidence. In February 2002, Conte said: “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.”[81] But Hautanen had admitted that files in her office “aren’t there anymore.”[82] “There is no question that some evidence has been lost or destroyed.” (448 Mass 585, n5) The sock and knife disappeared. A series of fingerprints from a telephone and from a hair dryer disappeared.[83] A partial from a Pepsi can disappeared.[84] Robert Cordy was accused of improperly accessing the courthouse storage.[85]

In May 1989, Judge Robert V. Mulkern denied a request for DNA testing.[86] In November 1996, Judge Herbert F. Travers denied a lawyer even access to the samples.[87] In September 1999, lawyers found the boxes of evidence with their tamper-proof seals broken.[88] (These seals were affixed, by court order, across the boxes in May 1989.)[89] This is not the first time that the District Attorney has had

[78] Schaffer, Noah. Massachusetts Lawyers Weekly. 10A October 10, 2006
[79] Unpublished letter to Globe Editor from John J. Conte, January 15, 2002
[80] 448-Mass. 585
[81] DA John J Conte’s unpublished response to a Boston Globe story entitled “Results could Lead to LaGuer’s Exoneration” 15 February 2002
[82] Transcript 9 January 2002, pp 14-15
[83] A series of photographic exhibits on file with attorney.
[84] Follow Up, Investigative Report by R Carignan, 15 July 1983, p.3
[85] 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.”)
[86] Attorney Barry Berke of Naftalis & Frankel, LLP, New York
[87] Attorney Oliver C Mitchel Jr., formerly of Goldstein & Manello, PC, Boston
[88] November 1999 affidavit of Richard Slowe, a former FBI agent and prosecutor hired to supervise the defense’s handling of these articles.
[89] Transcript of May 22, 1989 court hearing, pp. 130-131.

problems with the evidence chain of custody in a case.[90] In December 1999, Robert Cordy wrote the district attorney to set up DNA testing.[91] 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."[92]

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.[93] 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." [94]

This is false. The hearing on the absence of women from the jury was held December 11, 1998,[95] five months after Wysocki had requested "Benjie's underwear" and the rape kit.[96]

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." (Boston

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[90] Croteau, Scott J. Telegram, Missing evidence blurs assault case. 8 October 2013. Al.(Worcester Police Officer Joseph Vigliotti is accused of using excessive force, filing a false police report and racial profilinga22 year old Nigel H. Edwards of Cranston, R.I. The only evidence in the case that could corroborate Mr. Edward's account, a video Street surveillance tape, has gone missing from the evidence room. Worcester Police Chief Gary J. Gemme said his department's investigation into the missing videotape evidence was hampered by the district attorney's office.); Mcfarlane, Clive. Telegram. Missing evidence a red flag. 9 October 2013. Bi. (Chief Gemme, who said the DA's office had access to the evidence room, never was granted permission to interview the prosecutor in the case because DA Joseph D. Early, Jr., said such an interview would establish a dangerous precedent in the operation of his office. Yet Early acknowledged that his office was aware that Vigliotti and Edwards had agreed on their own to a release agreement, where the Edward family knew that signing an agreement not to sue Vigliotti or the city in exchange for probation. The agreement was drafted by Vigliotti's brother, a local lawyer.); Williamson, Dianne. Telegram. 10 October 2013. Bi. ("Within the last few weeks, (DA) Early has placed one of his prosecutors on unpaid leave after her arrest for drunken driving, and transferred a second assistant DA after she was caught on a courthouse videotape in a sexually compromising encounter with a Worcester police sergeant.)

[91] 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.

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

[93] 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."

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

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

[96] 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."

Herald 9/22/94)[97] In this case, Dred Scott (1857) did not whisper but screamed. One juror, putting matters plainly, said: "We saw an animal, and the judge saw the same animal."[98]

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 who treated the accuser was white. Every person on the prosecution witness list was Caucasian. The county jail psychologist subsequent 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.

What LaGuer faced in 1983 was not a modern criminal justice system, but an establishment that looked not a lot more different than. a PG-13 version of Jim Crow. "The life sentence shows the judge agreed with the verdict," juror Stephen J. Martin told a reporter in 2001. "We saw an animal, and he saw the same animal." 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."

A sobering, but not surprising recent Pew Research Center survey confirms an enduring racial chasm in this country. Seventy percent of 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 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. State 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

[97] Boston Globe, Courts Are Guilty Of Racism, by Associated Press, 22 September 1994.
[98] Bruun, Matthew. Telegram. Jurors Mixed On Recent Findings In LaGuer Case. 13 December 2001. B1.

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.[99]

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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 humane given what he knew about the DNA test. "He is still eloquent and humane," Patrick emphatically answered.

Patrick lied about their relationship to protect his campaign.[100]

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.[101]

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.

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

[100] 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."

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

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.[102] 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.

"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 appear 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.

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[102] 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.

In December 2006, in a statement to the media, Conte said that the genetic material used in the comparison was taken from Plante before LaGuer was in custody. Clearly, Conte was quelling growing opinion evidence that the genotype in dispute with LaGuer's own 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 LaGuer's behalf the hypocrisy of prosecutors opposing any effort "to admit any DNA-related laboratory or analytical reports before any court cautions against this court's consideration of any such alleged evidence now."[103]

On 19 May 2004 Hautanen and Reilly urged the trial court to deny a new trial because "post trial proceedings in this case, which defendant himself initiated, demonstrate to a mathematical certainty that he committed the crimes of which he was convicted." Prior to filing this pleading, the district attorney 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 quilt to a mathematical certainty."[104] His release reflects a fallacy. "The prosecutor's fallacy occurs when … he presents statistical evidence to suggest that the DNA evidence indicates the likelihood of the defendant's quilt rather than the odds of the evidence having been found in a randomly selected sample." (525 F.3 787) The 100 million to one odds that a second person in the general population shares LaGuer's genotype is not, as prosecutors suggested, the proof that demonstrates "to a mathematical certainty" LaGuer's 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." 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.

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.[105] Dr. Daniel Hartl of Harvard agreed with Kobilinsky.[106] In May 1989 Grant related that he ran multiple cases to save time.[107] 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 and chief scientific officer with Florida-based DNA Print Genomics 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." In a defensive response, Blake asked, "Is it reasonably plausible under the totality of circumstances? I don't think so." But Blake knew nothing about the problematic provenance of certain evidence. Over the previous summer, Blake, "You divide the evidence in half, if that's possible. You do the work blindly, you publish the work blindly—

[103] 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.")

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

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

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

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

before you do the reference samples—then you do the reference samples." At that point LaGuer would be either included or excluded. While the MSPCL forensic techs were always an integral part of the prosecution team, FSA was under a strict "double blind" protocol. "He's reported these results so it's absolutely clear that the work was done blindly."[108] But, FSA sent mixed signals. "It should be borne in mind that this type of exploratory investigation is like looking for a needle in a haystack where the existence of the needle may be unclear if the work product of the [MSPCL] is ignored."[109] Siegel's strategy prevented FSA from properly assessing the limited microbial evidence.

"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."

"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." LaGuer strenuously disagrees. The genetic data showing the absence of Plante's blood in the rape kit, contradicts the particular alleged sexual assault.

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

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

[109] FSA Report, Number 1, August 2001, p12.

[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)

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, 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.

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 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 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.” In April 2010, LaGuer had pledged to participate so long as that program did not seek a false admission of guilt.

A nationally recognized evidence-based risk assessment tool -- Correctional Offender Management Profiling For Alternative Sanctions, or COMPAS, scored him as the lowest measurable risk (1 out of 10) for violence and recidivism.[112] 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 been issued a demerit for his treatment of the female civilian or uniformed staff. 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] The trial judge prior to sentencing assigned independent psychiatrist Dr. Lawrence Hipshman to perform a psych and medical exam of LaGuer. Hipshman reported to the judge that LaGuer fit neither a psychological nor pathological profile of the alleged offender. “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 it…he is not a sexually dangerous person and I recommend no further action on that question at this time.” [114] In 1998, Leominster High School councilor Lee Alves testified before the state parole board that LaGuer was very sociable and well adjusted young mn in his teenage. Chief Psychologist Marcelino DeLeon only letter of support for parole he wrote on behalf of his former clerk of many years, LaGuer, and he stated he had no intention of writing on behalf of any other inmate. He was disciplined in the military for being present when a fellow soldier

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[112] 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.

[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.; Walker, Joseph. Wall Street Journal. Parole Boards Use Software To Predict Repeat Offender. Al. 12 October 2013 (Driven to cut ballooning prison casts, more states are requiring parole boards to make better decisions about which convicts to keep in jails and which to release. Increasingly, parole officials are adopting evidence—based methods, many involving software programs, to calculate an inmate’s odds of recidivism. In the traditional system, factors like the severity of a crime or whether an offender shows remorse weigh heavily in parole rulings. By contrast, automatic assessment based on inmate interview and biographical data are designed to recognize patterns that make release decisions more objective. “Some people are surprised to learn that offenders who we think of as the worst offenders, murderers and sex offenders—have some of the lowest recidivism rates,” said Lee Seale, former direction of internal oversight and research at the California Department of Correction and Rehabilitation.); 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] 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

sold a $20 cube of hashish. LaGuer accrued less than 30 disciplinary reports in his carceral years. Some include showering during a major headcount, overdue library books, participating in a live radio broadcast, and more than one inmate-on-inmate physical altercation. It is said that the average parole applicant has far more disciplinary reports.

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;[115] 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.[116] 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.[117] Judge Robert V. Mulkern commented that LaGuer "doesn't have a background of crime or violence. (Tr. 617)

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, <u>Commonwealth v. LaGuer</u> 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 Court for Massachusetts dismissed the petition. <u>LaGuer v. Bender</u>, 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 ordered a probe of jury racial bias. Prosecutors asserted that a stain of crime scene blood tied LaGuer's blood type. Subsequent tests revealed that the MSPCL had mistyped Plante's blood as Type B from her actual Type O.[118]) 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.") <u>Commonwealth v. LaGuer</u>, 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. <u>Commonwealth v. LaGuer</u>, 46 Mass. R.

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[115] Wadler, Joyce. Scrap Mansion. New York Times. 16 August 2012.
[116] http://www.benlaguer.org/statement.html
[117] According to the United States Department of Justice website, the average time served for rape in the 1990's was 5.5 years (or 65 months). Until one factors in race LaGuer's more than 28 years (or 344 months) seems highly unusual. 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.")
[118] 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.")

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 January 12, 2000, Mr. LaGuer filed a "Motion for An Order Authorizing DNA Testing." These findings "fail to support Benjamin LaGuer's claim of factual innocence of the rape and murder of Lennice Mae Plante."[119] 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)[120]

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, Tucker denied the ninth motion for a new trial. He denied both a reconsideration and a production of tangible evidence on 17 May 2012. Notice of Appeal filed. On May 23, 2012, LaGuer filed for executive clemency. On 9 August, the Board of Pardons recommended clemency be denied.[121] 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 reported, "I asked her if she knew who [did this to her] and she stated "no."[122] 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."[123] 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."[124] 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."[125] Her daughter Elizabeth Barry reported her mother to be a schizophrenic.

Detective Ronald N. Carignan (1935-1988) had only recently been promoted after twenty three years as a city patrolman. His report says that Lt. Robert Hebert telephoned his home on Granite Street at

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[119] 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.

[120] 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

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

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

[123] Tr. 241

[124] Burbank Hospital records of July 1983.

[125] Id.

5:15am. The timing in various reports can be said to have been guesstimates. The first responder, Officer Monahan, claims in his report that he received a call to respond at 5:10am. Lt. Hebert's report also says 5:10am. But the ER notes indicate Plante was admitted at 5:00am, ten minutes before Monahan said he received his call to respond to the Waterway Apartment Complex, Wednesday 13 July 1983. At any rate, Carignan went to the police station on Church Street, then drove to the tenement in his unmarked cruiser. This old factory building converted into 86 units for low income persons, Carignan says he was met by the side of the road by a maintenance man. In Monahan's report, the officer tells an exact story of being met by the side of the road by Dennis Benoit, the maintenance man.

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 Carignan prior to 7:50am.[126] After a hospital bedside interview, Carignan had a "scant" description.[127] "I asked her if he was a black man and to this she said, 'yes he was, he was very dark skinned."[128]

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After the building manager draw Carignan's eye to the young neighbor, Ben LaGuer, the detective had a memory flash from stopping and questioning him about a burglary in the area. LaGuer had given then Patrolman Carignan his correct name and address. Carignan had told him someone from the detective bureau might want to interview him, but LaGuer never heard from anyone. Carignan was now assigned to major crimes. To him, LaGuer became a suspect of convenience. He lived in the tenement. Lennice Mae Plante had reported that her key ring was missing, asking the building manager for a replacement. His earlier encounter with LaGuer over a burglary had the added twist that another internal secret file had him to be a party to a domestic violence complaint. Carignan apparently had LaGuer looking increasingly more shadowy a figure. He ignored the fact that despite a sanguinary crime scene, not a single speckle of blood had been found on his door knob when Lt. Herbert Hebert knocked on his next door apartment. He ignored to ask whether she had any whom might have robbed her of a purse, a neighbor might have seen Jose Orlando Gomez entering her ground floor 1G studio, clearly visible from the vestibule and mailboxes. There is no evidence that Plante's daughter was asked whether her mother had any unsavory characters in the periphery of her life. Other than the building manager, his assistant, and LaGuer, no one else was interviewed. While Lt. Hebert told some of the neighbors that someone from the detective bureau would be coming around to take statements, Carignan already had LaGuer on his scope's cross hairs. What was left is for Carignan to create a pretext of probable cause that would grant a local magistrate clerk reason to approve a search warrant for Luperto LaGuer's G2 apartment. The scheme for Carignan to obtain a search warrant begins with his claim that Lennice Mae Plante had identified her neighbor LaGuer as her rapist to her daughter. Elizabeth Barry told her mother that she was returning to the studio to apprehend the man who raped her unless she revealed his identity. According to Carignan, the only witness relating this account, Lennice Mae Plante then told her daughter that LaGuer of apartment G1 had raped her. Barry promptly places a call to the Leominster Police Department detective bureau to summons Detective Carignan. At Burbank Hospital, Carignan says he met with Elizabeth Barry. With Carignan and Barry standing along the side of her bed, Plante recounts the story she earlier related again. But this account is incredulous and dubious in a myriad of distinctive ways. Why would Elizabeth Barry threaten her traumatized mother with putting up her own life at risk if Lennice Mae Plante did not identity her rapist, when Barry had no evidence that her knew was either protecting his identity or afraid of retaliation if she named him to police. Lennice Mae Plante had already told a number of officials that he had threaten to kill her if she named him, but that he was a total stranger to

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[126] Burbank Hospital records of July 1983.

[127] 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.

[128] Id.

her. Detective Carignan's account grows in suspicion when one considers that he had already drawn to LaGuer as a possible suspect in a earlier burglary and a party to a domestic call. His account of what Lennice Mae Plante told him in the presence of her daughter doomed fated. She never told Detective Carignan, Lennice Mae Plante testified in her trial testimony, that she had seen the man who raped her leaving or entering LaGuer's G1 apartment. Detective Carignan's story, created for the purpose of securing a search warrant, began to be worry Assistant District Attorney James R. Lemire. In a pretrial letter, Lemire admitted that Barry was present in the hospital room when Lennice Mae Plante inculpated LaGuer in her rape. Lemire made this claim on the basis of Carignan's police narrative. He had listed Barry on the government's witness list also relying on Carignan's notes and advice.

On Monday morning, the day before jury selection was to begin, Elizabeth Barry entered the district attorney's office for the first time in her life. Lemire had earlier asked her to meet with him to go over her testimony. She would be a centerpiece of the prosecution's case. In her presence, her mother had identified LaGuer as her assailant to Carignan. Her testimony would corroborate the identification evidence, the central issue in this case. They met in his private office, a highly restricted are of the grand edifice on 2 Main Street, where the trial court department, probate and family court department, district attorney's office and staff had conducted business since the 1920s. After meeting with her only once Lemire pulled Barry off the witness list. While the district attorney's office claims that Lemire's trial notes may not be available, Assistant District Attorney Lemire reviewed the boxes of available files with Assistant District Attorney Sandra L. Hautanen. He told her that certain notes previously in the cabinets are no longer part of those files. One has to wonder what Barry told Lemire for him to swiftly erase her from the narrative. One can reasonably argue that LaGuer became a target of police not because Lennice Mae Plante had identified him to her daughter. LaGuer did not become suspect because, in the presence of Elizabeth Barry, her mother identified LaGuer as the culprit to Detective Carignan. What actually draw Carignan's focus was his prior encounter with LaGuer. Lennice Mae Plante testified she did not inculpate LaGuer. The fact that Assistant District Attorney Lemire cut Plante's daughter off his witness list cannot overstated in its symbolic significance. Barry would in no way testify against her mother. Detective Carignan knew the exculpatory value of those internal secret files. These files were the real basis for obtaining a search warrant for LaGuer's apartment. Once the jury considered Plante's testimony that she did not inculpate LaGuer, the only reason Carignan had for his focus on her neighbor was his focus on his secret internal files. It was an obsession. He had to let his curiosity run its course. To satisfy his continuing that sanguinary crime scene to her neighbor. In fact, the state police crime laboratory analyst could not detect a single speckle of blood or microbial fluid from Lennice Mae Plante on any of the fabrics recovered from LaGuer's bedroom. Detective Carignan's trial testimony, grand jury testimony, district court criminal complaint and police report relating his emphatic denial that LaGuer's fabrics were recovered deprived the jury of a forensic analysis that would have bolstered his defense. The fingerprints and latent print analysis Detective Carignan lied about in his recounting of events was part of a pattern of malice and intentions to deprived LaGuer of any favorable evidence. Carignan and Lemire may not have had evidence that created a reasonable inference of LaGuer's guilt except for a powerful in court identification of a white woman raising her index finger in LaGuer's direction. However Lemire and Carignan made a concerted effort to deprive LaGuer of every piece of physical evidence and analysis that exculpated him.

The risk that Elizabeth Barry would expose Detective Carignan's narrative as a complete fabrication inspired Assistant District Attorney Lemire to cut his ties to her. He could either call Barry or proceed on the basis of Carignan's version. Lemire knew that he had been complicit in allowing Carignan to offer a perjured account, that is, a version of events that Barry had personally denied to the prosecutor. There is still no columns to credit prosecutors for doing the right thing. Lemire had aspired to join the district attorney's elite Murder unit. District Attorney John J. Conte had only two columns, wins and loses, to measure whether a prosecutor could advance up the food chain. There is still no columns to judge a prosecutor for doing the right thing, despite the basic legal tenet that the objective of prosecutors

must be the fair administration of justice, and not just obtaining a conviction. What LaGuer faced was a rogue detective that risked the life of an innocent man who had no history of crime or violence. Behind the scene, Assistant District Attorney Lemire could only hope that his friend Ettenberg might be able to convince his client to plead guilty, so this entire charade might fade away. The difference between the tolerable little white lie Detective Carignan could have told to get a guilty rapist off the street and his false and fabricated evidence was legally criminal and morally offensive. Carignan had lied, if one credits Elizabeth Barry, about Lennice Mae Plante's identification of her neighbor. Detective Carignan expected any variation in testimony to cut his way. The twelve white jurors had observed Lennice Mae Plante as she raised her index finger to the colored man who raped, sodomized, beaten and threatened her for eight unremitting hours. Carignan understood the psychology of those jury men. But Elizabeth Barry made Lemire reconsider the police narrative. It may have been Carignan who suggested that Barry be taken off the witness list, leaving the twelve jurors no choice but to consider Carignan's version. The question of her identification of LaGuer would not be so apparently clear if Elizabeth Barry had told the jury what he had related to Assistant District Attorney Lemire that made him promptly cut her off.

When Detective Carignan entered LaGuer's apartment to execute a search warrant, says his police report, a picture of Ben LaGuer was seen on top of his dresser. Carignan did not take that portrait. The fact that Carignan would leave behind the only known image of a man who had been identified as the culprit informs internal mental processes. Some reports had Lennice Mae Plante at risk of dying as a result of a number of cardiomyopic episode. Her possible identification of LaGuer's picture as her assailant would have boosted any future prosecution in case of her sudden death. But most serious observers believe that Detective Carignan did not take LaGuer's picture because, in plain words, Lennice Mae Plante never told Detective Carignan, in the presence of her daughter, that her neighbor had entered her apartment with sexually assaulted her for the next eight hours.

Detective Carignan's account was incredulous for other reasons. If Lennice Mae Plante had truly inculpated LaGuer in her alleged horrendous assault, why did Carignan not alert anyone of her identification? Why did not alert the team of zone patrolmen assigned to cover that region of the city to keep an eye open for a young colored man fitting his description? What Detective Carignan admitted he did, in his trial testimony, is informally asked the building manager to call if LaGuer was seen. He made no request for an arrest warrant. He made no attempt to put LaGuer's name in the national database until late Friday morning, 15 July, two days after Lennice Mae Plante had alleged inculpated her neighbor to Carignan in the presence of her daughter. This allegation that only Detective Carignan relates is simply too incredible to credit. Defense attorney Peter Ettenberg should have interviewed Elizabeth Barry, requested Lemire's notes of her statement which prompted him to pull her name off the witness list.

The police narrative must be understood in the context for which Detective Carignan created it. The district attorneys does not dispute that Carignan's first created the narrative of Lennice Mae Plante's identification to convince a district court clerk that he had probable cause to execute a search warrant in the apartment that she had identified as her assailant. Detective Carignan never told the clerk magistrate that he had previously stopped Ben LaGuer on suspicion of burglary. Or that secret internal files indicate that he had been a party to a domestic violence call three years earlier. After LaGuer rejected an effort for him to plead guilty in exchange for two years, Lemire had to repurpose all these conflicting facts and counterintuitive actions of his lead investigating detective into a cohesive story. The lies, false coloring, concealment, and even pretence of stupidity deflected the focus off Detective Carignan's ripping and stressing fictional narrative. Of course, the new revelations of how Assistant District Attorney Lemire came to contrive a case for twelve white male to find LaGuer guilty is not the only issue Worcester County Chief justice James R. Lemire has menacing his peace and reputation.

District Attorney Joseph D, Early, Jr., should be more forthcoming as evidence mounts of Detective Carignan's fabricated narrative and perjured trial testimony that conceals vital facts about the

police identification, an illegal seizure of underclothes from LaGuer and his apartment as well as egregious errors in the evidence collection, provenance papers, handling, extraction of 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. As Detective Carignan tainted the provenance of the DNA evidence and data in this case, creating a fabricated provenance for certain specimens, his outrageous assault on the integrity of this evidence alone should seal its doom fate. District Attorney Early's response to these allegations has been, like his predecessor John J. Conte, to remain quiet and hope that the truth of his complicit office fade to the rear and blackness of historical trivia. But 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 criminal conspiracy to cover up a crime of state.

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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 Dalia St. Jean attended. In the Marriage Certificate, 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 Garnder State Hospital, where she was diagnosed a Paranoid Schizophrenic. He kept her in a padlocked closet when he left their Lunenburg home. According to public interviews, his daughter referred to her father as a drunk and womanizer. 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 she stipulated was a clause relinquishing custody of Elizabeth, then a thirteen year old. The final decree says, "the mother may visit and receive visits from said child at reasonable times." Raymond agreed to pay her sixty—five hundred dollars (or fifty thousand two hundred in current dollar value) to settle all 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 increasingly psychotic. 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".[129]

At the time of her assault, according to her daughter, Plante was under the care of the Fitchburg Herbert Lipton Mental Health Clinic. 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 Defense inquiries, Assistant District Attorney Lemire asserted that Plante was taken "off" antipsychotic pharmaceuticals three years prior to the Trial. He urged the Trial Judge to prohibit any inquiry into her past psychosis in front of the Jury. 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 case by a Mental Health Clinic and

[129] This disease is named after Rene Laennec, the French physician and inventor of the stethoscope.

has had a nervous break down about 14 years ago and has not been right since. She was going to call her counselor and also her doctor." On July 13, 1983, her daughter Elizabeth telephoned the hospital. She stated that her mother had been vomiting for three or four weeks, for which she had visited the Veteran's Hospital as a Out-Patient. She suffered from Cirrhosis. She was "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. That arrangement was to her dissatisfy action. She was then moved to the "Lipton Center" a halfway house operated by the Herbert Liptin Mental Health Clinic Staff, including Annie K. Dimartino.

Assistant District Attorney Lemire's near successful skewing of Plante's psychosis can also be discerned in his relating of 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 is that Elizabeth had never really forgiven her mother for abandoning her in the most formative years of her life. Lennice had grabbed her divorce settlement and left her in an empty house to nurse and care for a drunken father. Elizabeth herself shows signs that she might have inherited the Paranoid Schizophrenic gene. In 2010, Robert said that on her dying hour his wife made him pledge that he'd do all he could to keep LaGuer in prison.[130] In the 1990s, Elizabeth issued a complaint with the Leominster Police Department that LaGuer had slashed her car.[131] DOC officials assured police that LaGuer had never been free from their custody. Over many years, the Barrys have sat in the court and parole pews.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. Elizabeth did not name after her mother, as Lennice had named Elizabeth after her's, Elizabeth Deply. The pain Elizabeth and her accomplice husband unleashed on LaGuer had been percolating decades before a young soldier returned home. In 2010, 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 to her and her mom and dad. He was a stench in their air.

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Lennice Mae Plante had returned from shopping on Tuesday morning, July 12, 1983. She rushed in the vestibule, pass the mailboxes, her studio was the last door on the left wall. She forgot her key ring, left them connected to her door. The building manager gave her his only spare. On 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. He continuously raped her, vaginally and rectally, for eight hours. She noticed no accent, no distinctive speech characteristics. Even though 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 that he's thirty years old and from the town of Fitchburg. She told a police lieutenant that he threatened her with a knife, which the lieutenant observed on the table. She says he because angry about her having so little money. He eventually left with her straw pocketbook in tow. He snatched two rings off her fingers. The State Police benchnotes indicate that the nightgown she was wearing had only a torn strap. She repeatedly denied knowing his identity. Lt. Hebert said he knocked on LaGuer's apartment door. At 5:00am the grounds

[130] Parole Board, testimony, Samantha Barry 10 April 2010; Parole Board, Testimony, Robert J. Barry 10 April 2010
[131] Incident Report, Department of Corrections; Incident Report, Leominster Police Department (1991)

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.'

Patrolman Timothy Monahan, his partner and 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 naked on a pool of urine. Her wrists were tied with the telephone wire that the culprit had cut from the phone. 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.

Detective Carignan paused to note that her door appeared to have been "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 windows in her apartment had a view to her backyard. He did not believe her assailant had scaled up to that window from the lawn (eventually testifying that the height of that window was over twenty feet, too high to scale or flee from without getting hurt.) One window was opened and its shades half pulled. An aluminum Pepsi soda can was recovered. It is believed her assailant drank from it. Carignan observed, finally, a number of scattered pieces of had bloody stains.

While she had a memory of him entering her bathroom and turning on the light, Carignan found no blood smear or latent prints of LaGuer on the bathroom door handle, light switch, toilet, mirror, walls, sink or formica counter. Not a single latent print lifted of the hairdryer, trimline phone, aluminum Pepsi can or other imprintable surfaces could be traced to LaGuer. (In some instances, as we shall review later, Carignan found latent prints that he withheld in secrecy.)

The police found no trace of blood or female secretions on the floor or walls between the G1 and G2 apartments. There is no evidence that LaGuer had put his fingers on exterior of Plante's knob (evidence of his having entered her studio) nor proof that he grabbed the interior of her door handle (evidence of his exiting) and returning to his adjacent apartment. Lt. Hebert, who had knocked on his door, within an hour of the incident, reported no blood or smudges on the exterior handle of his door.

At trial, Carignan had no recollection of having dusted the window sills for blood smears or latent prints, supporting the more plausible scenario that he had jumped out of her window seven feet. Any discovery of blood on those window sills would have eviscerated Carignan's theory that a totally nude LaGuer (wearing only tube socks) had robbed her key earlier on Tuesday morning then returned that night. After many hours, Carignan figured, LaGuer returns to his apartment. But Carignan is wrong in a number of significant ways. LaGuer could not have exited her door, because the reclined chair, under the doorknob, left only a window for him to flee.

The building manager singled out LaGuer despite his olive complexion. Raymond Cochran, the manager, provided details. On the previous day, Tuesday 12 July, Plante had requested a spare key. She had not been able to find hers following a shopping trip. They interviewed nobody else. Once he got back to his desk, he dug up a pair of internal secret reports that the detective bureau had on Benjamin LaGuer. In 1980, three years earlier, he had been named a "possible suspect" in a burglary and a party to a complaint involving a domestic violence call.[132] While Carignan had a solid basis for suspecting

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[132] (While walking home from school one night, a city police officer stopped LaGuer along with two of his friends. The officer collected their names and told them that they may be interviewed about a robbery in the neighborhood. LaGuer never heard from the robbery investigators. However, his name was later included in a list of possible suspects and kept in an internal secret file.)

LaGuer, remote internal reports would not be enough probable cause to satisfy the Court Clerk to approve a search warrant for LaGuer's apartment.[133] What strains credulity about Carignan is not that Plante subsequently denied inculpating her neighbor, but that he alerted nobody about her alleged revelations because he was conducting his "own investigation." However, his lone wolf story is belied by the fact that Detective Keith LaPrade and Timothy Monahan shared credit with Carignan in breaking the 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.[134] He lied about his true reason for wanting to search LaGuer's apartment; withheld internal secret police files labeling LaGuer a potential suspect in a burglary and possible violent. He lied to the court clerk about recovering "nothing" during a search of LaGuer's apartment. He lied about recovering "nothing" in his reports and trial testimony. He withheld a state police crime lab analysis of LaGuer's fabrics. He stashed these fabrics as well as fingerprint evidence. LaGuer was convicted on the basis of Carignan's narrative. He had provided the investigative report, related the official version to the grand jury and the MSPCL. He had discarded the fingerprint evidence lifted off the telephone.

Carignan personally ferried eight tube socks to the State Police on August 2, 1983, along with a myriad of "underclothes from suspect" and other fabrics, including a jersey LaGuer was donning on the day of his arrest. It is easy to see what benefits were netted in this deception. LaGuer was deprived of the ability to show that his fabrics had no link to the crime scene next door.

In the warrant affidavit that a district court judge reviewed on July 14, 1983, Carignan described in detail what he hoped to recovered from LaGuer's apartment. He asked to search and seize the matching tube sock to the yellow and black one found earlier in his neighbor's studio as well as two rings, a straw purse, personal papers and some twelve dollars. Carignan found none in that raid. Moreover, he found no bloody latent prints or smudges, despite her assailant allegedly wrestling a blood-drenched Plante for eight hours. There was no blood in his bathroom. Plante testified that he entered her bathroom and switched on her light. But Carignan found no latent prints or smudges on either toilet or light switch. There was not a speckle of blood on his fabrics. There was no evidence of her carpet fibers on his tube socks. There was no evidence of her blood on the soles of his socks, even though LaGuer had allegedly been standing on a puddle of her urine and blood for eight hours.

His daughter, who lived on the ground floor under LaGuer's apartment, heard a toilet flush. 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 accusation date of birth and social security number obtained earlier from papers in his apartment. The countdown to LaGuer's last minutes of freedom had begun.

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[133] 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.

[134] LaGuer's lawyer had mailed him Carignan's police report and grand jury testimony. 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.

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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 had told police that he returned from the military two weeks. He had been present when a friend sold a cube of Hashish to an Undercover Military Police officer while he was stationed in Germany. While he had most of his belongings 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 was Carignan's partner in this criminal investigation, even though he 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 for his two hour interview.

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 Lennice Mae Plante might be able to identify her assailant. Instead of arranging a group of individuals for a police lineup on that late Friday afternoon, 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.

Carignan disappeared with Monahan. It was later said that Monahan had accompanied Carignan to the hospital. Monahan stayed out in the hospital corridor while Carignan and Elizabeth Barry went in the room where Plante was interned. As Barry was deliberately deleted from the prosecutor's trial witness list, Carignan became the sole narrator of what occurred. While defense investigators found a nurse who said Plante was only shown a single polaroid, not the array Carignan had alleged, the nurse could not jeopardize her job. She was a single mother of two young children.

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 L.aGuer 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 loan 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.

When Carignan emerged from his hospital trip, he still wanted a confession from LaGuer 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 her apartment, surely by 5A.M. Wednesday he was gone. But they were still trying to figure out when her assault 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. He could plead guilty and be slapped with a year probation. In retrospect, Carignan wanted LaGuer to admit to a minor detail to create the opening for the larger Bill of Particulars.

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 and even more in his father's home.

Who would believe that LaGuer had robbed her for pot money?

If told only that Plante was robbed, not sexually assaulted continuous for a span of eight hours, then LaGuer might confess to breaking and entering her apartment for pot money. This is the type of inferior mind Carignan had put on display. 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 he was first questioned about his scratch.

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.

LaGuer was interviewed for over two hours. At 1:00pm Plante's daughter contacted the detective bureau. 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. (Monahan did not witness her alleged identification because Carignan had asked him 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 has Carignan at the State Police Barracks at 2:30pm. Martin's report presents a substantial discrepancy. LaGuer was charged with Plante's assault much later than Carignan had admitted. He had fabricated his report to conceal the length of time that he actually spent in that alleged photographic identification. But Carignan had a lot more withheld exculpatory evidence.

Martin notified Carignan of his fingerprinting report on Saturday, July 16, 9:15am, that four latent prints from the base of the trimline telephone (as opposed to the one "partial print" noted in Carignan's report) did not match LaGuer's reference prints. Carignan must have notified Lt. Arthur Caisse, chief of detectives, about the fingerprint comparison because, leaving LaPrade and Monahan behind, Carignan and Caisse promptly returned to the scene within minutes. Carignan says in his report that he and Caisse with met with the building manager at 9:00am, a time that may not be precise. LaGuer had already been arraigned in Leominster district court. He was 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 his mind, Carignan must have considered the case wrapped with LaGuer's arrest. The fact that he was back at the scene, with Lt. Caisse in charge, must have left him feeling a little rattled. "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." If LaGuer's underpants tube socks and other fabrics were not taken in that first police raid, Thursday, July 14, these were surely swept when Lt. Caisse accompanied a doubt ridden Carignan to collect "additional evidence" to shore up the case and make up ground for the fingerprint setback. The fact that LaGuer's underclothes are presently in the custody of the clerk of court is incontrovertible proof that Carignan or Lt. Caisse had boxed these fabrics at some point as part of the evidence collection.

Grant's notes show certain testing in the "interior crotch" of a pair of "underpants - suspect" provided as part of the "underclothes from suspect" parcel. His notes also indicate certain hairs from a jersey that LaGuer had were put on microscopic slides. Grant testified all evidence was "bagged together in a box." Carignan's signature appears on all chain of custody forms.

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 for DNA forensic evidence handling now in practice, the way evidence was handled in 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)

Carignan asking the forensic chemist examine for inculpatory evidence then concealing that evidence in a storage room was a monstrous scheme. The forensic analysis of LaGuer's underclothes would have substantially bolstered his defense that he was never in that sanguinary crime scene.

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 police report, search warrant affidavit and trial testimony Carignan said that the tube socks he observed in LaGuer's apartment were never seized. (Tr. 344, 379) On November 23, 2011, Hautanen argued that neither LaGuer's fabrics nor hairs could have contaminated the less than 0.03ng pool of cellular material used to develop a DNA profile because Carignan never collected any fabrics from LaGuer. "The officers did not take anything out of that apartment." (Hautanen, 6)

On May 22, 1989, the state police analyst who first examined these fabrics, Mark T. Grant, identified the eight tube socks as those Carignan had asked him to analyze. (Tr. 75) After Grant's analysis, Carignan simply got rid of these fabrics. He put them in a storage room of the Leominster Police Department. He denied ever removing these fabrics. If the fact that police denied and withheld a secret box of LaGuer's illegally seized fabrics was not enough to discredit the criminal investigation, the attempt of Lemire to cover-up that embarrassing episode created a distorted probative value and false providence of the evidence FSA relied upon for its DNA analysis.

In spite of this demonstrated evidence, LaGuer was denied a new trial without an evidentiary hearing. "LaGuer's argument is 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 clothing taken from his apartment.

Judge Tucker's 2012 ruling is a travesty. "LaGuer's argument is 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".[135] Tucker said this despite Assistant MSPCL Chemist Grant's May 1989 testimony that Carignan had asked him to examine a parcel of evidence collected from Plante and her residence, then a second parcel of "underclothes from suspect" known to have originated from LaGuer and his residence. Grant testified that "everything was bagged together in a box."[136] The case file plainly reveal that a court clerk currently has custody and control of the "underclothes from suspect" whose provenance Lemire had concealed; eight tube sock and LaGuer's fabrics illegally taken from his apartment.

ADA Hautanen's April 2010 concession before the state parole board was the government had "men's underwears in this case" cannot be reconciled with her subsequent court assertions, in 2011, that the only underwear in this case consist of two clearly female nylon panties. Her conflicting accounts are part of a continuous scheme to defraud. Detective Ronald Carignan stashed the fabrics he had illegally taken from LaGuer in the deepest hideaway of the Leominster Police Department storage room. He clearly did not want the jury to know that, despite all efforts to detect a scintilla of microbial evidence to link him to the crime. Carignan however left a trail of clues. The state police laboratory report, provided in November 1983 indirectly referred to the "underpants - suspect" taken from LaGuer. Defense attorney Peter Ettenberg had requested a copy of the search warrant "utilized to obtain certain evidence from my client's apartment." Since the police only recovered a single tube sock from the scene, the eight tube socks secretly stashed in storage must have originated from LaGuer. Since the "underpants - suspect" was part of the same parcel as the eight socks, then the underpants must have also come from LaGuer's apartment.

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

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

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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. LaGuer, sensing a fabulist Lemire, asked if Attorney Terk could request the evidence from the Leominster Police Department. Lt. Caisse knew exactly where to locate the secretly stashed evidence. Unfamiliar with Carignan's second round of searches with Lt. Caisse, Lt Ptak described what appeared to him as "a cardboard box containing numerous articles which were used as evidence at the trial." In fact, what Lt. Ptak had was actually underclothes Carignan had denied recovering in a raid of LaGuer's apartment. But the worst was still ahead. The real story is not that Carignan had lied about the origin of these fabrics. The story is not that Carignan lied about 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.

The hairdryer, whose electrical cord was used to bound Plante's feet, has black fingerprinting dust all over its surface. This is evidence that attempts were made to lift fingerprints, but no result is available for that analysis. Carignan claims in a July 16 report that he lifted a "small partial" latent print from a Pepsi soda can. That print was probably no more a "small partial" that the four latent fingerprints taken off the trimline telephone, which Carignan had also initially described in his trial testimony as "small partial" print.

Once LaGuer was convicted, that police narrative was made smooth through clever literary skills. The appellate court clerks who write judicial opinions are drawn to the simplest narrative. The same shrewd lie that a clerk may have loosely copied from a prosecutor's brief will be, as in LaGuer's case, presented again and again as if the point was beyond challenge.

The single most important issue in this case pivots on whether one can trust that Plante had identified to police LaGuer as her assailant. The fact that Lemire had stricken Barry from his witness list should have exploded in Ettenberg’s eyeballs like a mushroom cloud.

Under his supervision, chief detective Carignan brought this case to trial. His thumbprints are on every critical aspect of LaGuer’s prosecution. 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 allegedly set up a Polaroid array 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 light fixtures on the building. There can be no doubt that Carignan’s credibility was a centerpiece factor. It is now evident that Carignan’s report and testimony concerning fabrics taken from LaGuer are misleading and incomplete. His cover-up of these illegal fabrics is exculpatory, should have been divulged prior to trial, because if jurors believe that Carignan had prevaricated on this fact, then his credibility would have been significantly affected. Most importantly, a disgraced Carignan would have greatly enhanced Plante’s testimony, overwhelmingly favorable to the defense, that she never identified LaGuer as her assailant. Victor Hugo wrote, “[i]f a soul is left in the darkness, sins will be committed. The guilty one is not he who commits the sin, but he who causes the darkness.” All of the jury racism, prosecutorial misconduct, faulty forensics, disputes over politics and money, and stubborn government refusal to admit wrongdoing – none of these are not caused by guilty parties: they are caused by the darkness wrought by Carignan.

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.)[137]

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 a Amherst—based New York Times stringer, Eric Goldsheider, whom was then considering a biography of Ben LaGuer. Annie Demartino granted journalist Goldsheider a interview, which he recorded and transcripted in the process of researching and writing a story. Through the trust of former gubernatorial candidate and Boston University President John R. Silber, whom had obtained the audio interview and transcript of Annie Demartino's interview through the journalist, she agreed to additionally 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 represented either exculpatory newly discovered or previously requested but withheld material. The progress came to a halt when Annie Dimartino became suddenly unavailable due to a medical issue. She was said to have travelled to Ireland. She also became increasingly worried that her public statements were being manipulated by her political foes to suggest that she was aiding a criminal defendant or worst betraying the professional and personal confidences of the late Lennice Mae Plante. The defense made a strategic choice to exercise its rights and privileges to compel Annie K. Dimartino to appear in court pursuant to Article XII of the Massachusetts Declaration of Rights as their rights under the Fifth, Sixth and Fourteenth Amendment to the United State Constitution. Any expectation that LaGuer was required to obtain a affidavit from Annie Demartino, a woman who was known to be suffering a "serious "heart condition, misreads Rule 30(c)(3) Ben LaGuer through had satisfied his legal burden. The transcript and audio recording of Annie Demartino from journalist Eric Goldsheider as well has the transcript of her interview and audio recording with Goodwin Proctor attorneys, including a newspaper interview of public comments she made to the Worcester Telegram & Gazette, confirming the basic facts and fairness of what journalist Goldsheider had published in the Valley Advocate, was credible and overwhelming. A different approach would have left the defense vulnerable to a charge that LaGuer had harassed a physically infirmed woman, possibly on medication, to sign an affidavit. Since Annie Demartino had no legal obligation to provide LaGuer an affidavit, the most logical view is that Rule 30(c)(3) cannot be so inflexible to require a criminal defendant to obtain a affidavit for which he has no authority over the affiant to compel. Rule 30(c)(3) requires that the "[m]ving parties shall file and serve and serve and parties opposing a motion may file and serve affidavits where appropriate in support of their respective positions. The judge may rule on the issue or issues presented by such motion on the basis of the facts alleged in the affidavit without further hearing if not substantial issue is raised by the motion or affidavits." Clearly, Rule 30(c)(3) of the risk a party suffers if may as a result of not filing "affidavits where appropriate in support of their respective positions," The rule is not intended to be absolute. In Commonwealth v. Figueroa, 422 Mass. 75—76 (1996) established that the motion judge has discretion to determine the merit of the issues by motion or affidavit. In this case, the trial court would have been within his discretion to determine the merit of the issue or issues presented, as Rule 30(c)(3) says, raised (either) by the motion or affidavits. This is not a case where Terk's memorandum was obscure, impressionistic, or trite. See. Commonwealth y. Lopez, 426 Mass. 657 (1998); Commonwealth y. Coyne, 372 Mass. 599, 599 (1977); Sayles V. Commonwealth, 373 Mass. 856 (1977) At one stage, the Commonwealth described his memorandum as containing a "large number of legal and factual improprieties in defendant's allegations and the length of the 25-page" memoranda that included 133 footnotes. In fact, Judge Tucker acknowledged that he had based his decision to grant LaGuer an

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

evidentiary hearing on the basis of the sufficiency of counsel or record's memoranda rather than affidavits. Judge Tucker was perfectly entitled to find a sufficient basis for an evidentiary evidence. See. Reporter's notes Rule 30(c)(3)

Her 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.

A judge inspected Plante's psychiatric records for a prior between April 1 and September 30, 1983. The judge found no evidence in those Herbert Lipton Mental Health Center, her only known mental health provider to the defense, which 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.

It was said Plante was not psychotic or under antipsychotics for over two years. (Tr 3, 314) But 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 that she had accused other men of the same assault.[138] Plante was under enormous stress, poor physical and mental health, which impaired her ability to encode information into a reliable memory.

"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."[139]

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[140], Plante may have identified LaGuer out of fear that Gomez might retaliate against her. The import of their relationship undercut her credibility, because Plante had denied in her trial testimony any such friendship. (Tr. 161) DeMartino would have enabled LaGuer to question whether Plante was afraid about revealing his 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,[141] the town where the Gomez family had resettled. Her handbag was found on a road toward Fitchburg. Gomez's blood type is consistent with the perspiration on the tube sock recovered at the scene. DeMartino aids in refuting Lemire about Gomez. "There is no evidence the Gomez family was in that apartment at the time." Tr. 569.

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[138] 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.

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

[140] 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.

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

Four fingerprints found on the base of the trimline telephone, the cord of which was used to bind the victim's wrists,[142] did not match LaGuer.[143] The defense would have attempted to match these prints to Gomez. The SJC disagreed, ruling that the fingerprints "by itself, without any evidence or explanation, create no reasonable basis for believing [Gomez] would have been revealed." DeMartino enabled LaGuer to establish Plante's living arrangements with Gomez.

In his eighth motion for a new trial, LaGuer's defense asserted that four latent prints recovered from a telephone were exculpatory, should have been released prior to trial, and the loss of this evidence warranted a new trial. Based on information then available, the Supreme Judicial Court held that " given all of the circumstances in this case, including the fact that the defendant was aware at trial that the only fingerprint found on the telephone was riot his, and the lack of any basis for assuming that other fingerprints would have identified a third party suspect, the defendant has not sustained his burden of showing that anything exculpatory has been withheld." Commonwealth y. LaGuer, 448 Mass. 585, at 599 (2007) Recent revelations that Lennice Mae Plante lied about her relationship with Gomez is enormously significant. If the top fingerprint on the telephone could be matched to Gomez, the fingerprint that signify who handled the telephone last, particularly if the fingerprint was stained with her blood, then a fact finder would have a basis to infer that he handled the device to pull its cord to bind Plante's hands.

The Supreme Judicial Court credit Detective Carignan's narrative with far more credibility he deserved. What Carignan reported in his police narrative is that he found a "small partial" on the telephone. According to a report, withheld for two decades, Trooper Martin was provided the telephone for fingerprinting analysis. It was Martin who found four fingerprints that did not match LaGuer. Carignan's report of a "small partial" only disguised what Martin says he actually communicated to the detective the next morning, July 16, 1983.

The notion that a medical or police official might have inadvertently used her telephone is flawed because it had been cut off her wrist. Moreover, Lieutenant Commander Herbert Hebert instructed officers not to touch anything until Detective Carignan arrived with further instructions. The fact that Detective Carignan felt as if he had to keep secret these latent is not a subject that fair-minded persons should ignore. The fact that Carignan held the forensic analysis that found no inculpatory link between LaGuer's fabrics and that sanguinary studio next door would have been highly exculpatory. What is significant is not the fact, as the Supreme Judicial Court had ruled, that LaGuer was "aware that the Commonwealth had no physical evidence connecting him to the scene of the rape" at 591, but how much physical evidence Detective Carignan was willing to keep from Ettenberg.

"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."[144] False. All witnesses except for Carignan entered the courtroom to testify then left after cross-examination owing to a sequestration order.[145]

"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

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[142] Original, Investigation Report by Timothy E. Monahan 13 July 1983, pp 3
[143] The prosecution withheld this evidence for two decades.
[144] Memorandum of Decision on Defendant's Motion for New Trial and Evidentiary Hearing and Commonwealth's Motion to Dismiss 27 February 2012, p. 10
[145] On 12 January 2004, LaGuer requested a sequestration order. (Docket No. 15)

testimony, at any time prior to her discovery by LaGuer."[146] False. At trial, Lemire himself admitted that Plante had met with Carignan in his courthouse office. (Tr. 154) Lemire had met separately with her. (Tr. 392) Demartino had to reveal her relationship to Plante to access Lemire's restricted office area.

After interviewing her, a day before the trial began, 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 had led to the inescapable conclusion that only LaGuer would have met her in the nude. Carignan's theory that LaGuer returned to his apartment next door runs afoul of other evidence. Monahan testified Plante was difficult to reach, because her door was barricaded inside. There was a lounge chair leaning under the door knob, wrapped with a belt.

In his summary, Lemire tackled the Gomez factor, as if the third party culprit defense had enormous significance. Gomez would have been a "real factor" in the jury's deliberation, given the Supreme Judicial Court's assessment that prosecutors could not place LaGuer at the crime scene by means of any evidence, including fingerprints or any other physical evidence. (448 Mass. 585) Plante could have barricaded herself with Gomez. In a haze of smoke, liquor and drugs, Gomez became violent and beat her. He hogtied her. A neighbor heard her screaming. With the police tearing down her trap door, Gomez leaped eight feet out of her window to the backyard. The essence of Dimartino's testimony is relevant because, in fact, her delusions of grandeur explains her denial of Jose Orlando Gomez, a third party suspect whom the Supreme Judicial Court named in its 2007 ruling, a bound of friendship that was forged on drugs. She was wholly dependent on Gomez to run her errands and he relied on her to provide the fuel of their combustible lifestyle. But, in her psychotic mind, how would President Kennedy feel if her secret life with Gomez was exposed at a public trial? She had an articulable reason for deny Gomez.

She had not been candid on other occasions. 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.) According to Dr. Robert Babineau, Plante had "never followed through with other tests" concerning a "large abdominal mass" discovered. Babineau was skeptical of Plante's claim that she did not consume alcohol. "The patient again denied any alcoholic intake although her GT was elevated in the range of 126, normal being 9-31." If Plante was willing to risk her life to maintain the facade of her "imperious" personality, denying the role Gomez played in her lifestyle could not be far off.

The fact that Plante was deceptive about her intimate friendship with a man of color named Jose Orlando Gomez, Tucker concluded, was not a basis to find a third party culprit link that would entitle LaGuer to 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." (Tucker's ruling, 12) Tucker's ruling might have some weight if Plante had not denied in her trial testimony the very relationship with Gomez that Tucker, in his ruling, credits Dimartino. According to Elizabeth Barry, her mother had been a victim of domestic abuse for years. Her denial of that secretive relationship with a man of color was fertile ground to challenge whether she had identified LaGuer in court because he was the only person of color, or whether she was afraid to identify Gomez and lose her only source of companionship. ADA Lemire admitted in his closing statement that Plante was afraid to name who assaulted her. (Tr. 565) If there was no "connecting link" between Gomez and Plante, as Tucker concludes in his ruling, why would Lemire relate to the jury in his summary that "[t]here is no evidence the Gomez family was in the apartment at that time. Consider what Mr. Ettenberg said, I would argue to

[146] Id., p. 7

you whether it's not just to distract [but] confuse you." (Tr. 568) Lemire did not refute that Gomez had link to Plante, only that his mother and siblings had earlier moved to the town of Fitchburg.

At trial, this interior barricade behind Plante's door is among the first questions asked of Carignan. "To the best of my recollection," he said, her door was unlocked by the maintenance man and "it opened fairly easy". (Tr. 247-249) But Carignan could not have seen her door being unlocked because a patrolman had earlier cleared the barricade prior to his arrival. Plante was admitted to the emergency room fifteen minutes before his phone even rang. (Tr. 247) Carignan crafted his testimony to shore up his theory that a LaGuer had returned next door, not that he not leaped out of her window.

"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)[147] In September 1999, former FBI agent Richard Slowe found her key ring in her purse at the clerk of court's office. Slowe's discovery undercut Lemire's hypothesis that LaGuer had stolen her key. Ettenberg never asked that the content of her purse be itemized.[148]

To return a verdict of guilty, the jury had to credit Carignan over Plante. The assertion that Plante identified LaGuer as her assailant pivots on Carignan's credibility. At the scene, Carignan made no effort to investigate Jose Orlando Gomez.

Police photographed a scratch on LaGuer's back.[149] But, Lemire never disputed LaGuer had scratched himself on a picnic table.[150] Other photos showed his left hand had no abrasions consistent with her assault.[151] Plante was beaten so hard around her face that physicians reconsidered reconstructive surgery.[152] But LaGuer's knuckles are his best evidence for establishing innocence.[153] He had no abrasions ordinarily found on the hands of aggressors. 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. (In Harper Lee's classic novel To Kill a Mockingbird, the argument for the accused rapist's innocence is the bruising on the right side of the false accuser's face; Tom Robinson had no use of his left arm owing to a childhood accident, and only a left-handed could have dealt her those injuries.) LaGuer flunked out of the US Army Communications School because of a stutter so severe that if agitated, could reach jackhammer intensity, yet, Plante denied anything peculiar about his speech. (Tr. 173, 174) According to the Sheriff's Department, LaGuer was never medically treated despite Plante's

[147] 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)

[148] The building manager testified that complainant often misplaced her keys. Tr. 64-65. Her pocketbook remains in the custody of Worcester County Clerk of Court.

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

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

[151] 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.

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

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

"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.[154]

According to Billings B. Kingsbury, a longtime Telegram court reporter, and columnist of the Society and Law column, 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."[155]

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 as if the man had pass her apartment to open the adjacent door. She heard no footsteps as if the man had come toward her end of the corridor. In fact, she did not know where he went in the building. When Lemire asked if the man she saw on the vestibule was in the courtroom, she raised her index finger, as if on cue, at the defense table. The trial judge said her "testimony is also somewhat unclear." (Tr. 108-111)

To suggest that she was familiar enough with LaGuer to fear revealing his identity until she felt safe is fundamentally flawed. While she says he had threatened to kill her if she revealed his identity, she repeatedly said that the man she had seen standing on the vestibule was not the same man she had seen accompanied by a woman. This was significant because while LaGuer's father was settling business affairs in Puerto Rico, she was staying with his son. She would prepare his meals. Lennice Mae Plante would have seen them walking out of their apartment almost on a daily basis.

If the assailant in this case was not the man Plante had seen coming and going for weeks in the corridor, often accompanied by a woman, then her identification of LaGuer in court as her assailant is a dubious piece of eyewitness evidence. Her identification of LaGuer is only powerful if one ignores her testimony that she never inculpated her neighbor, if one ignores the Burbank Hospital nurse who observed Carignan showing her a single Polaroid, rather than an array, or if one ignores Lemire's decision to strike her daughter from the witness list the eve of trial. It is said that Lemire learnt from Barry that her mother had not, in her presence, inculpated LaGuer. Plante's daughter new version of events, LaGuer's name had originated from Carignan. Carignan had earlier obtained LaGuer's name from the building manager who, in turn, discovered the secret internal reports.[156] In 1980, then Patrolman Carignan had stopped LaGuer as a "possible suspect" in a local home burglary. A second internal report had LaGuer as to party to a domestic violence call.

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[154] 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

[155] Sunday Telegram, Interesting Angles in Rape Appeal by Billing B. Kingsbury 26 May 1991. According to the Telegram's long time courthouse reporter, Billing Kingsbury, she had "an extremely difficult time on the witness stand. I covered the trial. It was only through delicate handling by [ADA Lemire] that the woman was able to come to court and be heard."

[156] 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. (While walking home from school one night, a city police officer stopped LaGuer along with two of his friends. The officer collected their names and told them that they may be interviewed about a robbery in the neighborhood. LaGuer never heard from the robbery investigators. However, his name was kept in their internal file.)

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. Detective Carignan admitted that Plante believed that her assailant would be seated in the courtroom. (Tr. 392) It had all been part of the trial rehearsal.

In this case, Tucker, J. misunderstood and so misrepresented the devastating effects of Dimartino's revelations. In particular, her claim that complainant had falsely identified a number of colored men of her assault. Judge Tucker described, in his ruling, a far flung account of Dimartino. "Dimartino's testimony regarding (complainant'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 Dimartino's observation of (complainant's) palpable fright of darker complexioned following the attack." (Tucker's ruling, 12) He mistakenly conflates complainant's palpable fear a known black man who lived in the psychiatry facility with Dimartino's distinct testimony that her client had accused, en route to trial, a number of colored men of her assault. Tucker, J. gives no weight to the incontrovertible fact that defendant was the only person of color seated in the courtroom. In a trial where the reliably of defendant's identification was the pivotal issue, any indiscriminate false accusations should not have been so glibly dismissed. The question of complainant's in court identification of defendant as her assailant probably stemmed from her identifying the only person of color in the courtroom. The Commonwealth did not dispute before the lower court that defendant was the only person of color, as his family. Were all asked to stay out of the courtroom due to a sequestration order in effect. 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 as her assailant, even though she denied that she had identified her colored neighbor to police, is not harmless beyond a reasonable doubt in the full context of the trial record.

Improper Handling of Forensic Evidence

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. In his ruling, Tucker says his predecessor "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."[157] In spite of these safeguards, FSA had "unspecified slides"[158] never approved for DNA sequencing and comparison.[159]

On the afternoon of July 14, 1983, Carignan and two other officers executed a warrant at the LaGuer residence. The warrant for LaGuer's apartment specified in detail 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.[160] They found a photo of LaGuer in uniform and papers bearing his name. "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," Hautanen said, adding: "The officers never took anything out of that

[157] Memorandum of Decision on Defendant's Motion for New Trial and Evidentiary Hearing and Commonwealth's Motion to Dismiss 27 February 2012, p. 5.
[158] FSA Report 2, 4 February 2002, pp. 6-7
[159] 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.
[160] 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."

apartment." (448 Mass. 589) Ettenberg knew that police had pilfered LaGuer's underclothes. In a pretrial letter to Lemire, Ettenberg requested "a copy of the search warrant and affidavit which was utilized to obtain certain evidence from my client's apartment."[161]

In 1989, Grant identified eight socks in the box as those he had examined prior to trial.[162] His forensic analysis in the "interior crotch" of "underpants – suspect"[163] revealed no female secretions.[164]

On 17 May 1989, Leominster Police Lieutenant Francis J. Ptak and Trooper William P. Kokocinski signed a receipt for three (3) underpants.[165] In court, Lemire only presented only two (2) pairs.[166] Lemire never disclosed that five days earlier, Kococinski and Ptak 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." [167] In 1998 ADA Sandra Wysocki-Capplis, requested "also Benjie's underwear" in a letter to Leominster PD. [168] In May 2000 the MSPCL catalogued an "underclothes from suspect" parcel.[169] Hautanen told the state Parole Board in April 2010 "obviously there were men's underwear in this case."

State Police analyst Karolyn M. LeClaire knew exactly what prosecutors in Worcester expected. Lemire had already outlined the particulars of his sock gagging hypothesis in his earlier 27 April memorandum.[170] Lemire was clever enough to formulate a hypothesis, theory and proof long before the tube sock was sent to the State Police crime laboratory on 17 May. She was ready to testify on 22 May. The original idea to reexamine the pretrial serology stemmed from Lemire's astonishing disbelief that no a single droplet of the blood exhumed from that sanguinary crime scene could be lined to Lennice Mae Plante, a known secretor of ABO O-Type antigens. The only reason for her bloodtype not to appear on the serology would be Grant's competence to perform that most simple of all analysis. Unbeknown to LaGuer's defense, Lemire had secretly gathered the bloodtype of every patrolmen and police detective who had been present. All except patrolman Dean Mazzarella were O-Type. Mazzarella was AB-Type. In his 27 April memorandum Lemire in essence posits that Grant was not smart enough to distinguish between saliva and the commonly known morphology of perspiration. Surely, the O-type in the sock linked perfectly Jose Gomez, a known secretor of O-Type.

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[161] 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.

[162] 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 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.

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

[164] 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."

[165] 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.

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

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

[168] 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."

[169] State Police "Record of Evidence Submitted" form of August 3, 1983

[170] Memorandum in Opposition to Defendant's Mass. R. Crim. P. 30(b) Motion for New Trial, 27 April

After a lengthy evidentiary hearing in a Boston courtroom, trial judge Mulkern denied LaGuer a new trial. In his ruling, he said LaGuer's assertion that a disparity between the O-Type perspiration found in the culprit's recovered sock and B-Type "appear to have merit." However, Mulkern had a change of heart. "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."[171] Naturally, Mulkern's narrative imploded when that blood matched Plante's genome. Carignan could not have seen the blood on her fingernails because Monahan testified she was "cleaned up" when they first met her. (Tr. 211-216, 258) According to Siegel, Plante had "dried blood on both hands." The notes of Dr. Edmund C. Meadows indicate "bright blood on both hands." In Monahan's testimony, her hand was covered in blood. It is specious to say that Plante had blood on her fingernail, when her hands were drenched in blood.

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By intentionally submitting to the Supreme Judicial Court and lower courts, under pains and penalties of perjury, facts which she knew to be false, Hautanen engaged in conduct involving dishonesty, fraud, deceit or misrepresentation, in violation of Massachusetts Rules of Professional Conduct 8.4(c); conduct prejudicial to the administration of justice, Rule 8.4(d); conduct that adversely reflects upon her fitness to practice law, 8.4(h) and Rule 3.3(a)(4), stating that "if a lawyer has offered...material evidence and the lawyer comes to know of its falsity, the lawyer shall immediately take reasonable remedial measures." Hautanen had ample evidence of malfeasance. Hautanen is guilty of Obstruction of Justice/Misleading a Jury/Judge/Prosecutor and Defense Lawyer under M.G.L. c. 268 s. 13B.

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."[172] 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. MWE had every intention of discharging its legal obligations. For another year, Kasten worked tirelessly to assist in creating a narrative. (In 2004, Siegel apologized in a letter to Silber. Rehnquist was later reimbursed by Siegel for settling Blake's debt.)

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On Friday 21 March 2002, Siegel made a comment for the Sunday Boston Globe that was widely read as 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." FSiegel had left the country for the Mediterranean. He failed to pay Blake thousands of dollars that Patrick and Silber had given to settle FSA. Blake then assumed that, in light of FSA branding him a guilty man, FSA would not get paid. (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."[173] However, Siegel was not totally in the dark. In fact, DA

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[171] Decision Denying a New Trial by Judge Robert V. Mulkern, 2 June 1989 pp4-5

[172] 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)

[173] Letter from E. Blake to D. Siegel of 4 April 2002

Conte had publically repudiated the evidence as "contaminated beyond the point of valid test results" in a 2000 press release.[174]

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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."[175] 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."[176] 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. There was no awareness of laboratory and analytical errors in DNA analysis. The stories of exonerated men through DNA feed the media with cases of injustice. For journalists, lawyers, and judges, a DNA test result made their task of judging a man guilty of innocent easy.

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, weeks 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."

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 assisteing 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.

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

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[174] District Attorney John J. Conte's Press Release of 14 January 2000
[175] Baron, Andy. Sentinel and Enterprise. LaGuer continues jailhouse affair with media. 18 April 1994.
[176] http://www.foxnewsa.com/story/0,2933,52915.html

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 was overwhelmed with the amount of support he had for this one case, which is more support than he had for the last 100 cases in Tennessee. Siegel assumed that a request for DNA testing in Massachusetts would be easily approved without any need for multiple law firms. He disagreed with his client that prosecutors in Worcester would fight to keep DNA testing from happening. Ben LaGuer had been campaigning for DNA testing, both through the media and letters since at least March 1989.[177] LaGuer copied a number of newspaper and magazine features to support his case. Siegel did not care. He believed that the DNA test result would overshadow any argument for keeping LaGuer in prison. Siegel did not object that the presiding judge had been a lawyer for the victim's family. If the DNA was definitive, Hillman's conflict of interest would not matter. In the end, a DNA exoneration would bring so much political and civic pressure to grant LaGuer a new trial 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 as the New England School of Law, 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 with him all faded. But Siegel came to terms over 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.

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."[178] 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.

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.

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[177] 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."
[178] 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 general business is far and above the overarching reason for his existence, 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 the lawyer is always hesitant to upset his ties to a prosecutor and their law enforcement agencies. Watching Ettenberg in court was like sitting with a beer and eating a sandwich 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 LaGuer, a client whom had even failed to finish paying his original retainer, was not a profitable enterprise for Ettenberg in 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.

Prosecutor Misinterprets Original Forensics

In October 1983 State Police Analyst Mark T. 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. Assistant District Attorney Lemire requested a order to compel Ben LaGuer to provide a saliva sample for ABO 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. While the district attorney says that LaGuer foiled the trial prosecutor's ability to offer a damaging serology report, the fact remains that the culprit's sock revealed O-Type antigens. Ben LaGuer is B-Type.

Analyst Grant was never on the witness list. In a review of the file, Lemire found it odd that Grant's serology report did not register a single droplet of blood to match Lennice Mae Plante. Detective Carignan had asked to examine a heap of bloody fabrics. This absence of her blood suggested that something was wrong with Grant's analysis. Lemire did not want a defense lawyer asking Grant about this fact in front of the jury. What other errors might a clever lawyer find?

Grant had reported that certain bloody wads from the scene had B-Type antigens. This finding further complicated the forensic equation. Lennice Mae Plante was an O-Type secretor. In April 1989 Judge Mulkern denied a request for a new trial, writing a convoluted set of reasons that had never been

argued to before. The Supreme Judicial Court endorsed that ruling, with particular emphasis on the fact that a wad bearing Ben LaGuer's bloodtype further inculpated him in the crime. In testimony before the state parole board, in 1998 and 2010, the district attorney argued those bloody wads discredit any claim of innocence. In August 2001, the Forensic Science Associates (FSA) announced that the blood on those wads had originated from Lennice Mae Plante.[179] One can say that Lemire was correct in his pretrial assessment that Grant had twisted her blood in his report to make it appear as if Ben LaGuer's B-Type blood is what Carignan had recovered. The DNA analysis radically recast the blood evidence.

Twelve years after Assistant District Attorney Sandra L. Hautanen was made aware that Grant's pretrial serology was a confirmed incorrect, she set forth a new thesis. Ben LaGuer should be denied a ninth request for a new trial, she argued, because he had foiled Lemire's ability to inculpate him with Grant's serology (faulty) report. Lemire could have argued that LaGuer was guilty because his blood was found on bloody wads near Lennice Mae Plante. What is devilish and equally ingenious about her argument was that Hautanan made that argument in 2011, twelve years after FSA made a conclusion that blood was genetically compatible to Lennice Mae Plante, highly embarrassing to the prosecution's case. Hautanen's argument to the court was radical, because she was suggesting that Ben LaGuer should be punished for impeding her office's use of a serology report which she knew was a hoax.

At trial, Lemire could not have argued that the tube sock was less significant than a few bloodstains found in wads. Any attempt to invert the value of those two pieces of evidence would have led the defense to request an independent analysis, a review that would have exposed everything that Lemire feared. An independent analysis would have shown that the wearer of the tube sock was not Ben LaGuer, boosting his third party defense, because the forensics of that sock only inculpated Jose Orlando Gomez. A review would have shown that the blood on the wads belong to Lennice Mae Plante, not Ben LaGuer, a fact that would have reflected poorly on the integrity of Detective Carignan theory and forensic testing of Analyst Grant. This hidden blemish is a driven force behind Hautanen's arguments to keep Ben LaGuer in prison and the public ignorant. The Worcester County District Attorney's Office sure had a skin and reputations at risk. Why has Ben LaGuer spent more than three decades in prison is indicative of how scared these agents are running.

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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 blood type O and Mr. LaGuer has blood type B, don't you think that presents a problem to me?"[180] According to his court papers, Lemire said: "(Plante, whom) testified that she may well have been gagged with the sock, is type) 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."[181]

On May 22, 1989, Lemire asked Grant whether he would have change the language of his report if Plante had been gagged with the sock. LaGuer's lawyer objected. Lemire had no basis for his hypothetical, thus the rule that an expert may answer a hypothetical question only if a fact has already been admitted to permit such inference was not applicable. Judge Mulkern asked Lemire if in fact they had had been used to gag Plante. In response, taking great advantage that he had the only available copy

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[179] 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.")
[180] Ayres, B. James. Boston Globe, Hearing Set to Consider New Trial in Rape case. 23 April 1989
[181] See. Commonwealth's Memorandum in Opposition to Defendant's Mass. R. Crim. P. 30(b) Motion for New Trial, 27 April 1989, pg. 10

of the trial transcript on hand, Lemire cited two alleged instances of a gagging sock in her testimony. Grant was allowed to answer in the affirmative; yes he would have changed his answer. (Tr. 49) But a closer examination of Lemire's first citation indicates Carignan's trial testimony "that he stuffed something in her mouth also." (Tr. 333) His second citation reveals defense counsel Ettenberg asking Plante "remember, ma'am, when it was that a sock was put in your mouth?" (Tr. 183) But she had never referred to a gagging sock. She answered as if she accepted his question. "He may have put a sock in my mouth when he put me in the bag, I didn't know about socks, you know the sock was in my mouth. All I know is the bag was over my mouth, a bag over my mouth was twisted." Ettenberg, reversing to what he should have first, asked, "Do you remember something being in your mouth?" Plante, in a clear voice, said "I don't know."

While police reports note a gagging, there is no evidence of her gagging on a sock.[182] Plante said he "stuffed something in her mouth and she kept gagging on her own blood."[183] A pretrial exam had detected no bloodstains on the sock.[184] And, a more intensive post trial exam in May 1989, also indicated no evidence of saliva.[185]

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Racial Bias in the Jury Deliberation

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?"[186] The SJC asked the trial judge to afford LaGuer a new trial if the allegations were "essentially true."

In 2012 ruling, Tucker dismissed the racist affair as one of "two known instances where LaGuer skewed evidence" in this case. It was said these 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."[187]

Dalzell told State Troopers: "The first two paragraphs, racism was brought up, and I asked the jury body to knock it off."[188] 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."[189] A fourth juror confirmed to WHDH Investigative

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[182] Follow Up, Investigative Report of July 14, 1983 by Detective Carignan. According to Carignan's report, complainant told Carignan, ". . . a garbage bag over her head, she believes was white, and stuffed something in her mouth, and she kept gagging on her own blood."
[183] Follow Up, Investigative Report of July 14, 1983 by Detective Ronald N. Carignan.
[184] 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.").
[185] Testimony of State Police Analyst Karolyn M. LeClair, 22 May 1989, pg 93. (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.")
[186] Early case for innocence, part 2: http://www.youtube.com/watch?v=BNu_XvpTF20
[187] Memorandum of Decision on Defendant's Motion for New Trial and Evidentiary Hearing and Commonwealth's Motion to Dismiss 27 February 2012, p. 17
[188] State Police Tpr. Richard D. McKeon and William Kokocinski 6/13/91 interview juror James Dalzell
[189] T&G, "Jurors mixed on recent findings in LaGuer case" by Matt Bruun of 13 December 2001

Reporter Hank Phillippi Ryan the racist slurs. [190] Another juror commented on the case.[191] 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.[192] Hautanen told the Parole Board April 2010, “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.”[193]

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.

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.”

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.

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

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[190] Early case for innocence, part 1. www.youtube.com/watch?v=bJPhecY_f7g

[191] 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.)

[192] Affidavit of Michelle L. Chafitz. http://benlaguer.org/pdf/Affidavit_Michelle_Chafitz.pdf

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

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 Ettenburg 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.

Allegations of Fraud are Unfounded

LaGuer rejected a plea.[194] 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." A parole board member, John Bocan, had openly pledged to investigate. LaGuer argued that he had already been denied parole three times, and another five year setback would be more than he would have served had he plead guilty. She obviously never spoke to counsel. 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 [his April 2010 Parole] hearing."

On September 9, Assistant District Attorney Sandra L. Hautanen earmarked for submission to the trial court 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. Hautanen delivered the pleading to Judge Tucker and counsel of Record minutes earlier. Hautanen averred that "there's no proof that there's anything material in those five volumes of exhibits that provides material evidence." Judge Tucker retorted, "I didn't say that anything of them entered into evidence." Judge

[194] 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)

Tucker then proceeded to accept from her Lemire's pretrial letter, then ultimately ruling that LaGuer had attempted to defraud the court. It is a real Kafkaesque tale. The defense was left engulf in a controversy over a letter which Terk had not even listed as part of his material support for an evidentiary hearing, a controversy based on little more than an inference of an unsigned letter.

After the April 22 public parole hearing Robert E. Terk, a longtime attorney and consultant, scour through his extensive files for any evidence that might corroborate a pretrial plea bargain offer. As ADA Hautanen had dumped a thousand page memoranda on the parole board members on the day of 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 April 29 and April 30 affidavits, the parole board members were asked to consider the unsigned pretrial letter that attorney Terk had retrieved from his archive. "At the April 22 hearing, the Board was determined to confirm whether I was offered a pretrial deal to plea guilty for an additional 17 months in prison. Trial Attorney Peter L. Ettenberg happily submitted a sworn affidavit confirming to this Board what his trial notes indicated. I provided a letter from the trial prosecutor (James R. Lemire) in which the pretrial deal was spelled out in detail."[195] ADA Hautanen had no objection.

In his motion for a new trial, LaGuer alleged that prosecutors had grossly misled the defense about the origin of the DNA analysis. Moreover, credible evidence contradicted Lemire's claim that Plante had been off antipsychotics for more than three years prior to trial. In his response, 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.[196] He had not seen his file since 1985. The fact that he had no memory of a letter can not be evidence supporting or denying authenticity. Hautanen claimed fraud even as she conceded that certain files from Lemire "aren't there anymore."[197] Since a copy of Lemire's letter would have been among those files that her office neglected to safeguard, her claim of fraud rings hollow and incredibly reckless.

Lemire's affidavit of 2010 avers that all pleas required Conte's approval, a fact made abundantly 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 as a consideration for Conte's likely approval of the deal. Lemire recalls that he met with Plante "shortly before trial to discuss our options in the case." At that late hour, the only options were for Lemire to proceed with jury selections or to sweeten a plea deal LaGuer had already rejected. The term "options" support Ettenberg's trial notes indicating a potential plea. It seems more credible that LaGuer was put on trial because he had rejected the plea offer, not because Plante had wanted her 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, whether the deal was "informal" and still required Conte's final approval is splitting hairs over what constitutes an offer and a rejection.

Judge Tucker's rationale for dismissing a ninth bid for a new trial due to fraud is a scheme to discredit LaGuer and protect a few old miscreants of the district attorney's office. "The Commonwealth asserts, in no uncertain terms, that this letter is fraudulent and is part of an ongoing scheme of a fraud on

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[195] Letter from Ben LaGuer to Parole Board 2 July 2010

[196] In his letter to LaGuer on February 15, 2001, Ettenberg confirms to his former client, "I have reviewed the content of my files and can only locate the enclosed documents; the jury list and pretrial conference report. 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."

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

the court. 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. Taking the latter issue first, Lemire's affidavit could not have denied the content of a letter that was only made public for the first time in July 2010 to parole officials. Second, there is nothing "unusual" about unsigned documents floating in the case file. In her September 2011 petition to dismiss due to fraud, she included an unsigned 1991 pleading to the Supreme Judicial Court.[198] In her 2006 appellate brief to the Supreme Judicial Court, Hautanen included an unsigned letter from Ettenberg to Lemire. How she obtained an unsigned letter from Ettenberg is no more unusual than Terk retrieving an unsigned letter from the trial prosecutor in his archive. In the 1980s, it is said, the District Attorney's office routinely circulated unsigned papers, pleadings, letters and reports. Carignan testified that a search warrant return provided to Ettenberg was unsigned (Tr. 379-380) In November 2001, while disclosing withheld latent print evidence, ADA Hautanen provided an unsigned letter dated July 8, 1989, where ADA Sandra Wysocki had requested of the Leominster PD the rape kit and "also Benjie's Underwear" more than a year before DNA analysis. On April 30, 2012, in ADA Hautanen's opposition to releasing any more discovery, she put into the exhibit an unsigned joint stipulation from the 1999-2002 forensic DNA litigation.

After LaGuer submitted a motion for a new trial alleging fraud in the DNA analysis, Hautanen asked Ettenberg to sign for her an affidavit she had left on his email. On September 6, 2011, three days before a hearing, Hautanen had her weapon of words. In the most glaring example, the affidavit spells "Laguer," with a small alphabetic "g" letter, which is how Hautanen insisted on spelling his name in her writings. Instead of asking Lemire to authenticate the unsigned letter, she had Ettenberg affirm that Lemire had "never made a formal written plea offer." Lemire had previously told Hautanen that certain files had been removed from their case file, and that some files "aren't there anymore." Considering his letter could be among those files her office failed to safeguard or removed to prevent future certain embarrassing disclosures, Hautanen's claim of fraud is particularly odious. In a February 15, 2001 letter, Ettenberg told his former client that he had not seen the trial file since 1984, when "my files was sent on to the attorney after me, Michael Caplette, as I notice a release and request from him to you that I send him my file."

Rather than addressing the myriad allegations in the motion for a new trial, Hautanen hurled the letter upon the court as if the letter were a pivotal factor. But Judge Tucker was conjuring a previous racial bias assertion, a claim that prosecutors had not claimed in their papers. Tucker's purpose was really to destroy every ounce of credibility LaGuer had left. While Hautanen asserted the letter was not authentic, she offered no evidence from Lemire. She had no linguistic or forensic expert. Her office did not even signal that it had a sufficient basis to bring criminal charges. There was no evidence that Hautanen had interviewed Lemire's 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 that ADA Hautanen drafted for Ettenberg provided exactly the language for her to manufacture a distracting narrative, one that refocused the attention on the black rapist and far off center from the crimes of state her office perpetuated and covered up.

Judge Tucker acknowledges that: "Attorney Ettenberg, in his affidavit dated April 29, 2010 states that he spoke generally to ADA Lemire about the possibility of a plea agreement. He states further that a joint recommendation for a twenty year Concord sentence came up for discussion, but that it went no further because the defendant was unwilling to plea guilty." The unsigned letter does not contradict these basic facts. "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." Tucker had no rationale for how a controversy over a rejected plea could be a scheme to "attempt to interfere" with LaGuer's claim that illegally seized underclothes contaminated a 0.03ng stain of male DNA.

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

If the guidelines recommended a sentence of no less than three years after a jury trial, a 20 year Concord plea agreement is not unlike other pleas of that era. This is exactly the type of case that prosecutors, despite their current claims of strong evidence, would eagerly plea. What is incredible is Lemire's claim that he tried this case because the psychotic Plante decided she wanted a day in court.

"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 case should prompt criticism over Professor's Siegel's timidity to challenge the origins and prior history of forensic tests the evidence was subjected. The best forensic testing protocol a group of lawyers could design would never compensate for the result of testing extraneous and incorrectly labeled evidence illegally collected 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."

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." Of course, a fair survey of the case file indicate that Carignan and Lemire conspired to conceal critical evidence. Only a fool will insist that Lemire and Carignan revealed all they knew. "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." In this case, Lemire and Carignan had met to defraud LaGuer of a fair trial. This paper seeks to correct the official narrative in large and small matters.

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.

"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

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This case presents His Excellency with a number of rare and extraordinary circumstances. In order to further the interest of justice, LaGuer requests that his petition for executive clemency be considered in light of Herrera v. Collins, the United States Supreme Court legal precedent affording criminal defendants asserting claims of factual innocence a secondary avenue for relief. LaGuer further requests a waiver of Section III(B)(2)(a)(e) and (h)of the 21 May 2007 Executive Clemency Guidelines. While LaGuer is asking a for fact-based review of his prosecution with an eye toward having His Excellency invalidate and expunge the criminal verdict, LaGuer will settle for a commutation of his life sentence.

Respectfully submitted,

Benjamin LaGuer,

Dated: August 22, 2014

By His Counsel

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 22nd day of August, 2014, that a true copy of Ben LaGuer's Petition for Executive Clemency, by mailing same, first class postage prepaid to Joseph D. Early, Jr, Esq., District Attorney and Jane A. Sullivan, Chief, Appellate Litigation Unit, Judicial Regional Courthouse, Room G301, 225 Main Street, Worcester, MA 01608.

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Robert E. Terk, Esq.