COMMONWEALTH OF MASSACHUSETTS
SUPERIOR COURT DEPARTMENT
FOR THE TRIAL COURT

Worcester, ss

Criminal Docket
WORC1983-03391

Commonwealth

v.

Ben LaGuer

Defense Opposition to District Attorney's Frivolous "Gatekeeper" Request, and Renewed Motion for Evidentiary Hearing in Support of New Trial

The Worcester County District Attorney's office filed a motion on 19 June 2012 for relief from frivolous filings, and petition for this Court to restrict Ben LaGuer and his attorney to subject any future petition to a "gatekeeper" scheme. What they seek is for a judicial decree that embarrasses LaGuer and his defense in a way that will prejudice his claims before the Court of Appeals. In other ways, the district attorney's office seeks to recruit this Court in their effort to mudsling. In their motion for relief from frivolous filings, the district attorney offers a 39-page memorandum that is full of lies and half—truths.

A LexisNexis search of "Commonwealth v. LaGuer" generated over fifty seven citations in state and federal jurisdictions. This number of cited authorities believes the assertion that LaGuer's legal defenses have been frivolous. To the contrary, the appearance of ADA Sandra L. Hautanen demarcates a radical upsurge in the number of filings. Her incessant writ writing manifests a near clinical obsession.

In January 2000, LaGuer's court docket had 85 entries spanning his 1983 arraignment, pretrial discovery, jury trial, seven motions for a new trial and appeals. By the time FSA had a 0.03 DNA nanostain, in March 2002, the docket topped 150 entries, owing to Hautanen. The defense spent $32,500 cash in lab fees. The law firm billed over 1.4 million dollars. Her present pleading, which flashes a 200 benchmark on the docket entries, is a 39 page diatribe of epic fancy and hurling accusations. The defense has been responding to her endless tangents and her lack of honesty about the germane issues. Her blatant attempt to recruit this Court to discredit and strangulate LaGuer's quest for justice should not succeed. Her 30 April 2012 pleading describes a ninth motion for a new trial as "extremely detailed allegations" which "include 133 footnotes" requiring her response. ADA Hautanen escalated her persecution of LaGuer from her predecessor Lemire, whom the state Court of Appeals felt a need to remind him that "a criminal trial is not a game. The objective of the prosecutor must be the fair administration of justice, and not obtaining a conviction." See Commonwealth v. LaGuer, 65 Mass. App. Ct. 612, at n15

(2006). The defense voluntarily provided Hautanen an exhaustive bibliography of its documentary stockpile. Considering that basic questions that have been posit over the authenticity of a letter, the defense made a request that Hautanen produced a similar register for comparison. In response, she found every indignation and loophole to show that defaming counsel and withholding vital evidence is her racket.

Conspicuously absent from this petition are the pertinent and germane issues LaGuer presented in his ninth motion for a new trial, which included the alleged newly discovered testimony of Annie K. Demartino as well as forensic DNA evidence that in substantial ways undercut the flimsily constructed eyewitness case. The prosecutor avoids the pertinent and salient testimony of Demartino, which threatened to totally undercut all previous arguments made concerning the psychotic history of Lenice Plante and her use of use of powerful antipsychotics.

She totally avoids the presence of pilfered underpants from LaGuer, among many other items, because the historical records support an illegal search and seizure from LaGuer and his apartment. At trial, then assistant district attorney James R. Lemire, told the court that nothing was seized from LaGuer or his apartment.

Worcester County assistant district attorney (ADA) Sandra L. Huatanen and her superiors opposed a review of the laboratory and analytical DNA evidence for errors, despite the apparent eagerness of the State Police Office of Legal Counsel.[1] Her refusal to let the State Police exercise their forensic expertise is antithetical to her self righteous claims. Her arguments defy the intuitive senses of faith and reason, order and chaos, of cause and effect, of up-ness and down-ness.

The fact that LaGuer elects to contribute to his own defense is not a reason to demerit his claims, since the right to participate in one owns defense is a indisputable constitutional right. Counsel of Record stands firm in his belief that Mr. LaGuer has presented for a new trial issues of merit, each fully detailed and documented with proper legal citations and original authorities. The district attorney cites that LaGuer assigned error of ineffective assistance over counsel's sexist strategy to systematically exclude all women from the jury pool. The Court of Appeals ruled that counsel's strategy was constitutionally offensive, but the panel was not inclined to grant LaGuer a new trial because the tactic of his counsel aimed to benefit him. The three male judges seem to believe that women were less likely to dispassionately evaluate evidence in a sexual case of interracial rape than the twelve white males who sat in judgment LaGuer had argued that a systematically exclusion of women deprived him of a fair cross section of the community and thus a violation of his rights.

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1 Wedge, Dave. Patrick Aide Aids LaGuer. Boston Herald. 4 January 2007. (State Police Attorney Ann McCarthy said the agency cannot reopen the case without the orders from the Worcester County District Attorney's Office.)

Wedge, Dave. New DA nixes LaGuer rape case review. Boston Herald 11 January 2007 ("He believes justice has been served,' spokesman Tim Connolly said of Joe Early. "The evidence is very strong and compelling in the case...Early has no plans to grant LaGuer's request for a review of DNA test that linked LaGuer to the 1983 Leominster rape. LaGuer claims the 2002 tests were tainted.")

The fact that a three judge panel of the Court of Appeals concluded that the systematic exclusion of perspective women jurors is constitutionally offensive belies the assertion that LaGuer had engaged in the Court in frivolous litigation.

The district attorney has again twisted the facts of racism in the jury in ways that rub up against fraud upon the court. ADA Sandra Hautanen admitted before the state parole board on April 2010 that the jury was not free from racism, but not as much existed as LaGuer asserted. Yet, she now appears in-her petition asking this Court for relief from frivolous filings, with the opposite argument that that issue of racism is a figment of the defense imagination. Hautanen understood that a parole board, consisting of an African-American chairman and two Hispanic panel members, would question any claim that totally denied the allegation of racism. Therefore, she did her best to acknowledge the racism, but mitigate its ultimate impact upon the legitimacy of the verdict. Previously, the Court of Appeals split on a number of legal and factual questions owing to these claims of racism in the jury.

At trial, Lemire made a number of assertions (all false) that Lenice Plante was not psychotic or using antipsychotic for a period of time ending two years prior to trial. The appellate courts on direct appeal had the benefit of none of the new disclosures pertaining to Plante's true psychotic history, because prosecutors had failed to timely disclose accurate information. At any rate, this Court found enough merit in LaGuer's ninth motion for a new trial to admit that over the prosecution's objection, the defense would be granted an evidentiary hearing. This fact belies all assertions of frivolous filings, which she asserts in a careless and reckless manner against, a member of the bar.

In her petition for relief, ADA Hautanen devotes a lengthy part of the petition to arguing the merit of a petition for executive clemency which counsel filed on behalf of LaGuer. But this clemency petition is beyond the jurisdiction of this court. ADA Hautanen appears to want to bait and hook this Court into declaring this independent remedy of relief as part of an ongoing scheme. ADA Hautanen will use this Order to present it as a judicial determination that his claims for clemency relief are frivolous. If this Court wishes to be manipulated in this manner, if this Court feels compel to encroach upon the prerogatives of the governor under the state constitutions, if this Court wishes to stain its judicial legacy by undertaking such judicial activism, then LaGuer has done his duty in assigning abuse of discretion. The matter of executive clemency is beyond the court, and LaGuer's motion for a new trial is pending before the Court of Appeals.

Hautanen's June 2012 petition display unprecedented depths of imbecility in asserting "there is little chance he [LaGuer] 'would be a law-abiding citizen' out of prison" owing to his disciplinary record, but namely "more than one 'inmate-on-inmate altercation.'" (27p) It is common sense that LaGuer is imprisoned for the type of offense which stirs great emotions within the general inmate population, many of whom owe their dysfunctional lives to physical and sexual abuse. Many men in prison suffer from emotional arrested development. Men in prison fight for reasons not much different than boys in schoolyards.

ADA Hautanen complains that LaGuer's petition for reconsideration of his denied motion for a new trial (2012) contains what ADA Hautanen alleged to be extraneous

biographical data. But biographical information on LaGuer has become increasingly pertinent since Hautanen has made a calculated effort to sully his character. She has no legitimate right to complain about LaGuer offering biographical evidence of his good character when they have forcefully sought to malign his biography.

Only a demented agent of state would ask this Court to draw an adverse inference between LaGuer's active role in his defense with the psychosexual impulses endemic of a rapist's nature and character. In her present petition, Hautanen offers a passage "Rape…is concern much more with status, hostility, control and dominance than with sensual pleasure or sexual gratification" quoting from Wisdom y. State, 708 S.W. 840, 844 (Tex. Crim. App. Ct. 1986) Only a agent of dubious intellect would ask this Court to find a link between LaGuer's award winning publications with a hypothetical psychological profile, as Hautanen most recently did before the state parole board without a shred of expert opinion. Her endless hours of browsing LexisNexis for legal phrases, all hatefully dispersed in her petition, should have been better spent earnestly searching the record and correcting the truth of her wrongdoing agents. Her sludge of words are a disgrace to the justice that Lenice Plante still deserves and the relief that LaGuer is so rightfully entitled.

The district attorney cites a number of issues, such as the alleged disputed letter from Lemire to Ettenberg and other issues, but those issues may possibly be reviewed de novo when the case is heard before the state Court of appeals. The naked allegations of prosecutor's do not discredit LaGuer's argument that he was offered a pretrial plea. The factual disputes concerning this question of an unsigned letter as fraudulent are not final, since the appellate courts may review the law and facts. While this Court has made a number of factual and legal determinations, LaGuer is entitled to disagree with all due respect.

LaGuer requested an evidentiary hearing to establish that sets of genomic data substantially disprove the alleged crime. In good faith, his defense proffered a series of testimonial and documentary evidence in support of said hearing. He rigidly detailed the deficiencies in the collection, labeling, storage and typing of the DNA evidence. A series of state and federal audit reports, citing mismanagement and high error risks at the state's crime lab, puts in grave doubt the proficiency of the lab. The specific errors and omissions of the salient facts in this case further erode confidence. On July 10th 2012 the United States Department of Justice and Federal Bureau of Investigation announced the launch of a comprehensive review of thousands of criminal cases to determine if flawed forensic evidence could have resulted in wrongful convictions. All of these factors compel the need for an evidentiary hearing. Three decades after the state crime lab issued its first report in the LaGuer evidence, two decades after a second round of tests and a decade after the lab packaged the evidence for DNA analysis, the State Police top brass is still concerned over its deficiencies. "The Superintendent of the Massachusetts State Police pledged Friday that he will focus on improving the state's crime lab."[2]

The Court of appeals may elect to order an evidentiary hearing, allowing LaGuer to put in evidence pertinent information regarding newly discovered and withheld evidence. As LaGuer has made clear, in his reconsideration petition to this Court's denial of his motion for a new trial,

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2 Boston Globe, Alben, New Head of State Police Pushes Anticrime Strategy by Brian R. Ballou, 13 July 2012.

this Court was clearly erroneous in its factual determination that Annie K. Demartino was learnable owing to his presence with complainant Lenice Plante in the court throughout the trial. As demonstrated, a sequestration order was in effected and over the defense objection, the trial judge only allowed the chief of detectives to remain in the courtroom. This alleged error of fact may be considered before the Court of Appeals. This error belies any suggestion of LaGuer or his lawyer filing a frivolous filing, which should leave this Court to only conclude that ADA Hautanen is merely trying to twist the facts in ways that distract and distort. Her unhinged style of writing, riddled with complicated grammatical contraptions and interruptions, seems further designed to distract and confuse a fact finder. Her constant insertion of extraneous grammatical brackets, paraphrasing original quotes between endless parentheses, requires of the reader and this Court to either trust her or devote enormous amount of energy and time double checking her context for accuracy. Her unusual style of narrative is unnecessarily complicated and burdensome. At the September 2011, ADA Hautanen complained that a 27 page motion for a new trial was uncommonly long. Yet, after the facts have been adjudicated and after the motion for a new trial is en route to the Court of Appeals, beyond the jurisdiction of this case, ADA Hautanen now appears before this court with a 39-page diatribe that reads more like a petition for this Court to prejudice LaGuer than a petition for legitimate relief. If this Court adopts what she demands, the result will henceforth allow her to quote this Court as having found the series of frivolous facts which she fabricated in the first place. Perhaps Hautanen wishes this Court to stenograph her naked assertions and disguise them as judicial rulings. This Court should not engage her in this mockery. Notice of Appeal has been properly and timely filed. For all of these reasons her motion is moot and should be denied on its merit.

Forensic Science Associates (FSA) was obligated to match LaGuer's DNA profile to male DNA extracted from the accuser's body. In this unusual case, the stockpile of evidence used to make the DNA comparison included "unspecified" samples never approved for DNA analysis. For a useable DNA profile, the crime lab included evidence which the court had not authorized for use in the creation of this DNA profile. A state police official said it was customary to cluster objects in a single package according to delivery dates. Prosecutors deliberately inserted these samples pilfered from LaGuer and his apartment to contaminate a tiny pool of cellular material. However FSA's genomic data confirming the absence of the false accuser's own blood on her rape kit swab contradicts the alleged assault. The false accuser had a history of psychosis. The genomic data also undercuts her identification, which owes all its credibility upon the assumption that she was face-to-face with her assailant for eight hours. Other evidence (to which we shall return) evince "no blood, abrasions or lacerations" of her anus despite specific allegations of an anal attack spanning many hours.

LaGuer's defense is raising fresh evidence bolstering its case that prosecutors deliberately sabotaged a DNA testing protocol that was yielding exculpatory analytical data.

Alan Keel of Forensic Science Associates (FSA) examined the DNA evidence in Ben LaGuers's case as well as that of Cy Young legend Roger Clemens in his federal perjury trial over alleged false statements to Congress.[3] This high-profile case, in which Clemens was exonerated in spite of FSA's analysis, renews troubling and capricious issues of Keel's and FSA's DNA analysis. LaGuer, who has not had any opportunity to question Keel's analysis in court, remains hopeful that his day will come.

[3] Wall Street Journal, Clemens Cleared In Steroid – Lies Case by Devlin Barrett 19 June 2012

Both cases exposed major flaws in Keel's analytical and laboratory work. FSA disclosed that samples in LaGuer's case had been compromised: "A few dozen epithelial cells from Mr. Keel were inadvertently deposited on these slides while speaking near or over them."[4] Mr. Keel had also been given a motley mixture of crime scene evidence with 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.[5] In Clemens' trial, Keel conceded that "hundreds of thousands" of white males in the U.S. alone could be tied to the partial DNA profile recovered. Brian McNamee, a former trainer of Clemens alleged that he had 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 under cross examination that Clemens' DNA might owe its presence to contamination.[6]

To rebut what ADA Sandra Hautanen herself admits were the "extremely detailed allegations" of LaGuer's motion for a new trial and DNA component, she offered the Court an obsure article published by Dr. D. Kim Rossmo, Director for Geospatial Intelligence and Investigation at Texas State University. Suffice to say that Rossmo freely admitted, "I have not read the original police reports or trial transcripts, visited the crime scene, interviewed any parties, or reviewed any response or rebuttal from the district attorney's office, law enforcement agencies, or the state crime laboratory." (Rossmo, 260) In spite of this cautionary caveat, Rossmo in his article asked "Did Benjamin Laguer receive a fair trial? I cannot answer that question. Is he factually guilty? Conjecture and theories aside, the actual evidence supports the conclusion, beyond any reasonable doubt, that he brutally raped his neighbor in 1983." (Rossmo, 264)[7]

To present such a Geospatialist, someone who specializes in applying statistics analysis to geography, as a valued forensic opinion in DNA analysis demonstrates the Hautanen's lack of support for her forensic rebuttal within the respectable scientific community, most notably, the Massachusetts State Police Crime Laboratory. It is not apparent that D. Kim Rossmo has been certified as a criminalist or DNA expert in any jurisdiction within the homeland or abroad. A Lexis Nexus search of "D. Kim Rossmo" yielded no results of this man that Hautanen embraced.

When prosecutors claimed that the physical evidence was contaminated beyond the point of valid DNA test results, the Court spent the next three years on laboriously articulating protections against procedural errors. When LaGuer alleged possible contamination, the establishment rallied to boost prosecutors and cheat LaGuer of his day in court. The improper grouping of crime scene evidence with items pilfered from LaGuer is the imbroglio that led Governor Patrick to order a review. This error substantially undercut the anyltical assumption of a few nanoparticles. 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.")[8]

For a period ending in May 2008 all prison telephone calls between LaGuer and his lawyers were monitored until Department of Corrections Grievance Coordinator William P. Win put an end (Grievance

[4] FSA Report 2, 4 February 2002, p. 12
[5] Telegram, LaGuer DNA A Match by Matt Bruun, 23 March 2002
[6] Boston Globe, Clemens DNA Linked To Needle by Joseph White (A.P. 26 May 2012)
[7] Commonwealth's Response To Defense Motion For New Trial 23 November 2011, Exhibit 18.
[8] 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 Superintendant 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.")

Number 33698) to this violation of attorney/client privilege. No law enforcement agent other than Hautanen had any interest in these wiretaps. She learnt that James C. Rehnquist would ignore the DNA in his legal strategy. This insight her to zealously argue 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?"[9] When LaGuer included the DNA reports to prove fraud, Hautanen then cowardly argued that LaGuer was not entitled to a hearing since she had never admitted the reports into evidence.

Judge Timothy S. Hillman, who had presided over the DNA proceedings, had previously been a lawyer to Plante's family.[10] Hillman's younger brother attended High School with Barry.[11]

Judges Tucker and Lemire had a public lunch on September 9, 2011, immediately after Judge Tucker held a 90-minute courtroom session about the prosecutorial abuses of Judge Lemire's actions as a prosecutor in LaGuer's trial. Judge Tucker had endorsed Lemire as a defense witness.

Instead of disputing the Department of Corrections report that LaGuer's telephone calls with his lawyers were illegally wiretapped, or that Judge Tucker had an *ex parte* meeting with Lemire, ADA Hautanen's only complaint is that "[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.[12]

Over the years, LaGuer has admitted to telephoning his accuser disguised as a Catholic priest to obtain information. He let it be known that he had swapped his saliva with another prisoner, prior to trial, when he was asked to provide a sample for bloodtyping comparison. He said that he did not visit a former girlfriend on the night in dispute, even though six alibi witnesses had told defense investigators that LaGuer had indeed visited her home. In return for his candid admissions, prosecutors have so far refused to admit that samples pilfered from LaGuer were jumbled with crime scene evidence to create a DNA profile; refused to admit that underclothes from LaGuer, currently in the possession of the District Attorney, owe their presence in the stockpile to an illegal search and seizure from LaGuer and his apartment; refused to explain how a state police chemist reported a less than 0.03 nanogram stain in 1983when such a scant amount of cellular material could not be detected until the advent of DNA testing twenty years in the future; refused to admit that its office lied about the false accuser's history of psychosis and her use of antipsychotics; refused to admit that their chief detective lied to the grand jury; and refused to disclose a number of material reports – we shall return to all of these issues.

The biography of Lenice Plante has been a source of enormous consternation. Prosecutors from Day One said that she was not psychotic or under antipsychotics. Prosecutors have argued against disclosing her psychiatric records. What Anne K. DeMartino would have said promised to rock the foundation of the prosecution's centerpiece eyewitness. 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.)[13] Her portrayal

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

10 Boston Herald, judge in rape trial set to be victim's ex-lawyer by J.M. Lawrence 6 November 2004 ("The judge acknowledged he advised the victim's daughter about her father's estate but had little memory of the work.")

11 Tr. 5-7 (March 13, 2000, Volume 1). Telegram, Obama nominates Judge Hillman by Bob Kievra 1 December 2011.

[12] 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.

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

of Plante's mental fitness substantially undercut the highly specific details disclosed prior to trial. It raises the question whether Superior Court Judge William C. O'Neil, Jr., who denied the defense her psychiatric records, actually read her records. O'Neil had long been partner with the John J. Conte political machine. If DeMartino, who is intimately familiar with Plante's psychiatric record, understood Plante to be under antipsychotics, how could O'Neil conclude otherwise? Every trick in the book, every pretext of fact and law, was made not to disclose Plante's psychiatric records. A clique of white judges and prosecutors were simply not inclined to let an accused black rapist besmirch a white woman.

A number of actions can be found in this case that are unique to cases of interracial rape. It is the invisible evidence of trauma, shame and psychosexual paranoia that manifest in society wanting to avert its eyes. 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." What basic right did LaGuer have in American courts, if considered an animal, that twelve white jurors and others had any duty to respect?

U.S. Attorney General Eric Holder, the first black Attorney General, was publically chased for saying publically that the country is a "nation of cowards" when it comes to matters of race. 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 Herald 9/22/94)[14]

Since the Worcester clique of personalities is unlike to afford a fair and impartial assessment of the physical evidence and historical documentary record, the matter becomes all of the urgent. Lieutenant Governor Tim Murray asked Telegram columnist Clive McFarlane and his editors to cease reporting on the case and it was not long before LaGuer completely faded from all columns. It was revealed in December 2001 that crime scene fingerprints recovered two decades earlier had been kept a secret. Leominster Mayor Dean Mazzarella, who had been a rookie cop at the scene of the crime, was specifically told not to touch anything. In 2002, Mayor Mazzarella tried to help prosecutors dismiss this illegally suppressed evidence by inventing the possibility that he had used the phone at the scene of the crime, and thus, that the fingerprints might be his. Police reports from Monahan make it clear that before Mazzarella arrived at the scene of the crime, other officers had cut the telephone cord which was tied around Plante's wrists. Commonwealth v. LaGuer, 448 Mass. 597, 2007 ("While it is certainly possible that, because the rapist used the telephone cord to bind the victim, he grasped the base of the telephone, it is entirely speculative to assume that the fingerprints on the telephone (not disclosed arid since lost] belonged to a third party suspect rather than…the police who were in the room the day following the crime while the telephone remained there.")

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.) He grew up in New York and Puerto Rico until the age of 15 when he moved to Massachusetts with a sister; he grew up in a Seventh Day Adventist family.[15] He attended high school in Leominster; elected president of Latino Student Body. 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.

In a sentencing report Dr. Lawrence Hipshman said, "LaGuer does not fit either a psychological nor pathological profile of a person capable of committing this crime." (Tr 610-611). Dr. Hipshman met

[14] Boston Globe, Courts Are Guilty Of Racism, by Associated Press, 22 September 1994.

[15] Ben LaGuer has three older sisters from his father's first marriage, two older brothers from his mother's first, and two younger brothers from the union of Maria and Luperto.

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 engage in a twelve dollar robbery then whipping her over her having so small little money. In a second report, Dr. Daniel Weiss said, "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." [16]

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, Worcester Telegram and Gazette, Fitchburg 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 on his mother.

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 partcipate 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, sex offender treatment program co-ordinator Stephanie Adamala, 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 pledge to the State Parole Board that he would participate in any program required of him, so long as that program did not seek to coerce from him 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.[17] He has no history of psychosis,

[16] 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

[17] 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. Crimaldi, Laura. Boston Herald. LaGuer tries again; 4th parole bid. 23 April 2010 ("He said the pornography

neurosis, violence, deviance, animal cruelty or substance abuse. He has never failed drug tests routinely administered to the prison population. He was disciplined in the military for being present when a fellow soldier sold a $20 cube of hashish.[18] LaGuer accrued 30 disciplinary reports in his 29 carceral years. Some infractions are minor, found in shower while a major headcount or not returning library books in time, others include participating in a live radio broadcast, and a couple of inmate-on-inmate physical altercations. This record of behavior, read fairly in the context of his unique predicament, reflects nothing beyond the abnormal episodes of an abnormal existence in prison. It is said that the average parole applicants with equal number of years in prison has far more disciplinary reports that LaGuer by a factor of many times over.

LaGuer and his supporters presented to the Parole Board in April 2010 a detailed home plan for him to reside in one of the safer communities in the Northeast; a work plan that afforded him the opportunity to clerk for a retired Superior Court judge in a Boston law firm; and an educational plan including a prestigious university Masters of Fine Arts program.

The Trial

In January of 1984, LaGuer rejected a plea.[19] 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 guilty verdict at 11:53 am. (Tr 592, 596). He was sentenced to life.[20]

Case History

On April 5, 1985, while his first direct appeal was pending, Mr. LaGuer filed his first motion for a new trial over false grand jury testimony. In 1985, the trial judge ruled that alleged police perjurer "acknowledged the inconsistencies discussed above, but denied any purposeful attempt to mislead the grand jury." The motion was later denied. On July 24, 1985, the Appeals Court affirmed the conviction, Commonwealth v. LaGuer 20 Mass. App. Ct. 965, 396 Mass. 1103 (1985). On October 15, 1985 Mr. LaGuer filed a second motion for a new trial. On December 31, 1986, he filed his third (amending his second). On March 27, 1987, a fourth motion for a new trial (amending his second and third) was filed and on September 27, 1987, a joint motion was filed to obtain the defendant's blood type. On December 11, 1987, Mr. LaGuer filed a habeas corpus petition. On November 8, 1988 the U.S. District Court for Massachusetts dismissed the petition. LaGuer v. Bender, Civil Action No. 86-1237-WF, 1988. On February 24, 1989, he filed a sixth new trial motion (amending his second, third and fourth), which raised a jury bias claim based on an affidavit signed by Juror Nowick alleging that jurors made ethnic

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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.")

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

[19] 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.") (Since Lemire understood that aggravated rape was not eligible for a Concord sentence, LaGuer would have plead guilty to the lesser assault and battery, a charge for which the Grand Jury had earlier indicted LaGuer.); 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.") (Prosecutors dispute this account.); At sentencing, Lemire did not object that Probation Sentencing grids called for a minimum of three years and a lower maximum of twelve years. (Tr. 616)

[20] 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.

slurs during deliberation. On remand, the judge denied the claim of jury bias. Mr. LaGuer appealed, and the Appeals Court affirmed the decision and the SJC denied further review. Commonwealth v. LaGuer, 410 Mass. 89 (1991), 36 Mass App. Ct. 310, 313, 315, rev. denied, 418 Mass. 1103 (1994). (The Supreme Judicial Court did not award a new trial because prosecutors claimed that crime scene recovered blood matched LaGuer's bloodtype. On August 4 2001, these stains of blood were found to match Plante's DNA profile. The State Police Crime Lab had mistyped Plante's blood as Type B from her actual Type O.) On May 22, 1997, Mr. LaGuer filed a seventh new trial motion, arguing ineffective counsel over his systematic exclusion of all women jurors. Mr. LaGuer appealed. On January 19, 1999, the Appeals Court affirmed. Commonwealth v. LaGuer, 46 Mass. R. Ct 1108, rev denied, 429 Mass. 1103 (1999). According to the Court of Appeals, the systematic exclusion of women jurors was constitutionally impermissible. But LaGuer could not claim prejudice, in this unusual case, because his lawyer had acted in his interest to exclude women in a sexual case. The SJC denied further review.

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 Lenice Plante".[21]

On February 11, 2003, LaGuer filed his eighth new trial motion. On September 22, 2004, the judge denied the motion and further denied a motion to reconsider. LaGuer appealed and the Appeals Court affirmed the denials. Commonwealth v. LaGuer 65 Mass. App. Ct. 612, 623 (2006). On March 23, 2006, Mr. LaGuer filed for further appellate review which the SJC allowed. The order denying the motion for a new trial was affirmed. See Commonwealth v. LaGuer 448 Mass. 585 (2007).

In 2010, Ben LaGuer retains his former lawyer, Robert E. Terk, with whom LaGuer had a longstanding relationship. Terk examined anew the entire file. He arranged for former Superior Court Judge Isaac Borenstein to grant him written permission to use his draft (work product) motion for new trial, which included a tape recording a draft of a statement that came from Annie K. DeMartino, a newly discovered witness. In a statement to Lawyer's Weekly, Judge Borenstein said: "I would not have dedicated myself to the case and to his [LaGuer's] defense if I had not spent many months going over things meticulously and believing in it." (6/29/09) Judge Borenstein had obtained the DeMartino material from a team of Goodwin Proctor lawyers led by James C. Rhenquist.

On 28 April 2011, the defense files a ninth motion for a new trial based on newly discovered and withheld evidence. At some point, either in the first or second week in August, a superior court assistant clerk of court, orally informed the parties by telephone that the judge had scheduled a hearing for September 9th. The judge did not issue a written order. And no formal notice was put in the court docket entries. In a pleading, prosecutors correctly assert that an email from the Ben LaGuer Defense Committee was sent on August 12 under the subject line "Judge Grants Ben LaGuer a Hearing." In the email, LaGuer expresses his earnest gratitude to "Judge Tucker for opening up this process to what I expect will lead to a full scale evidentiary hearing..." The defense was never informed that Judge Tucker had intended an evidentiary hearing.

It was not until September 1st, when the court endorsed a list of witnesses on the basis of a pleading that proferred their testimony, that the parties learned of the court's intent. Judge Tucker's order did not reach the parties until September 6th, two days before the hearing. On September 8, prosecutors

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

filed a motion averring that "it was the Commonwealth's understanding that the hearing scheduled for September 9th would be non-evidentiary in nature; the Commonwealth did not receive notice of the Court's September 1st order allowing 'live testimony' until Tuesday, September 6th, which allowed little time to prepare for an evidentiary hearing with 27 possible defense witnesses." Id. .

On September 9th, Judge Tucker expressed displeasure with defense attorney Robert E. Terk's apparant lack of preparation. "Six weeks ago I said you'll have a hearing...If you didn't think it was an evidentiary hearing until you inquired, so be it. But I always intended that you would have as much..." (Transcript, ppl5) Tucker had obviously discerned enough merit in the pleadings to express that an evidentiary hearing was "always" his intent. In his ruling, Tucker reaffirmed that he granted the defense an evidentiary hearing over the objection of prosecutors.

On September 9th, Tucker obviously misspoke when he said that notices of a hearing had been sent out "six weeks" in advance. Prosecutors first claim notice of a non-evidentiary hearing on the first week of August. The earliest evidence of notice is an August 12 email, sent out from LaGuer's gmail account, quoting his hope of what he "expect[ed] will lead to a full scale evidentiary hearing," not that Tucker had granted his defense any such hearing.

By all accounts, the defense and prosecution both suffered prejudice by the due process violation of Judge Tucker depriving the parties of adequate time to prepare. It was prosecutors who first cited Mass. R. Crim. P 30(c)(7) providing that the "parties shall have at least 30 days notice of any hearing" as a reason to petition Judge Tucker "for additional time to prepare for 'live testimony' by witnesses who will actually appear for the defense." Judge Tucker was aware of what each witness would aver because he had endorsed the witness list and their prof erred testimony. Judge Tucker had no rejected a single witness as extraneous, repetitive or immaterial. As the party with the enormous burden of proof, the defense was entitled to equal, if not more, time to prepare its case.

On appeal, the Court of Appeals should remand the case for the evidentiary hearing that Judge Tucker "always" intended with adequate time for both parties to prepare their respective exhibits and testimonial evidence.

On February 27, 2012, Superior Court Judge Richard T. Tucker denied a ninth motion for a new trial. He denied a reconsideration 17 May 2012. On 25 March 2012, LaGuer filed for discovery and production of tangible evidence. Judge Tucker also denied this request on 17 May 2012. Notice of Appeal filed. On May 23, 2012, LaGuer filed for a gubernatorial executive clemency relief with Governor Deval Patrick.

The Police Investigation

Leominster Police Department Patrolman Timothy E Monahan reported that, "I asked her if she knew who [did this to her] and she stated "no." [22] 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 that "she was unable to give me any description of the assailant." [23] Patrolman Dean J. Mazzarella obtained no description. Dr. William C. Siegel says that she arrived "by ambulance stating that she was beaten and raped by an unknown assailant."[24] She had an infection so advanced that Plante was discharging a "yellowish" pus.[25]

[22] Original, Investigation Report by Timothy E. Monahan 13 July 1983, pp 3
[23] Tr. 241
[24] Burbank Hospital records of July 1983.

Luc Rape Crises Center notes from counselors Linda K. Reedy and Ruth Givens are not available. 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."[26] Her daughter said that her mother "is under care by" the Herbert Lipton Mental Health Center owing to a psychotic episode she had 14 years prior to the assault. Elizabeth Barry reported her mother to be a schizophrenic.

After a hospital bedside interview with Plante on 13 July 1983, Detective Ronald N. Carignan left the hospital with a "scant description of a black male very short and small in build."[27] "I asked her if he was a black man and to this she said, 'yes he was, he was very dark skinned."[28] Carignan asked the building super whether anyone fit that description. He singled out Ben LaGuer despite his olive-toned skin, tattoos, including a stutter.

Carignan recounts in a report how on 14 July 8:50 a.m. Barry telephoned and summons him to hospital. It appears totally out of character that Barry, while discussing the crisis with her mother, would threaten her to reveal her assailant's identity. Barry had no evidence that her mother knew his identity in the first place. "At first (Plante) did not want to say anything so (Barry) told her mother that she was going to stay in the apartment herself and put herself up as bait to apprehend this subject who attacked her. At this point Plante decided to tell her daughter what happened and (Barry) called me to the hospital."

Carignan's search warrant affidavit swears that Plante, in the presence of Barry, said her assailant lived next door. (Plante denied this account.)

If Plante did not inculpate LaGuer in her assaults as she said, then why did Carignan target LaGuer? In April 2001, two previously undisclosed police reports from Carignan's 1983 file depicted LaGuer as "a possible suspect" in a residential burglary, a second noted his role in a case of domestic violence.[29] If these reports had been divulged prior to trial, as they should have been, the jury could have inferred any interest in LaGuer home stemmed from them.[30]

Plante's assertion that she did not inculpate LaGuer is supported by Carignan never alerting a single Leominster Police Department official to be vigilant for LaGuer. Carignan would not have returned to the tenement had the super not reported a toilet flush in LaGuer's apartment on 15 July. (Tr. 57)

Carignan recounts in a report how on 15 July 1:00 p.m. Barry had again telephoned. "I told her that I wanted to show her mother some photos to see if she could identity somebody in the photos…Barry

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25 Leominster Hospital, Lab Report of specimen from Lenice May Plante of 13 July 1983; Report Number 1, Forensic Science Associates, 15 August 2000, p 4 ("numerous yeast cells; no spermatozoa were detected from either swab even after the non sperm cells were digested away.")

[26] Id.

[27] 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.

[28] Id.

[29] (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.)

[30] 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.

and I went to (Plante's) room and asked her if she could look at some photographs and see if she could recognize anyone." Officer Monahan stayed in the corridor. At the police station, LaGuer had asked for a face to face identification. She might remember the time he helped her pull her shopping cart or him returning her key set when she often left it visibly in her door lock.[31]

After meeting with Barry in private, Lemire substituted her for a handyman who called 911.[32] One can only imagine what Barry had told Lemire for him to delete her from his trial witness list. (Barry never said to the Parole Board, or at political events, or to the media that in her presence her mother had inculpated LaGuer in statements and photos.)

At trial, Plante could not remember if she spoke with police before or after she was shown a photo array. (Tr. 171) She testified that seven of the eight males were. Tr. 178. In fact, the array consisted of eight "dark skinned" young males.[33] She denied describing her assailant to police as "very dark skinned" because his photograph was not of a "very dark" skinned man.[34] She said a white plastic bag was put over her head, but Carignan testified the only bag was dark green. Tr. 373.

Her assailant covered his face with an afghan only when he lit the bathroom light, a fact that itself undercuts all claims of adequate lighting. As further evidence of inferior illumination, Plante was unable in pretrial interviews to describe her assailant's facial features. (Tr. 372)

She identified LaGuer when asked to point out the culprit in court.

Carignan recounts how Plante told him that her assailant was totally nude except for a pair of tube socks. No one other than her neighbor would have met her in the nude. In his opening statement to the jury, reversing from Carignan, Lemire said: "Lenice Plante will testify she first became aware of him he had some type of shorts on and white tube socks. During the course of this he removed his clothing." (Tr 23) Plante denied describing a totally nude assailant. (Tr 181)

Monahan says her door was difficult to open because a chaise lounge chair was interiorly "leaning at an angle. When you opened the door it was caught under the door." (Tr. 225-6) He agreed the scene was "a little bit unusual" for someone who had left through an interiorly barricaded door. (Tr. 206, 250) Gomez had hopped out her window. But Carignan incorrectly testified her window was 20 feet high, more than double its actual 8 feet height.

New Details of the Accuser's History of Psychosis

According to Lemire, Plante was not psychotic and not under antipsychotic drugs. (Tr 3, 314) Lemire was very precise in his assertions that Plante was not psychotic or under antipsychotics for over two years. It is not possible to argue his ignorance. Lemire either had a very poor source of information or he lied to the court about Plante's psychiatry history. Annie K. DeMartino offered evidence that Plante had ties to third party suspect Jose Orlando Gomez; her use of antipsychotics and; and that she had indiscriminately accused other colored men of the same assault. [35]

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[31] At trial, she denied that LaGuer had returned her key set or helped her with her groceries. LaGuer felt as if she wasn't able to tell him apart from her assailant. (Tr. 167, 385).

[32] Raymond Benoit was not even on Carignan's list of prospective witnesses.

[33] Follow Up, Investigative Report of July 15, 1983 by Detective Carignan

[34] Tr. 191

[35] 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.

In 1983 Plante had delusions about visits from the deceased President John F. Kennedy. Plante was under antipsychotics at the time of trial, including Haloperidol. In 2003, Barry told WGBH that her womanizing father beat her mother and locked her in closets whenever he left the house.[36]

"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."[37]

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[38], Plante may have identified LaGuer out of fear that Gomez might retaliate against her. The import of her friendship with Gomez substantially undercuts Plante's credibility, she denied in her trial testimony any such friendship. (Tr. 161) DeMartino would have enabled LaGuer to question whether Plante had an abusive relationship with Gomez and whether she was afraid of revealing his identity.

Her assailant told her that he was from Fitchburg, the town where the Gomez family had resettled. Gomez's blood type is consistent with the perspiration detected on the tube sock recovered at the scene. Her stolen pocketbook was found on a road toward Fitchburg.

The presence of Gomez undermines prosecution arguments: "This is very important to recall, the setup of the apartment building. Who would walk by her door that day? Who? That chap right there is the only person that would have any business walking by her door, Benjamin LaGuer."[39] DeMartino substantially aids LaGuer in that Lemire had challenged even the very existence of Gomez in Plante's life. "There is no evidence the Gomez family was in that apartment at the time." Tr. 569.

In his ruling, contrary to separate audio taped declarations of the salient facts central to this case, including her public statement attesting to the accuracy of her declarations to the Telegram & Gazette, a New York Times Company newspaper, Tucker found "the purported testimony of Demartino, as submitted in the motion record lacks attributes of reliability. Neither statement has been sworn to, confirmed, or even signed by Demartino." (11p) But See. LaGuer's Memorandum in Support of Motion for New Trial 28 April 2011, 14p, note 42, where the pleading cites an 8 April 2007 Telegram article where Demartino confirms the accuracy of these salient facts. See. Telegram, New LaGuer Trial Supported, Demartino Raises Questions of ID by Matt Bruun 8 April 2007.

Four fingerprints found on the base of the trimline telephone, the cord of which was used to bind the victim's wrists, did not match LaGuer. The prosecution withheld this evidence for two decades. The defense said it would have attempted to match these withheld 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." 488 Mass 585 (2007) The import that Plante let Gomez

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

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

[38] 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.

[39] Tr. 563

stay with her would have created that missing link. Again, DeMartino would have enabled LaGuer to question whether Plante had an abusive relationship with Gomez and whether she was afraid of revealing his identity.

"Plante's prior treatment within the Herbert Lipton system was well known," Judge Tucker ruled, and added: "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."[40] False. All witnesses entered the court to testify then, owing to a sequestration order, immediately left after redirect examination.[41] Over the defense objection, only Carignan remained in court to assist in the prosecution. (Tr. 14) To even suggest that DeMartino was learnable because her name was referred in the Lipton records is untenable because LaGuer was denied those records.

"DeMartino had not been listed as a witness at trial by the Commonwealth and there has been no credible evidence put forth that the district attorney's office or the police knew of her existence, or her testimony, at any time prior to her discovery by LaGuer." [42] False. According to Lemire, Carignan interviewed Plante in his office prior to the trial. (Tr. 154) DeMartino escorted Plante to the courthouse, a fact not in dispute. DeMartino could not have escorted Plante into the restricted area of Lemire's office without learning of DeMartino.

To say that the trial judge did not hamper "the defense in their exploration of any lack of cognitive ability of Plante as the result of her medications at the time of the attack, at the time of her identification of the defendant as the assailant or at the time of trial"[43] misreads the medical testimony. Plante's use of antipsychotics at trial undercut all previous rationales for impeding LaGuer from undercutting her credibility or her identification. The trial judge ruled that two drugs, Demerol and Compazine, "may have an effect upon the cognitive ability of a person who is using those drugs. What effect, if any, it may have had upon Mrs. Plante is ultimately for the jury." But any prior history of psychosis, the trial judge ordered, "is not to be explored before the jury and the objection of the defendant is noted. (Tr. 311-315)

"What is exculpatory is that the Commonwealth could not place the defendant in the victim's apartment by means of any evidence, including fingerprints or other physical evidence." 448 Mass. 585 (SJC, 2007) In this void of physical evidence, Plante's false pretrial accusations of black and Latino men bare heavily on the reliability of her identification. LaGuer was the only person of color in the entire court room during his trial.

Elizabeth Barry, her husband Robert and their daughter Samantha were all Plante had for family. 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. Samantha, who was adopted as an infant some years after the 1984 trial from a Honduran orphanage, tearfully revealed how her grandmother's rape loomed so large over her life.[44] No lawsuit was filed against Continental Wingate Corp. because the Barrys fear - based on legal advice - that litigation might risk disclosures beneficial to the defense. In the 1990s, Elizabeth issued a complaint with the Leominster Police Department that LaGuer had

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

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

[42] Id., p. 7

[43] Id.

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

slashed her car.[45] 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. Robert was paid him for his appearance in court. The district attorneys, past and present, have tapped dry Robert and Elizabeth's guilt for abandoning their mother: leaving her alone and vulnerable for a felon like Gomez to prey on. According to Lemire,[46] mother and daughter "don't get along." (Tr. 4). The super testified "I wouldn't know her daughter if I saw her."[47]

Improper Handling of Forensic Evidence

New found evidence undercut the analytical assumptions of a March 2002 DNA result of Forensic Science Associates (FSA). DNA testing did not clear him, as it should have, because FSA matched his DNA to samples taken from his apartment – not from the original rape kit.[48]

The rape kit held no inculpatory DNA.[49] "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."[50] The Q-Tip swab used to transfer her pubic hairs yielded no blood or sperm fractions.[51]

Robert Cordy was accused of improperly accessing the courthouse storage.[52] The defense then accused prosecutors of trying to include specimens of dubious origins.[53]

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."[54] For all these alleged safeguards, FSA developed a usable DNA profile by combining eighteen samples, as well as extraneous "unspecified slides" which had never been approved for this analysis. The insertion of these samples sabotaged the entire forensic enterprise.[55] This Frankensteinian DNA stain was less than 0.03 nanograms.[56] ("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.")[57] Dr. Lawrence Kobilinsky, Chairman Sciences Department John Jay College says, "The minuscule level of

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[45] Incident Report, Department of Corrections; Incident Report, Leominster Police Department (1991)

[46] James R. Lemire is currently an Associate Justice of the Massachusetts Trial Court.

[47] Tr. 27, 66

[48] Boston Herald, "Patrick Aids LaGuer" by Dave Wedge, 4 January, 2004

[49] 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.");

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

[51] 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.")

52 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.")

53 Transcript of Hearing of 15 May 2000 David M Siegel said, "Most of the things that they want to test aren't things that they're established authentication of."

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

55 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.

56 FSA, Report 2, Table 1, Profiler Plus Genes, P4 (February 2001).

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

DNA the FSA report relies for its conclusions is of an amount that could be consistent with contamination."[58]

On September 27, 2001, a baffled Ed Blake of FSA told the Telegram, "This is very difficult evidence, there's no question about it." The attempt to conceal articles not mentioned in the warrant distorted the analytical assumptions.[59]

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Carignan averred in his police report,[60] search warrant[61] and trial testimony[62] that "nothing" was taken during a search of LaGuer's apartment. Lemire said a drawer of tube socks in LaGuer's bedroom was not seized.[63] All false. While executing a search warrant in LaGuer's apartment, the Supreme Judicial Court concluded, "the officers observed in a drawer and on the floor many mismatched white 'tube' or 'athletic' socks with strips on the top." None of these socks matched the yellow and black strip sock recovered from Plante's studio. 448 Mass. 589 (2007) In May 2000 a state police crime laboratory (MSPCL) inventory revealed the socks.[64] The inventory revealed a jersey shirt he had on the day of his arrest.[65] The inventory also revealed "underclothes from suspect" whose "interior crotch" revealed no female secretions.[66]

Mark T. Grant, an MSPCL chemist, would clump in a single package items according to their delivery date. Later, each specimen would be sorted for forensic testing.[67] "I might run two or three cases at once in order to save time," Grant added. (Tr. 74) "Nothing is known about where the socks came from," Hautenen said.[68] But Grant added: "Those are these socks from this case." (75p)

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58 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.

59 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 Lenice Plante. 1 tube sock with black and yellow stripes to match one left behind in the Plante apt."

60 Follow Up, Investigative Report of July 14, 1983 by Detective Ronald N. Carignan.

61 The search warrant return has Keith LaPrade, Carignan's partner, also affirming with his signature that "nothing" was seized during the search of LaGuer's apartment.

62 Tr. 344, 379

63 Tr. 261

64 State Police, Evidence Inventory and Documentation Report of 12 May 2000 by Gwen Pino; ("Eight Socks, 1 Pair of white calf length athletic socks with 2 navy blue stripes and holes in the toe area were bounded by a rubber band.") 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

65 MSPCL Pretrial Bench notes of M.T. Grant, p.1. Commonwealth's Response to the Supplemental Memorandum in Support of LaGuer's Ninth Motion for a New Trial. 23 November 2011 (5, 7, 8, 12, 13, 14, 17pp)

66 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."

67 Testimony of Mark T Grant 22 May 1989 "…not every single item would be listed on the chain of custody form. What would actually happen would be things would grouped into blocks and then the actual chemist, when the chemist went through the evidence, when he began to do — or he or she began to do the analysis, then they would make sure that each item, if there were any items that were listed that weren't there, but notations would have been made but just to save time, everything was bagged together in one box, everything that came in at that particular time was in one box and then at a later time, it would be gone through to determine exactly what things constituted a block of items. In other words, victim's clothes might contain three, four or five items." (Tr. 68)

68 Commonwealth's Response to the Supplemental Memorandum in Support of LaGuer's Ninth Motion for a New Trial. 23 November 2011, p.9

In May 2000 Gwen Boisvert Pino found three (3) slides wrapped in a brown paper towel marked pubic, jersey, and pillow hairs.[69] She resealed the slides,[70] essentially comingling hairs from LaGuer and Plante for Cellmark to test. Cellmark found cellular material on these hairs.[71] While prosecutors say the jersey was never shipped to FSA,[72] these LaGuer/Plante slides shipped to FSA 14 June 2001.[73] In May 1989, Lemire displayed a white box stuffed to the brim with evidence not discosed as pilfered in the course of searching LaGuer's apartment. (Tr.130) Prosecutors had no interest in acknowledging these stolen items.

"LaGuer's argument is basically that DNA samples stated as being recovered from the scene had been purposefully or negligently been'jumbled' and mixed with samples of LaGuer's DNA recovered from clothing taken from his apartment," Judge Tucker ruled. "The court finds that, upon this motion record, there is no evidentiary support for this assertion."[74]

Indeed, prosecutors argued contamination prior to the DNA testing: "[O]ne of the things the testing could tell us 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."[75] Blake was totally in the dark. In 2004, Blake said contamination was never a contested issue.[76] "The time to make those claims was on Day One," Blake said.[77]

Prosecutors said none of LaGuer's "contamination theories have any foundation in fact, and even if his DNA test results were contaminated, the DNA result still fail to exonerate him, because no other male DNA was identified in the pooled sperm from the victim's kit."[78] But Cellmark could not confirm the stain was even sperm.[79] Prosecutors quoted a February 2002 FSA report that a "preparation of 'pooled sperm' was used to get the 100 sperm needed to generate a male DNA profile."[80] But, there is not a single reference to 100 sperm on any page of that report.[81] The MSPCL report plainly refers to "sperm" only as the "presumed fluid" in this case alleging a sexual assault.[82]

In January 2000, the court docket of his case had 85 entries spanning his 1983 arraignment, pretrial discovery, jury trial, seven motions for a new trial and appeals. By the time FSA had a 0.03 DNA nanostain, in March 2002, the docket topped 150 entries, owing to Hautanen. The defense spent $32,500 cash in lab fees. The law firm billed over 1.4 million dollars.

Some Forensic Data Undercut Accuser's Allegations

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69 State Police, Evidence Inventory and Documentation Report of 12 May 2000 by Gwen Pino, item 6.
70 Id.
71 Report, Cellmark Diagnostics, J.J. Higgins, 5 September 2000 p.2
72 Commonwealth's Response to the Supplemental Memorandum in Support of LaGuer's Ninth Motion for a New Trial 23 November 2011, 15
73 FSA, Report 2. February 4, 2002 p2
74 Memorandum of Decision on Defendant's Motion for New Trial and Evidentiary Hearing and Commonwealth's Motion to Dismiss 27 February 2012, p. 6
75 ADA Joseph J. Reilly, III, 15 May 2000 pg 17,19
76 Telegram, Conte Rejects LaGuer's Claim by M Bruun 15 February 2004
77 Telegram, DNA finding difficult to rebut by Matt Bruun 31 March, 2002
78 Commonwealth's Opposition to Defense Motion to Stay Execution of Sentence 12 January 2012, 1p
79 Report, Cellmark Diagnostics, J.J. Higgins, 5 September 2000 p.2 ("cellular material not recognized for identification.")
80 Commonwealth's Response to the Supplemental Memorandum in Support of LaGuer's Ninth Motion for a New Trial 23 November 2011, 15
81 FSA Report 2, February 4, 2002
82 Report, State Police Post Conviction Evidence Assessment, Gwen B. Pino, 14 August 2000

The absence of her blood on swabs and smears discredits a continuous vaginal, oral, and anal assault lasting 8 hours. The sexual assault alleged would have left on her remarkable physical and biological evidence. Tr. 333 (reporting rape as "continuously…all night long"). But her swabs were soaked only in biological yeast.[83] The Q-Tip swab used to transfer her pubic hairs yielded no blood or sperm fractions.[84] As the genomic data undercuts an eight hour sexual assault, her centerpiece identification owing its credibility to eight hours necessarily suffers, along with her reliability.

The absence of any blood on her swabs support Meadows's note that her "anus showed no blood, abrasions or lacerations."[85] David Arnold of the *Boston Globe* says a physician familiar with the case doubted key aspects of her account.

The strength of Plante's identification stems from her unusually precise 9 p.m. to 5 a.m. timeframe. But, Plante had first told police between ten minutes and a couple of days. (Tr. 149, 213) One tenant told police the couple under her studio heard thumping and howling noises between 1 a.m. and 3 p.m.

MSPCL chemist Mark T. Grant read all police reports.[86] Patrolman Monahan quoted emergency room physician Siegel as reporting semen in her vagina and throat. According to Dr. Ed Blake, "Twenty years ago, scientists would not have been able to detect the evidence."[87] How could Grant detect a 0.03 nanostain prior to DNA sequencing machines? Cellmark could not confirm the stain was even sperm.[88] MSPCL officials were unsure if the analysis was even performed.[89]

Prosecutor Misinterprets Original Forensics

Ben LaGuer's refusal to provide a reference sample of his saliva for bloodtype comparison could not have stemmed from a prescient fear, since not a single piece of crime scene evidence has ever been tied to him. This truth underscores the point that Hautanen's "fact based" pleadings are nothing more than disguises for prosecutorial slushy fantasies. The more logical rationale is that he refused, as LaGuer originally said, because he feared Carignan would frame him with that fluid. In 2007, Hautanen argued before the SJC that stains of blood incriminated LaGuer, even though she knew that blood was genetically compatible with Plante's DNA profile.[90] Her 2007 argument before the Supreme Judicial Court demonstrated her willingness to still use fabricated evidence to keep LaGuer in prison.

The police had recovered the assailant's tube sock: "Item 14 - Black and Yellow striped tube sock: Testing indicated the wearer of the sock to secrete group 'O' blood factors in the perspiration

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[83] 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.")

[84] Report Number 1, FSA, 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.")

[85] Burbank Hospital records of July 1983.

[86] 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

[87] 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)

[88] Report, Cellmark Diagnostics, J.J. Higgins, 5 September 2000 p.2 ("Unknown stain, morphology of cellular material not recognized for identification.")

[89] Report, State Police Post Conviction Evidence Assessment, Gwen B. Pino, 14 August 2000 p.3 ("Please note that the method used to remove the semen in 1983 from the cut pubic hairs is unclear.");

[90] Report number 1, FSA, August 2001, p 10

deposited on the sock." [91] The police had also recovered human blood on paper napkins: "Item 4 - Tissue from couch: Examination of this item revealed the presence of blood. Tests indicated the presence of group 'B' human blood." [92]

Lemire requested a saliva sample from LaGuer on October 21, 1983 for blood typing comparison. LaGuer refused. But Lemire did not need his bloodtype to figure out that the MSPCL had botched the serology. No forensic evidence was proffered prior to trial because Lemire knew stains of Plante's blood had been mistyped as Type-B from her actual Type-O and his admission of that bogus test result would have only triggered an independent defense analysis.[93]

In October 1983 LaGuer had a real distrust of Carignan and a basis for not cooperating with his saliva request. His lawyer had mailed him Carignan's police report and grand jury testimony. In his July report, Carignan had 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, however, Carignan averred, "She 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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By April 1989, LaGuer could not be guilty because his blood type was different than perspiration on the assailant's sock. Lemire speculated Plante was gagged with this sock: "Further, the victim, testified that she may well have been gagged with the sock, is of type O blood. A tissue, bearing droplets of type B blood, also was found in the victim's apartment," Lemire argued. "The depositor on the sock could well have been the victim, and the tissue bearing defendant's blood type, also does not exclude him from suspicion."[94] While she was probably gagged, the evidence included her gagging on her own blood. [95] A pretrial MSPCL found no blood on the sock.[96]

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[91] MSPCL Nov. '83 report, Item 14

[92] MSPCL Nov. '83 report, Item 4

[93] See. Commonwealth v LaGuer, Docket of 21 October 1983 providing Commonwealth's Motion for a Saliva Sample, filed and allowed, Deft's objection noted (Donohue, J.)

[94] See. Commonwealth's Memorandum in Opposition to Defendant's Mass. R. Crim. P. 30(b) Motion for New Trial, 27 April 1989, pg. 10; The argument that Plante had a sock in her mouth stems from a poorly prepared defense attorney. "Do you remember, ma'am, when it was that sock was put in your mouth?" asked Peter Ettenberg. Nobody had previously suggested a gagging sock. Plante answered, "He may have put a sock in my mouth when he put me in the bag. I don't know about socks, you know, the sock was in my mouth. All I know is the bag was over my mouth. A bag was over my mouth was twisted." (Tr. 183). Plante, nervous and fatigued, answers as if she accepts the premise of the question. She is under the influence of antipsychotics. But a fair reading of her answer, her syntax, in no way supports Tucker's finding that "Plante maintained that the sock was used by the assailant to gag her."

[95] 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."

[96] 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.").

Judge Mulkern rattled Lemire: "If the assailant had bloodtype O and LaGuer has bloodtype B, don't you think that presents a problem to me."[97]

With the verdict in peril, Lemire ordered a new round of testing on the tube sock to validate his sock gagging hypothesis. His posttrial test revealed no saliva.[98] These facts absolutely undercut the sock gagging theory. In May 1989 Lemire ordered new blood tests to reargue the bogus 1983 state police serology.[99] He sent the state police a yellow and black stripe tube sock linked to the culprit. Lemire held back the stain of Plante's blood because he knew its serology was incorrect. By withholding the stain of blood, keeping the 1983 serology hidden, Lemire showed how far he was willing to go to manipulate vital forensics to incriminate an innocent man.

Tucker's ruling that LaGuer deprived prosecutors "of the ability to use forensics in the prosecution" [100] assumes (incorrectly) that his saliva would have incriminated him. While swapping his saliva with another inmate seems damning, "the result would have provided evidence of his innocence rather than a false impression of his guilt." (Esquire May 1994). Neither the perspiration on the sock (O-Type) nor blood on the napkins (O-Type) inculpated LaGuer, a B-Type.

His defense argued that had LaGuer submitted his own saliva it would have provided evidence of innocence. But, in one sentence, Tucker said, "This court does not agree." Tucker had concluded, agreeing with Hautanen, that recovered blood incriminated LaGuer. The fallacy of his conclusion is that this blood was determined in March 2002 to be genetically comparable with Plante's DNA profile. To suggest, as Tucker did, that prosecutors were initially denied of the opportunity to incriminate LaGuer with a stain of Plante's blood is a gross miscarriage of justice, and especially distressing coming from a superior court judge.

Hautanen's Claim that LaGuer had a Prescient Knowledge of the Alleged Inculpatory DNA Result is Fallacious

Hautanen argued a point that is mostly reliant on a newspaper account. "According to media reports, on March 22, 2002 – just one day after FSA had reported the DNA test result on March 21, 2002 in Report 3 -- defendant sent an eleven page, single-spaced letter, including numerous footnotes to Judge T. Hillman, the judge who had overseen the DNA proceedings, 'outlining his response to the DNA finding'. As such defendant must have written the eleven page letter before FSA reported the DNA results, which means that defendant knew in advance what the DNA testing on the 'rape kit' evidence would show: that his DNA profile would match the only male profile found in the 'pooled sperm.'"[101] This narrative is flawed in a number of critical aspects.

The term sperm is only used to describe the presumptive cellular material.

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[97] Ayres, B. James. Boston Globe, Hearing Set to Consider New Trial in Rape case. 23 April 1989

[98] 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.")

[99] 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 Lenice Plante.")

[100] Memorandum of Decision on Defendant's Motion for New Trial and Evidentiary Hearing and Commonwealth's Motion to Dismiss 27 February 2012, p. 14

[101] Commonwealth's Response To Defense Motion For New Trial 23 November 2011, p. 18.

In fact, FSA generated a DNA profile in Report 2 of February 4, 2002. Report 2 revealed that samples FSA had predicted would yield DNA instead generated none. Report 2 allowed LaGuer to pull together a number of facts and inferences for 47 days prior to Report 3 in March 21, 2002. The presence of extraneous material from LaGuer and his apartment was hazy but perceptible in various reports. LaGuer expressed concern over the threats of these extraneous samples contaminating the DNA sensitive testing to his lawyers, reporter Eric Goldscheider and former Telegram & Gazette reporter Matt Bruun.

After examining Report 2 for 45 days, LaGuer could easily prepare an eleven page letter to the trial court judge, which he began writing on the morning of Friday. His letter was mailed from prison prior to 1PM on Saturday. The District Attorney's office dated and time stamped the letter March 25, 2002 at 9:50AM.[102] LaGuer was well qualified to write his letter given his education, acuity and work ethic. He is also an award winning writer. Hautanen stretches the bounds of credulity on this point, and simply wasted the court's time with another irrelevant argument.

The Supreme Judicial Court's 1991 narrative, resulting in the reaffirming of the verdict, is totally inaccurate in its analysis of the blood recovered at the crime scene. The following is an excerpt of the SJC ruling: "The defendant's Army records indicate that he had blood type 'O.' No pretrial blood test was run on the defendant. However, a post trial blood test indicated that the defendant had blood type 'B.' The defendant, therefore, contends that if his blood type had been tested and compared with the blood type found on the sock it would not have matched and the jury could have reached a different verdict...The judge acknowledged that without the benefit of the evidence presented at the [22 May 1989] hearing, the defendant's point appeared to be a good one...There was further evidence relative to blood tests and blood types presented...Certain tissues, found next to the couch near which the victim claimed to have been raped, were found in the pretrial test to have contained type 'B' blood...The judge concluded that if defense council had discovered and presented evidence at trial that the defendant had type B blood, the jury would have been warranted in finding that the tissues [described in some reports as napkins OR paper tissues] were used by the defendant." 410 MA 92 (SJC, 1991).

This SJC scenario is fatally flawed since DNA analysis of the recovered blood shows it to be genetically comparable to Lenice Plante's DNA profile, a fact long known to Lemire, which is why no blood evidence was admitted at trial. Lemire also never ordered retesting of LaGuer's inconclusive saliva and never asked the state police crime lab in 1989 to redo the testing on the recovered blood.

Critical Evidence Missing from Prosecutors' Custody

In February 2002, responding to charges of missing evidence, DA John J. 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."[103] But Hautanen had admitted that items previously in her office "aren't there anymore."[104] The sock and knife disappeared. A series of fingerprints from a telephone and from a hair dryer disappeared.[105] A partial from a Pepsi can disappeared.[106]

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[102] Exhibit 16
[103] DA John J Conte's unpublished response to a Boston Globe story entitled "Results could Lead to LaGuer's Exoneration" 15 February 2002
[104] Transcript 9 January 2002, pp 14-15
[105] A series of photographic exhibits on file with attorney.
[106] Follow Up, Investigative Report by R Cariganan, 15 July 1983, p.3

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 had remarked, "The goddamned spic is guilty just sitting there; look at him. Why bother having a trial?[107] "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."[108] Dalzell was emphatic in his June 1991 interview with State Troopers: "The first two paragraphs, racism was brought up, and I asked the jury body to knock it off." [109] In his August court testimony, the judge asked Dalzell 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."[110] A fourth juror confirmed to WHDH Investigative Reporter Hank Phillippi Ryan the racist slurs. [111] Another juror commented on the case.[112] Lemire lectured about the racially tainted verdict to a college class. and one of his students offered the defense an affiavit. Lemire never disputed a student's affidavit concerning the contents of his lecture.[113] 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."[114]

The prosecution did not dispute LaGuer's characterization of this jury bias affair. 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 (1994) "The objective of prosecutors must be the fair administration of justice, and not just to obtaining a conviction.

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[107] Early case for innocence, part 2: http://www.youtube.com/watch?v=BNu_XvpTF20

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

[109] State Police Tpr. Richard D. McKeon and William Kokocinski 6/13/91 interview juror James Dalzell

[110] T&G, "Jurors mixed on recent findings in LaGuer case" by Matt Bruun of 13 December 2001

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

[112] One juror Gerald J. Scalon, spoke about the deliberations of this case when he 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.)

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

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

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." (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.")

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." These individuals had placed LaGuer miles away when she was face to face with her assailant.

Defense attorney Peter Ettenberg never interviewed these witnesses because he had already laid the ground for LaGuer to plea. But when he refused, Ettenberg had no ready defenses. He was only days in from Barbados. Perhaps Ettenberg had no realistic plans of ever taking the case to trial for the five thousand dollar retainer he had requested. He had no alibi witnesses, psychiatric or forensic experts lined up.

What each alibi said firmly put LaGuer across town, in Litchfield Terrace, visiting Tina Pouliot's home (ex-girlfriend) at the exact moment when Plante said a man broke in. All remembered what LaGuer was wearing, that the day had fallen to night while others recall the Tuesday. In July, the sun would have set and darkness settled after 9 p.m.. Elizabeth Bromes, LaGuer's sister, testified that she left her brother in front of Cumberland Farms at approximately 9:30 p.m. (Tr. 443).

Prior to the first witness taking the stand, Ettenberg openly admitted that he had no defense: "Quite frankly, 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, aborting his alibi. He claimed to have telephoned Pouliot's home from a café, then stayed when her sister told him that Tina was not home. (Tr. 490-494). This 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 the trial, Ettenburg released the Mayday report to his former client. With report in hand, LaGuer then prepared a retrial motion alleging that "trial counsel's failure to call certain alibi witnesses on his behalf amounted to ineffective assistance of counsel." LaGuer requested a hearing so Ettenberg might explain why, in light of the Mayday report, he falsely stated that he had no "defense other than where (LaGuer) says he was, his word against her word." Why did Ettenberg let his client testify to a sequence of events he knew to be untrue? Why would his client testify to a version that left him alone rather than supported with six alibi witnesses?

Judge Mulkern denied a new trial. "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

After LaGuer charged fraud with regard to the DNA, Hautanen said that a pretrial letter from Lemire to Ettenberg is fraudulent. In support of this claim, she emailed Ettenberg an affidavit to sign in 2011. Ettenberg's affidavit of September 6, 2011, is distinct insofar as he had always spelled "LaGuer" with the "G" capitalized. In this document, it spells "Laguer" as prosecutors have customarily done.

The affidavit lacks credibility because Ettenberg (a) had passed on his trial file in 1984 to appellate counsel, [115] (b) he had no memory of his own pre-trial request to retest a forensic specimen, [116] and (c) his declarations do not preclude that his staff received Lemire's disputed letter while he was in Barbados. (Ettenberg's passport can be subpoenaed.)

That Ettenberg had mentioned that he had no memory of his own 1983 letter requesting a key forensic sample belies his 2011 affidavit, drafted by prosecutors, attesting to a memory (obviously frail) that Lemire "never" made a pretrial plea offer in writing. At best, Ettenberg could only say that he had no memory of Lemire's letter.

In April 2010, Lemire signed an affidavit in response to questions from the state Parole Board over whether LaGuer had a plea bargain offer. On the previous day, Ettenberg had signed his own affidavit to the Parole Board attesting to his plea deal with Lemire. In 2010, the defense retrieved a letter from its archives from Lemire to Ettenberg dated 17 January 2004. This letter undercut Lemire's earlier affidavit to the Parole Board. It had the ability to refresh his memory. In light of additional evidence including Ettenberg's own trial notes. Despite the fact that Lemire's affidavit did not address his 1984 letter, ADA Hautanen submitted Lemire's affidavit as proof that his 1984 letter to Ettenberg was fraudulent. Hautanen's argument suffers her lack of proof that precludes staff writing the letter on Lemire's behalf. She suffers from her own admission that documents from her office "aren't there anymore". She suffers from the absence of forensic or linguistic expert evidence of irregularities with the letter. Finally, Lemire has not provided any evidence or assertions that his letter in inauthentic.

"I find the January 17, 1984 letter to be unauthentic and its knowing use in this proceeding is an attempt to interfere with the judicial system's ability to adjudicate the matter." (17 p.)

The content of this disputed letter is generally what Lemire and Ettenberg stated in their own separate affidavits. Lemire's 2010 affidavit avers how he only made plea deals with Conte's approval, a fact made abundantly clear in the letter; Lemire's affidavit recalls a conversation with Ettenberg in the court lobby, a fact noted in Ettenberg's affidavit of April 29, 2010, as well as Lemire's letter; Lemire's affidavit recalls concern over the health of Lenice Plante, a concern also noted in the disputed letter. Lemire's affidavit merely set forth his general practice.

The fact that his letter is unsigned is not peculiar, because the District Attorney's office has released unsigned letters and court pleadings. In his 2012 ruling, Judge Tucker appears to credit the naked assertion "that this letter is fraudulent and is part of an ongoing scheme of fraud on the court. The Commonwealth points to this letter as being unsigned and the unusual situation of defendant, or defendant's counsel, having an unsigned letter from the ADA." [117] Astonishingly, Hautanen's pleading

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[115] 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."

[116] In February, 2001, Ettenberg responded to LaGuer's inquiry about a 1983 letter sent Lemire. "I do not recall any conversation I might have had with Lemire about the October 4, 1983 letter and do not have any notes about it."

[117] Memorandum of Decision on Defendant's Motion for New Trial and Evidentiary Hearing and Commonwealth's Motion to Dismiss 27 February 2012, p. 13

alleging fraud owing to an unsigned letter itself included an unsigned pleading.[118] In April 2012, Hautanen opposed a motion for discovery, which she again included an unsigned "joint stipulation" from the 2002 DNA proceedings.

This claim of fraud is substantially undercut by Hautanen's own admission that materials previously in her files "aren't there anymore."[119] Since Lemire's disputed letter could have been among those alleged missing files, her assertion of fraud is fatally flawed.

Prior to April 2010, when parole board member Thomas F. Merigan pledged he would get to the bottom of this pretrial plea offer with LaGuer's trial attorney Peter Ettenberg, whom Merigan claimed he knew well, prosecutors had never disputed this claim. This pretrial offer has been in the public domain since a November 1987 feature article in Boston Magazine. LaGuer has argued this plea at his parole boards. District Attorney Conte, whom objected all matters LaGuer, did not despite this plea offer in his widely distributed "Setting the Record Straight" eighteen page memoranda to the media of 25 April 2001. On May 10, 2010, retired Superior Court Judge Isaac Borenstein sent the state Parole Board a letter "enclosed, please find 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."

When Ettenberg confirmed the plea offer, only then did prosecutors challenge LaGuer because his pretrial offer undercut their demand that LaGuer be kept longer in prison.

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.

Hautanen's excessive whining on the writ writing platform over emails shared with her and many other persons of interest, but addressed to the governor and state chief justice, illustrate how callous is her regard for the rights of an educated and active citizenship and the duty she holds as a public servant. The Worcester County District Attorney is wholly under the constitutional stewardship of Joseph D. Early, Jr., a state elected official and politician. Under the state Declaration of Rights and federal Bill of Rights, supporters of LaGuer have a protected right to petition Early and his minions for redress of grievances through email. The presumed stigma of frivolity ascribed to the gatekeeping Hautanen seeks is actually a disguise for her to build her claims to further prejudice LaGuer in his actual innocence. Her gatekeeper request effectively shields her office of future defense claims that her office knew salient facts of a miscarriage of justice. Gripes about emails sent to a government server, not her personal email account, as part of a communique to the highest branches of state government is keenly hypocritical. The defense would rather be engaged in finding substantive relief instead of wasting time and limited human resources responding to Hautanen's tangents and frivolous requests. But, as instructed, the defense has made a fact-based response. The defendant prays

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

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

once again that the Court will grant him an evidentiary hearing in support of a new trial, given these **new** and **clear** fact-based declarations.

Respectfully submitted

Ben LaGuer,

By his Counsel,

Dated: July 31, 2012

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 31st day of July, 2012, that a true copy of the within Defense Opposition to District Attorney's Frivolous "Gatekeeper" Request, and Renewed Motion for Evidentiary Hearing in Support of New Trial, by mailing same, first class postage prepaid to Joseph D. Early, Jr, Esq., Judicial Regional Courthouse, Room G301, 225 Main Street, Worcester, MA 01608.

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Robert E. Terk, Esq.