COMMONWEALTH OF MASSACHUSETTS

SUPERIOR COURT DEPT. FOR THE TRIAL COURT

WORCESTER, ss. Criminal Docket WOCR 1983-03391

COMMONWEALTH

v.

BENJAMIN LAGUER

DEFENSE MOTION FOR RECONSIDERATION OF DENIAL OF MOTION FOR NEW TRIAL

On 27 February 2012 Superior Court Judge Richard T Tucker denied a petition for a new trial. On 26 March, Tucker granted leave to consider a petition for reconsideration. The defense seeks to demonstrate a number of defects in Tucker's findings of fact and rulings of law.

In this case, the defense submitted with its motion for a new trial a sworn proffered statement of relevant facts that 27 witnesses would aver in support of a new trial. Over the objections of prosecutors, Tucker ordered an evidentiary hearing with the full understanding that LaGuer had these many witnesses and 118 material exhibits. It is undisputed that both parties got only 3 days notice of a hearing, two days not counting the day of that 2PM September 9th, 2011 hearing. In the middle of this already short notice, prosecutors filed a motion and memoranda in opposition to an evidentiary hearing and new trial, which this Court scheduled for the September 9th morning court secession. This limited notice prosecutors noted in their own memoranda, violated Massachusetts Rules Of Criminal Procedures 30(c)(7) ("The parties shall have at least 30 days' notice of any hearing unless the judge determines that good cause exist to order the hearing sooner.") Both the defense and prosecution agreed that no good cause existed. An evidentiary hearing will expose how samples from LaGuer found their way to Cellmark through MSPCL despite all procedural safeguards that have been put in place.

Clearly, defense could not fulfill the subpoena requirements of 17(a)(b) and (e) within thirty-six hours notice. "Surprisingly," Tucker finds, "neither party presented witnesses at the hearing and it proceeded among the arguments of counsel and/or LaGuer."[1] Tucker should not have been so surprised since a 2 day notice to subpoena forensic experts from Ohio and New York as well as other law enforcement agents, including state officials requiring special subpoena protocols, was not a reasonable burden that LaGuer could satisfy.

[1] Memorandum of Decision on Defendant's Motion for New Trial and Evidentiary Hearing and Commonwealth's Motion to Dismiss 27 February 2012, p. 2

Tucker's factual findings that Annie K. DeMartino's testimony is not newly discovered or withheld owing to her presence with complainant "at court throughout the entire trial" is demonstrably inaccurate. (Tr. 14) The finding that complainant's use of antipsychotics at the time of her trial testimony was learnable is demonstrably inaccurate, since the defense was denied her psychiatry records, and trial prosecutor had claimed (falsely) that she was neither psychotic nor under antipsychotics for a period of two years prior to her assault (Tr. 4, 314)

The finding of a name third party culprit link resulting from DeMartino merits reconsideration. The finding that DeMartino created no substantial risk that the jury would have reached a different verdict merits reconsideration, since the Court incorrectly applied the Grace, instead of Tavares, standard of review.

The finding that LaGuer deprived prosecutors "of the ability to use forensics in the prosecution" by not providing his saliva assumes, contrary to all evidence, that a genuine bloodtyping test would have revealed incriminating evidence. That, to put matters plainly, is an absolute fallacy of the Court's ruling, and merits reconsideration.

The finding that allegations of racism in the jury deliberations are part of LaGuer's ongoing scheme to skew the evidence is unconscionable and merit reconsideration.

The findings that the "motion record" does not support exculpatory genomic data merit reconsideration, since LaGuer had no time to prepare 118 material exhibits or subpoena even a single witness on three days' notice.

The Court's fixation over a pretrial unsigned letter about a plea bargain offer which never materialized is legally and factually untenable, merit reconsideration.

The rape kit held no inculpatory DNA.[2] "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."[3] The Q-Tip swab used to transfer her pubic hairs yielded no blood or sperm fractions.[4]

LaGuer's DNA was never matched to DNA either from her body or crime scene recovered evidence. For a usable genotype, FSA congregated a few nanoparticles from 18

[2] 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.");

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

[4] 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.")

samples plus three "unspecified"[5] specimens in a Frankensteinian stain. Judge Hillman never approved, nor did the defense consent to the use of these "unspecified" specimens.[6]

Judges Tucker and Lemire had a public lunch on September 9, 2011, immediately after a 90-minute courtroom session on issues of prosecutorial abuses directly affecting Judge Lemire's role as a prosecutor in LaGuer's trial. Their ex parte encounter was witnessed.

Herrera v. Collins, the United States Supreme Court held that judges "sit to ensure that individual are not imprisoned in violation of the Constitution--not to correct errors in fact." This emphasis, Adam Gopnik of the New Yorker thinks, "has led to the current mess, where accused criminals get laboriously articulated protections against procedural errors and no protection at all against outrageous and obvious violations of simple justice...You may be spared the death penalty if you can show a problem with your appointed defender, but it is much harder if there is merely enormous accumulated evidence that you weren't guilty in the first place and the jury got it wrong." Ben LaGuer's epic quest over 29 years to prove his actual innocence is framed within this reality and context. "The case of Ben LaGuer is disturbing, not just because of its possible wrongful incarceration and political opportunism but because something happened to Lenice Plante," says Professor Joy James. "And whatever happened to her was not important enough to witness with the truth about what was happening to LaGuer. During the prosecutorial phase of the case, which continues, one may pit a black man against a white woman and celebrate some Pyrrhic victory with whomever (or whose ever memory) prevails. Still, in the absence of witnessing through the construction of a narrative that brings meaning to the implications of these conflicts and traumas, social justice seems a losing proposition."

This case deals with withheld, mislabeled, contaminated and destroyed evidence, DNA samples, errors in the DNA laboratory and analytical work, ineffective assistance of trial counsel, false testimony, inconsistent statements, third party suspect, suggestive identification, mistaken identity, police procedures, conflict of interest, abuse of judicial discretion, prosecutorial misconduct, a strong argument of actual innocence, and more.

Ben LaGuer's carceral experiences are among the most thoroughly documented and reported events of any Massachusetts inmate in recent history. His medical, housing and program observational and evaluative reports are in the thousands of pages. He maintains a private archive of correspondences as well as a public collection with Northeastern University. Public testimonials of individuals acquainted with LaGuer or his case are posted on the website devoted to his quest for justice and freedom.

Born May 1, 1963 at 4:06 PM 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

[5] Report Of FSA 2, 4 February 2002 P6-7

6 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.

Massachusetts with a sister; he grew up in a Seventh Day Adventist family. 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 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. Ben LaGuer had over two thousand dollars from his military separation checks. He had no reason to engage in a twelve dollar robbery than whipping her in anger over her having so small little money. In a second report, Dr. Daniel Weiss said, "In talking with him [LaGuer] 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." [7]

Ben 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. LaGuer 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.

The Standing Population Risk Assessment, Department of Corrections, made LaGuer eligible in 2012 to participate in only 1 out of 7 programs available in prison; "not considered a need area for this offender, no recommendation required." LaGuer attended the pre-treatment phase of the sex offender program. He was asked to leave after his inability to admit guilt. (Prosecutors often use such admission to undercut claims of innocence) He has no history of psychosis, neurosis, violence, deviance, animal cruelty or substance abuse. He has never failed drug tests routinely administered to the prison population. Has never psychologized him as volatile. 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

[7] 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

10) for violence and recidivism.[8] He was disciplined in the military for being present when a fellow soldier sold a $20 cube of hashish.[9]

In January of 1984, LaGuer rejected a plea bargain that his lawyer confirmed to the Parole Board.[10] The trial began Tuesday and ended Friday, 24-27 of January 1984. (Tr 3, 593) Jurors deliberated from 3:25 pm until 4:45 pm 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.[11]

On 28 April 2011, a ninth motion for new trial 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.[12] Annie K. DeMartino,[13] a former mental health aide, 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. (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.)

In April 2011 the defense petitions for a new trial alleging a number of issues. On June 15, prosecutors moved to dismiss. On June 21, LaGuer filed a rebuttal to their motion to dismiss and requested "a status conference hearing without further delay."(Docket No. 173). On June 22 LaGuer filed 118 material exhibits in support of his petition for a new trial. On September 1, the court (Tucker, J.) approved a defense list of 27 witnesses in support of a new trial.

On September 8, the District Attorney asserted that it was its "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

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[8] 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.

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

[10] 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)

[11] 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.

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

[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

evidentiary hearing with 27 possible witnesses."[14] Prosecutors cited Mass. R. Crim. P 30(c)(7)("The parties shall have at least 30 days notice of any hearing…") [15]

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." [16] Lt. Robert Hebert reported that "she was unable to give me any description of the assailant." [17] 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."[18] She had an infection so advanced that Plante was discharging a "yellowish" pus.[19] 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."[20] Monahan also reported her daughter to say that her mother "is under care by" the Herbert Lipton Mental Health Center owing to a nervous breakdown 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."[21] "I asked her if he was a black man and to this she said, 'yes he was, he was very dark skinned."[22] Carignan asked building super whether he knew anyone at the building who 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 AM Barry telephoned and summons him to hospital. "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, told him that her assailant lived next door. (At trial Plante denied this account.) This narrative seems incredulous on

[14] Commonwealth's Renewed Opposition and Motion to Reconsider Allowance of "Live Testimony", 8 September 2011, pp. 7-8
[15] Id.
[16] Original, Investigation Report by Timothy E. Monahan 13 July 1983, pp 3
[17] Tr. 241
[18] Burbank Hospital records of July 1983.
19 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 ("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.")
[20] Id.
[21] 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.
[22] Id.

other levels. According to Lemire,[23] mother and daughter "dont get along."(Tr. 4) Barry seldom visits.[24] The super testified "I wouldn't know her daughter if I saw her."[25]

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.[26]

If these 1980 police reports had been divulged prior to trial, as they should have, the jury could have deduced that Carignan's interest in searching LaGuer's home stemmed from those reports, not Plante's (disputed) statement. 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.

At the police station, LaGuer had asked for a face to face identification instead of a photographic array. LaGuer believed that she would 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.[27]

Carignan recounts in a report how on 15 July 1:00 PM 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 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. After meeting with Barry in private, Lemire substituted her for a handyman whom had merely called 911.[28] One can only imagine what Barry had told Lemire to make him so quickly withdraw her from his trial witness list. (Barry never affirmed in statements 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.)

Carignan recounts how Plante told him that her assailant was totally nude except for a pair of tube socks. (tube sock was recovered at the scene.) No one other than her neighbor would have met her in the nude. In his opening statement to the jury, Lemire said, "Lenice Plante will testify she first became aware of him he had some type of shorts

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

[24] It appears totally out of character that Barry, when she was mending with her mother over this crisis—would threaten her mother to reveal her assailant's identity—when Barry had no evidence that her mother knew his identity in the first place.

[25] Tr. 27, 66

[26] The defense recognized this internal police file in April 2001, when ADA Sandra Hautenan provided a stack of reports several inches thick. (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.)

[27] 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).

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

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)

Patrolman Monahan testified that 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. Carignan testified that her door was easily openable, as if to suggest that LaGuer had returned next door. But Carignan arrived long after she was taken to the hospital. (Tr. 206, 250, 361, 362, 359, 563) The jury could have found that Gomez had hopped out her window. But Carignan incorrectly testified her window was 20 feet high, more than double its actual 8 feet height.

Lenice Plante failed to remember if she made a statement to police before or after she was shown a photo array. (Tr. 171) On the Monday before trial, Carignan again showed her a photo array. On the stand, ADA Lemire had her select his photograph. She identified LaGuer when asked to point out the culprit in court. Tr. 120, 129, 155, 159, 193. At trial, she denied describing her assailant to police as "very dark skinned" because his photograph was not of a "very dark" skinned man.[29] She told police that she was hooded with a white plastic bag but the only bag near her was dark green. Tr. 373. She testified that seven of the eight males in the photographic array in front of her were white males. Tr. 178. In fact, the array consisted of eight photos of "dark skinned young males" plus a Polaroid of LaGuer.[30]

New Details of the Accuser's History of Psychosis

According to Lemire, Lenice Plante was not psychotic and not under antipsychotic drugs. (Tr 3, 314) Annie K. DeMartino was employed at the Herbert Lipton Community Mental Health Center ("Lipton Center") from 1982 to 1988.[31] In 1983, DeMartino discovered that Plante had a highly abusive husband, a psychotic break for which she was hospitalized, and frequent delusions about visits from the deceased President John F. Kennedy. On numerous occasions before and after the trial, when she saw dark skinned men, she would say "That's the fellow who raped me." In 2007 DeMartino revealed that Plante was under antipsychotics at the time of trial, including Haloperidol.

Plante had befriended a felon who lived with his mother in their apartment building. He slept on her couch when his mother locked him out because of his drunkenness. Felicita Gomez, a fellow parishioner at Saint Francis Church in Fitchburg,

[29] Tr. 191

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

[31] Transcript of Annie K. Demartino interview of Eric Goldscheider 13 February 2007; Valley Advocate, Tragedy Times Two by Eric Goldscheider 5 April 2007 ("If I went out in public with her," Demartino recalls, "everybody saw who was either Spanish or black, she would be saying, that's who did it, that's who did it, and of course it wasn't, because basically they were just people in the street. She was very paranoid at that time about everybody...she hated anybody dark-skinned"); 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.

told DeMartino that she had lived at the 89-unit Waterways Apartments with her son and third party suspect José Gomez. Tr. 547, 548, 557. Ms. Gomez had moved away in December 1982.[32] 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. Gomez was very abusive with his future wife.[33] In 2003, Barry told WGBH that her womanizing father beat her mother and locked her in closets whenever he left the house.[34]

It is said that Plante did not initially identify LaGuer because he had threatened her life. But if Gomez had threatened her life, as he had his estranged wife, Plante may have identified LaGuer out of fear that Gomez might retaliate against her.

The presence of Gomez in Plante's life discredits a key argument: "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."[35] 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.

"It also appears that LaGuer asked this court to find a basis for a third party culprit defense. Presumably the Hispanic male with whom Plante developed a friendship prior to the attack would be such a culprit. The court makes no such finding. Far from establishing a connecting link between this male and the crime, DeMartino's testimony supports that Plante was not frightened by and, in fact, was a friend of a man of color prior to the attack, but became extremely fearful thereafter. As such, this testimony is not the basis for an order for a new trial."[36] The import that Plante had a friendship prior to her alleged assault with Gomez substantially undercuts Plante's credibility, because she had 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.

The MSPCL reported 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. In January 2007, the defense averred to the Supreme Judicial Court that it would have attempted to match these withheld prints to Gomez. The justice disagreed, ruling that the fingerprints "by itself,

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[32] Tr. 59

[33] 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.

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

[35] Tr. 563

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

without any evidence or explanation, create no reasonable basis for believing [Gomez] would have been revealed." 488 Mass 585 (2007) The import of DeMartino's testimony that Plante let Gomez stay with her could would have created that stronger link.

ADA Hautanen asserted that LaGuer had "waived" his right to use her exculpatory testimony because he failed to exercise reasonable due diligence to uncover DeMartino prior to trial.[37] "The significance of the victim's mental health history for obtaining pertinent information from someone familiar with the victim at the Herbert Lipton Mental Center were logical avenues of inquiry."[38] To suggest that LaGuer could have discovered DeMartino on the basis of Lipton is untenable because, first, a judge had denied LaGuer's those Lipton records. Second, LaGuer could not ethically ask Lipton staff to violate the confidentiality expected of psychiatric centers; no Lipton staff would have disclosed what a judge had already denied LaGuer through petition.

Judge Tucker understood the controversy of requiring LaGuer to solicit information that is minimally confidential from the staff of psychiatric center.

Judge Tucker rejected the very best argument of prosecutors, only to assert his own demonstrably inaccurate reason why DeMartino was learnable prior to trial. "Plante's prior treatment within the Herbert Lipton system was well known. 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."[39] The record contradicts this ruling. DeMartino was in no way present at trial because a sequestration order was put in effect.[40] Plante entered the court to testify then immediately left after redirect examination. Over the defense objection, one detective remained in court to assist in the prosecution. (Tr. 14)

Judge Tucker's ruling 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"[41] misreads the trial record.

At a voir dire, the medical testimony deduced that Plante's medicines at hospital may have had an impact on any person whether she had a psychotic history or not. 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)

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[37]Commonwealth's Response to the Supplemental Memorandum in Support of LaGuer's Ninth Motion for a New Trial. 23 November 2011, pp. 24, 26, 27.
[38]Commonwealth's Response to the Supplemental Memorandum in Support of LaGuer's Ninth Motion for a New Trial. 23 November 2011
[39] Memorandum of Decision on Defendant's Motion for New Trial and Evidentiary Hearing and Commonwealth's Motion to Dismiss 27 February 2012, p. 10
[40] On 12 January 2004, LaGuer requested a sequestration order. (Docket No. 15)
[41] Id.

The import that Plante was using the antipsychotic Haldol prior and during trial undercuts all previous claims that Plante was not on such medicines. DeMartino is relevant to Plante's credibility and the reliability of her centerpiece identification evidence.

DeMartino substantially alters the evidentiary context in favor of LaGuer's ability to have argued error in Judges O'Neill and Mulkern's refusals to allow him access to the Herbert Lipton psychiatric records. On appeal, LaGuer could not demonstrate that Plante was psychotic and under antipsychotics because he had been denied her Lipton records.

The import of DeMartino's testimony that Plante had falsely accused other black and Latino males of her alleged assault prior to trial cast substantial doubts on a verdict which is dangling on a single thread of an eyewitness.

In his ruling, Judge Tucker found that the jury reached its verdict "Almost entirely upon the victim's identification of defendant as her assailant."[42] The photographic identification procedure Carignan used, having Plante select a photo from a nine photo array, without telling her that her alleged assailant may not be in this group, has been discarded in August 1999 as unreliable evidence and new guidelines adopted.[43] In 2007 the Supreme Judicial Court: "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." In this void, Plante's false pretrial accusations of black and Latino men would have bare heavily on her credibility and the reliability of her identification. Under Grace, any alleged newly discovered evidence must be said to "probably have been a real factor in the jury's deliberation." Since DeMartino's new evidence was requested and withheld, ADA Lemire was very precise in his assertions that Plante was not psychotic or under antipsychotics for over two years, the prosecution could not possibly argue his ignorance over this affair. Lemire either had a very poor source of information or he lied to the court about Plante's psychiatry history. An evidentiary hearing will allow the court to settle this affair once and for all. Under Tucceri, a standard of review for specifically requested but withheld exculpatory evidence, LaGuer is entitled to a new trial if there is a "substantial basis exists for claiming prejudice from the non-disclosure." In addition, as fully articulated in LaGuer's original April 2011 motion for a new trial, the risk of a miscarriage of justice is particularly acute where Plante was randomly accusing black and Latino men during this period of time and LaGuer was the only person of color in the entire court room during his trial.

"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."[44] This finding is clearly erroneous. Both Lemire and Carignan knew of

[42] Memorandum of Decision on Defendant's Motion for New Trial and Evidentiary Hearing and Commonwealth's Motion to Dismiss 27 February 2012, p. 7

[43] See. U.S. Department of Justice, Office of Justice Programs. Eyewitness Evidence: A Guide for Law Enforcement, pp. 29-31, 33-34. https://www.ncjrs.gov/pdffiles1/nij/178240.pdf

[44] Id., p. 7

DeMartino. According to Lemire, Carignan interviewed Plante in his office prior to the trial. (Tr. 154) DeMartino escorted Plante to the courthouse, a fact Judge Tucker does not dispute. DeMartino could not have escorted Plante into the restricted area of Lemire's office without him learning of DeMartino's role in Plante's care, and possibly asking her about Plante's physical and mental fitness. An evidentiary hearing will make this even more abundantly clear.

In his ruling, Judge Tucker finds that "the testimony of DeMartino does not provide a measure of strength in the proof that a substantial risk exists that the jury would have reached a different verdict had the evidence been admitted at trial."[45]

But the standard for withheld exculpatory evidence under Tavares is much more favorable to the accused in this case. The verdict in dispute dangles on a single eyewitness, which is particularly vulnerable, owing to its cross-racial qualities. The eyewitness's testimony is riddled with inconsistencies and contradictions, particularly in the dynamics of what Plante told police or statements police ascribed to her which she strongly denied.

Improper Handling of Forensic Evidence

The attempt to conceal articles not mentioned in the warrant undercut the defense.[46] In his ruling, Judge Tucker finds that the previous presiding justice in the case "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." [47] For all of these alleged safeguards, the defense asserts, FSA was still allowed to sequence a genotype from three "unspecified"[48] specimens which the prosecution cannot preclude originated from LaGuer and/or his apartment.

On September 27, 2001, a baffled Ed Blake of FSA told the Telegram, "This is very difficult evidence, there's no question about it." On February 15, 2002, after a blood previously cited as inculpating LaGuer was genetically tied to Plante, defense lawyer David M. Siegel told the Boston Globe "It is but one more finding in a case that feels more and more like something out of 'Alice in Wonderland.'

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

[45] Id., p. 11

46 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."

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

[48] Report Of FSA 2, 4 February 2002 P6-7

[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.");

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]

LaGuer's DNA was never matched to DNA either from her body or crime scene recovered evidence. For a usable genotype, FSA congregated a few nanoparticles from 18 samples plus three "unspecified"[52] specimens in a Frankensteinian stain. Judge Hillman never approved, nor did the defense consent to the use of these "unspecified" specimens.[53] The quantity of DNA was less than 0.03 nanograms.[54] ("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.")[55]

Dr. Lawrence Kobilinsky, Chairman Sciences Department John Jay College says, "The minuscule level of DNA the FSA report relies for its conclusions is of an amount that could be consistent with contamination."[56]

Carignan averred in his police report,[57] search warrant[58] and trial testimony[59] 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.[60] All false. In May 2000 a state police crime laboratory (MSPCL) inventory revealed "eight" socks and "underclothes from suspect" linked to his apartment.[61] The inventory also revealed underpants from LaGuer's apartment and a jersey shirt he had on the day of his arrest.[62] The lab notes reveal an "interior crotch" analysis of his underpants. In 2011, Hautanen argued that tube socks in the box of evidence are from a different case. "Nothing is known about where the socks came from," she said, "or who put them in the box of evidence."[63] But a MSPCL chemist testified in May 1989 "Yes. If you notice, there's a number 686 next to the sock. Those are these socks from this case." (75p)

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[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] Report Of FSA 2, 4 February 2002 P6-7

53 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.

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

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

56 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.

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

58 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.

59 Tr. 344, 379

60 Tr. 261

61 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

62 MSPCL Pretrial Bench notes of M.T. Grant, p.1.

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

"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."[64] LaGuer's underpants revealed no female yeast cells, blood, vaginal secretions or feces.[65]

The District Attorney argued that the jersey came from the crime scene, that it was not seized from LaGuer at the time of his arrest. To support this claim, prosecutors cited its evidence tag of proof of its origin. But this tag is unreliable because (a) prosecutors have put other tags in doubt, (b) Carignan testified that LaGuer had a jersey when he was taken into custody, (c) Carignan did not tag this jersey because his name on the label is misspelled as "Crr" with a double R,[66] (d) a police mug shot taken upon his arrest shows LaGuer donning a jersey, (e) the jersey is conspicuously absent when all other crime scene evidence was put to the jury, (f) the trial prosecutor totally ignored the jersey once in the prosecution, (g) the "yellow cotton jersey" and "yellow pullover" are "aka" of the single jersey in this case and, finally, (h) Carignan did not list the jersey in his search warrant application for LaGuer's apartment, which he would have included if one had been recovered at the scene.[67]

In May 2000 Gwen Boisvert Pino found three (3) slides wrapped in a brown paper towel marked pubic, jersey, and pillow hairs.[68] She resealed the slides,[69] inadvertently mingling hairs from LaGuer and Plante. Cellmark found cellular material on these jersey hairs.[70] In April 2010 ADA Hautanen did not dispute that MSPCL had LaGuer's jersey hairs. She only argued FSA never had a single strand.[71] But Hautanen cannot preclude that the furtively inserted "unspecified" specimens are not these hair slides.[72] In this ninth motion for a new trial, the prosecution did not dispute that police seized underclothes from LaGuer. The Clerk of Courts still holds custody over these extraneous items. In May, 1989, a MSPCL chemist testified that it was customary to jumble samples in a single package according to the date of receipt, then specimens would later be sorted for forensic testing.[73]

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64 Analytical forensic report from Wideman to state representative Ellen Story of 30 March 2006.
65 MSPCL Pretrial Bench notes of M.T. Grant, p.1; MSPCL Nov. '83 report, item No 21.
66 State Police, Evidence Inventory and Documentation Report of 12 May 2000 by Gwen Pino, item 6.
[67] Carignan's trial testimony. Tr. 347; State Police inventory and documentation report by Gwen Pino 12 May 2000 (include a "yellow cotton jersey"); State Police inventory and documentation report of Trooper William Kokocinski 17 May 1989 (include a "Yellow cotton jersey"); Leominster Police Department inventory and documentation report of Lt. Francis J. Ptak, Jr. 17 May 1989 (include a "yellow cotton jersey")
68 State Police, Evidence Inventory and Documentation Report of 12 May 2000 by Gwen Pino, item 6.
[69] Id.
[70] Report, Cellmark Diagnostics, J.J. Higgins, 5 September 2000 p.2 ("Unknown stain, morphology of cellular material not recognized for identification.")
71 Testimony State Parole Board 22 April 2010. (Audio tape available in attorney's files.);
[72]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)
[73] 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

The stockpile of physical evidence was so disheveled that prosecutors alleged that socks in the boxes came from a different case and items from this case are mislabeled. That, to put matters plain, is the fallacy of Judge Tucker's ruling: "The court finds that, upon this motion record, there is no support"[74] for DNA contamination claims owing to mix-up of forensic samples.

"I might run two or three cases at once in order to save time," Grant testified. (Tr. 74) Dr. Daniel L. Hartl of Harvard, says, "If it is correct that articles taken from LaGuer and/or from his bedroom were mislabeled and mixed together with actual samples taken directly from the victim, then the DNA evidence is of no value, even if the samples were mixed by mistake."

"Serious questions have been raised concerning the handling of evidence in Mr. LaGuer's case—questions that deserve serious consideration," says state Senator Jarrett T. Barrios, chairman, Public Safety Committee, in a letter to Dr. Carl Selavka of the MSPCL.[75]

For two years, the defense hunted a few particles in a nanostain to prove LaGuer's actual innocence through DNA science.[76] In January 2000, the court docket of his case had 85 entries spanning his 1983 arraignment, pretrial discovery, jury trial, seven complex motions for a new trial and other appeals. By the time FSA had a 0.03 DNA nanostain, in March 2002, the docket topped 150 entries. The defense spent $32,500 in lab fees. The law firm billed over 1.4 million dollars in hourly rate plus related expenses in the thousands of dollars. For prosecutors to say that the DNA fails to exonerate even if contaminated is unscrupulous, since the defense never agreed to develop a genotype of the presumptive culprit using nanoparticles previously mixed with extraneous samples pilfered from LaGuer.

ADA Sandra Hautanen alleges that 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

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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)

[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] Letter, J. Barrios to C. Selavka of 15 July 2004.

[76] "[F]orensic DNA testing rarely occurs [under] idyllic condition. Crime scene DNA samples do not come from a single source obtained in immaculate conditions; they are assortments of multiple unknown persons, often collected in the most difficult conditions. The samples can be of poor quality due to expose to heat, light, moisture, or other degrading elements. They can be minimal or insufficient quantity, especially as investigators push DNA testing to its limits and seek profile from a few cells retrieved from cigarette butts, envelops, or soda cans. And most importantly, forensic samples often constitute a mixture of multiple persons, such that it is not clear whose profile is whose, or even how many profiles are in the sample at all. All of these factors make DNA testing in the forensic context far more subjective than simply reporting the test results…" District Attorney's office v. Osborne, 129 S Ct 2308, 174 L. Ed. 2d. 38 at 59 (2009) quoting Erin Murphy, The Art in the Science of DNA: A Layperson's Guide to the Subjectivity Inherent. in Forensic DNA Typing, 58 Emory L. J. 489, 497 (2008)

pooled sperm from the victim's kit."[77] First, Cellmark could not confirm if the stain was even spermatozoa.[78] The MSPCL report plainly refers to "sperm" only as the "presumed fluid" in this case alleging a sexual assault.[79] Second, prosecutors argued contamination prior to the DNA testing. In 21 January 2000 ADA Joseph Reilly stated, "I am informed that the manner of handling such physical evidence may affect the accuracy and integrity of scientific testing conducted on that evidence."

In May 2000, ADA Reilly adds: "[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."[80] Blake obviously did not get any cautionary note. In a 2002 interview, "The time to make those claims was on Day One," Blake said.[81] In 2004, Blake was still under the mistaken belief that contamination was never a contested issue prior to the testing.[82]

The charges of evidence tampering stem from attorney Robert Cordy (currently an Associate Justice of the Supreme Judicial Court) being accused of improperly accessing the courthouse storage.[83] The defense then accused prosecutors of trying to include specimens of dubious origins.[84] "LaGuer, in the present motion, seeks a new trial due to the alleged flawed procedure of the DNA testing. This argument is made despite the fact that it was his own chosen laboratory, FSA that made the qualitative determination of a statistical match of LaGuer's DNA with samples taken from the scene. LaGuer's argument is basically that DNA samples stated as being recovered from the scene had been purposefully or negligently 'jumbled' and mixed with samples of LaGuer's DNA recovered from clothing taken from his apartment. The court finds that, upon this motion record, there is no evidentiary support for this assertion."[85] While LaGuer's own lab did make certain qualitative and statistical findings, as the Court correctly points out, all bets were off when it became know that prosecutors withheld critical information about the integrity of the sample. Naturally, the forensic interpretation of genomic data can always be revised upon new facts; this is the hallmark of western experimental science.

Improper Presentation of Forensic Evidence

In May, 2004, Hautanen and Reilly asked the court to deny LaGuer a new trial because DNA evidence "in this case, which defendant himself initiated, demonstrate to a

[77] Commonwealth's Opposition to Defense Motion to Stay Execution of Sentence 12 January 2012, 1p

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

[79] Report, State Police Post Conviction Evidence Assessment, Gwen B. Pino, 14 August 2000

80 ADA Joseph J. Reilly, III, 15 May 2000 pg 17,19

81 Telegram, DNA finding difficult to rebut by Matt Bruun 31 March, 2002

82 Telegram, Conte Rejects LaGuer's Claim by M Bruun 15 February 2004

83 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.")

84 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."

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

mathematical certainty that he committed the crimes of which he was convicted. As such, further litigation is unnecessary and pointless." [86]

"In 1984 we proved Mr. LaGuer's guilt beyond a reasonable doubt, that is to a moral certainty. In 2002, DNA testing has proved Mr. LaGuer's guilt to a mathematical certainty." [87] They mistook the "random match" probability (i.e., the probability of two men sharing LaGuer's DNA profile in the human population) with the "source probability" (i.e., probability that a stain from a crime scene originated from LaGuer.)[88] The improper conflation of random match probability with the probability of guilt is the "ultimate issue error". FSA could not provide a "source probability" because such analytical work required FSA to do more than the "blind testing" they had agreed to do.[89] Prosecutors incorrectly equated "random match" probability as proof of guilt.

Prosecutors Illegally Wire-tapped LaGuer's Lawyer Conversations

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 Number 33698) to this violation of attorney/client privilege. No law enforcement agency other than District Attorney had any interest in these wiretaps. Prosecutors learnt that James C. Rehnquist would ignore the DNA in his legal strategy. This insight led prosecutors 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?" When LaGuer listed the DNA reports in his 2011 motion to prove fraud in the forensic analysis, prosecutors then argued that LaGuer was not entitled to a hearing since the DNA test results have never been admitted into evidence."

Some Forensic Data Undercut Accuser's Allegations

The absence of her blood on perenial swabs and smears discredits the hypothesis of 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.[90] The Q-Tip swab used to transfer her pubic hairs yielded no blood or sperm fractions.[91] The absence of any blood on her swabs support Meadows's note that her

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[86] Commonwealth Opposition to Defendant's Eighth Motion for a New Trial 19 May 2004, p.11.
[87] Telegram, "Conte Says DNA Match Proves Guilt" by Matt Bruun, March 27th, 2002.
[88] Brief of 20 Scholars of Forensic DNA in McDaniel v. Brown S. Ct. 665, 670-71 (2010) pp. 11-13
[89] Telegram and Gazette DNA profile completed in LaGuer rape case by Matthew Bruun 7 February 2002 ("He's reported these results, so its absolutely clear that the work was done blindly," defense attorney David M. Siegel said explaining why FSA was presenting the analysis of the 1983 evidence before testing the reference sample from LaGuer.)
[90] MSPCL Nov. '83 report, Items 18 ("No seminal fluid or sperm cells were detected on the swabs."); MSPCL Nov. '83 report, Items 15 and 16 ("No sperm cells or seminal fluid were detected on the slides."); Report Number 1, Forensic Science Associates, 15 August 2000, p 4 ("Microscopic examination of the cellular debris revealed a low to moderate number of epithelial cells and numerous yeast cells; no spermatozoa were detected from either swab even after the non sperm cells were digested away.")
[91] 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.")

"anus showed no blood, abrasions or lacerations." [92] David Arnold of the *Boston Globe* interviewed a physician familiar with the case who doubted key aspects of her account.

MSPCL Grant testified that he had reviewed all police reports.[93] Patrolman Monahan quoted emergency room physician Siegel as reporting semen in her vagina and throat. Siegel disputes making this statement. According to Dr. Ed Blake, "Twenty years ago, scientists would not have been able to detect the evidence."[94] How could Grant detect a 0.03 nanostain prior to DNA sequencing machines? Cellmark could not confirm if the stain was even spermatozoa.[95] MSPCL officials were unsure if the analysis was even performed.[96]

Judicial Conflict of Interest

Judge Timothy S. Hillman, who had presided over the legal proceedings and analysis, had previously been a lawyer to Plante's family.[97] Michael Hillman, Judge Hillman's younger brother, attended High School with Barry.[98]

Police photographed a scratch on his back.[99] ADA Lemire never disputed that LaGuer that had scratched himself on a picnic table.[100] Other police photos showed that LaGuer's left hand had no abrasions consistent with her assault. [101] This evidence exculpates him.[102] Plante was hit very hard on the right side of her face.[103] (In Harper Lee's classic novel To Kill a Mockingbird, the argument for the accused rapist Jim Crow's innocence is the bruising on the right side of the false accuser's face; Crow had no use of his left arm owing to a childhood accident, and only a left-handed person could have dealt her those kinds of injuries.)

Prosecutor Misinterprets Original Forensics

In his motion for a new trial, LaGuer argued that his hampering the prosecution's ability to collect his saliva was not motivated to shroud inculpatory blood type evidence, since not a single piece of crime scene evidence inculpates him.

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[92] Burbank Hospital records of July 1983.

[93] 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

[94] 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)

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

[96] 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."); Report 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.")

97 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.")

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

99 Follow Up, Investigation Report by R N Carignan of 15 July, 1983

100 Trial Transcript, February 1984, Closing Statement by ADA Lemire

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

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

103 Testimony, Grand Jury, R. N. Carignan, August 2, 1983.

At trial, Lemire had two pieces of evidence from the crime scene. ADA Lemire was free to request retesting with a new saliva sample.[104] 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 deposited on the sock."[105] 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."[106]

On the basis of these forensics the prosecutor requested a saliva sample from LaGuer on October 21, 1983 for blood typing comparison.[107]

Lemire did not expect this case to go to trial, nor could he make heads or tails of the state forensic report. Plante was a Type O secretor.[108] Her bloodtype was compatible with the perspiration on the sock, not the more logical blood on the napkins.

Lemire did not want to risk retest. If LaGuer was Type B, then he could not be tied to the sock. If he was Type O, then the blood in napkins could not be tied to either Plante or LaGuer. The reason Lemire was so puzzled over the state forensics is that the MSPCL had misreported Plante's O Type blood in the napkin as B Type.[109] In 2000, FSA said that the blood in napkins "is the same as the genetic profile from Plante."[110]

In the end, Lemire knew all the twelve white jurymen needed in this case was a white woman identifying a black man of rape.

In October 1983 LaGuer had a real distrust of Carignan and a basis for not cooperating with him. 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 been from the hospital. He testified that she was lying in a puddle of blood; his own report claims one that

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[104] LaGuer's fear of submitting a saliva sample has a context of Carignan discounting, distorting, and destroying evidence. In 2007, Hautanen told the SJC that LaGuer had thwarted their ability to inculpate him with a blood on napkin that she knew FSA had earlier had traced to Plante. In 2007, Hautanen's use of this report only lent credence to his fears.

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

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

[107] 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.)

[108] State Police, Crime Lab, Serological Blood Supplemental Report by Gwen Pino, 17 Feb. 1988

[109] Boston Globe, DNA testing faults evidence by David Arnold 15 February 2003 (For many years prosecutors had "insisted that the blood on the tissues belonged to LaGuer. Parole boards and appellate judges have kept LaGuer in prison partly because of that assertion.")

[110] Report number 1, FSA, August 2001, pp 10

smelled of urine. In 1985, the judge ruled that Carignan "acknowledged the inconsistencies discussed above, but denied any purposeful attempt to mislead the grand jury."

In April 1989, the defense averred in a brief that LaGuer could not be guilty because his blood type was different than perspiration on the assailant's sock. Judge Mulkern rattled prosecutors. In his papers,[111] Lemire had claimed that Plante may have been gagged with this sock, so the test had detected her saliva. And the blood on napkins did not exclude LaGuer from suspicion. Mulkern asked if there was any evidence of her gagging on a sock. Under cross examination, Plante was asked when (not if) she was gagged with a sock.[112] This question had no factual basis. While quoted as claiming she been gagged, the context of her statement included her also gagging on her own blood. [113] A pretrial MSPCL found no blood on the sock.[114] A post trial MSPCL test revealed also no saliva.[115] These facts absolutely undercut the sock gagging theory. (What remains proves the axiom that the facts and the truth have little to do with each other.) In February 2012 Judge Tucker again misread the record in asserting "Plante maintained that the sock was used by the assailant to gag her."[116]

In 2011, the prosecution once again fails to cite a single piece of crime scene evidence it could have used prior to trial to inculpate LaGuer. Neither the perspiration on the sock (O-Type), nor blood on the napkins (O-Type), inculpated LaGuer, a possessor of B-Type. The finding that LaGuer deprived prosecutors "of the ability to use forensics in the prosecution" [117] by not providing his saliva assumes, contrary to all evidence, that a genuine bloodtyping test would have revealed incriminating evidence. That, to put matters plainly, is also the rulings fallacy.

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[111] See. Commonwealth's Memorandum in Opposition to Defendant's Mass. R. Crim. P. 30(b) Motion for New Trial, 27 April 1989, indicating that LaGuer's "dog tags, the only evidence of his blood type apparently known at the time of trial, indicated that he was Type O blood." But only from debriefing Carignan, whom admittedly noted LaGuer's military gear, Tr 378, could prosecutors have known about these dog tags.

[112] 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, accepting the premise of his question: "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). What Plante had actually averred in her trial testimony has been twisted through certain dubious arguments.

[113] 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."

[114] 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.").

[115] Testimony of State Police Analyst Karolyn M. LeClair, 22 May 1989 pp93. (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.")

[116] Commonwealth's Response to the Supplemental Memorandum in Support of LaGuer's Ninth Motion for a New Trial. 23 November 2011, p.3

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

While LaGuer swapping his saliva with another inmate seems damning, a genuine saliva sample supported his innocence because, "the result would have provided evidence of his innocence rather than a false impression of his guilt." (Esquire May 1994)

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."[118] But Hautanen had admitted that items previously in her office "aren't there anymore."[119] The sock and knife disappeared. A series of fingerprints from a telephone and from a hair dryer disappeared.[120] A partial from a Pepsi can disappeared.[121] In 2007, the SJC held "that the Commonwealth could not place [LaGuer] in the victim's apartment by means of any evidence, including fingerprints or any other physical evidence."

Racial Bias in the Jury Deliberation

In 1991 a challenge to his conviction went to the Supreme Judicial Court which rendered a landmark ruling. In one affidavit, corroborated by the jury foreman,[122] one juror had remarked, "The goddamned spic is guilty just sitting there; look at him. Why bother having a trial? "The SJC asked the trial judge to afford LaGuer a new trial if the allegations were "essentially true."

In his 2012 ruling, Judge Tucker revisits the racism affair and regrettably finds that it was one of "two known instances where LaGuer skewed evidence" in this case. The Judge reanimates a 1983 ruling to describe that the racial slurs "as well as other allegations set forth in Nowick's affidavit, were not corroborated by the jury foreman or by any other jurors, despite the fact that Nowick's affidavit sets forth they were during jury deliberations."[123] In fact, jury foreman, James Dalzell was emphatic in his June 1991 interview with State Troopers, confirming the first two paragraphs of Nowick's affidavit. "The first two paragraphs, racism was brought up, and I asked the jury body to knock it off." 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 his ruling, Judge Tucker denied what the prosecution did not dispute: LaGuer's characterization of this jury bias affair. To conclude that LaGuer is responsible for this racial stain on the verdict is shameful and misplaced blame. *See*, *Commonwealth v. LaGuer*, 36 Mass. App. Ct. 310 (1994) (Fine, J. dissenting) ("Surely, given their

[118] DA John J Conte's unpublished response to a Boston Globe story entitled "Results could Lead to LaGuer's Exoneration" 15 February 2002
[119] Transcript 9 January 2002, pp 14-15
[120] A series of photographic exhibits on file with attorney.
[121] Follow Up, Investigative Report by R Cariganan, 15 July 1983, p.3
[122] State Police Tpr. Richard D. McKeon and William Kokocinski 6/13/91 interview juror James Dalzell
[123] Memorandum of Decision on Defendant's Motion for New Trial and Evidentiary Hearing and Commonwealth's Motion to Dismiss 27 February 2012, p. 17

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.")

When a reporter asked one of the twelve white jurymen to reflect on the trial 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."[124] Another juror commented on the case.[125] Hautanen testified before 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."[126] "A number of reporters have concluded that at the very least, his trial was a pretty odoriferous piece of business."[127]

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 from when she was face to face with her assailant between 9 pm to 5 am period.

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 had to say 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 pm. Elizabeth Bromes, LaGuer's sister, testified that she left her brother in front of Cumberland Farms at approximately 9:30 pm (Tr. 443).

What happened next is not the stuff of a Law and Order episode. 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, razing

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

[125] 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.)

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

[127] Boston Globe, "The Best PR Man Behind Bars" by Mark Jurkowitz 9 January 1996

his alibi. He claim to telephoning Pouliot's home from the Café, then stayed when her sister told him that Tina was not home. (Tr. 490-494). This account is demonstrably false, but consistent with what Ettenburg had told Judge Robert V. Mulkern. 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 LaGuer's request for a hearing and 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, the District Attorney alleges that a January 17, 1984 letter from then ADA James R. Lemire to defense counsel Peter L. Ettenberg is fraudulent. In support of this claim, prosecutors had Ettenberg sign an affidavit that he first saw this letter in 2010. (A request of District Attorney Early's server should reveal their e-mail draft affidavit to Ettenberg.) 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 is incredulous because Ettenberg (a) had passed on his trial file in 1984 to appellate counsel, [128] (b) had no memory in 2001 of his own pre-trial request to retest a forensic specimen, [129] (c)does not preclude that he was in Barbados when his staff may have received the disputed letter. (Ettenberg's passport can be subpoena.)

When Ettenberg has no memory of his own pretrial request for a forensic specimen, it is foolhardy to equate his three decade memory as proof that the letter is unauthentic. Ettenberg had not seen his trial file in twenty-eight years, at best he simply could not recollected said letter.

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128 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."

129 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."

Judge Tucker's legal analysis is flawed and factual conclusions are unwarranted and unreasonable. The content of this disputed letter is generally consistent with what Lemire and Ettenberg stated in their separate affidavits. Lemire averred in his April 30, 2010 affidavit how he only made plea deals offer with the approval of the District Attorney, a fact made abundantly clear in the disputed 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 disputed letter; Lemire stated in his affidavit that he was concerned over the health of Lenice Plante, a concern also noted in the disputed letter. Lemire, does little more in his affidavit than set forth his general office practice. Prosecutors do not assert that Lemire did not draft the disputed letter or offer any proof that precludes a support staff writing it on his behalf. There is no evidence from Lemire that his disputed letter is unauthentic or fabricated. Prosecutors have offered no forensic document expert affidavit in support of forgery or linguistic expert testimony to support their naked charge that the unsigned letter is not stylistically consistent with its author. His disputed letter adds, finally, no additional support than Ettenberg's April 2010 affidavit.

LaGuer's attorney submitted this disputed letter in good faith. This disputed letter pertains to a pretrial plea offer that never materialized because LaGuer asserted factual innocence. This is not an issue central to this court proceeding or its truth-finding process. Cf. hug v. Gargano & Associates, P.C., 76 Mass.App. 520, 527-528 (2010); Passlogix, Inc. v. 2FA tech, LLP., 708 F.Supp.2d 378 393 (2002)

The fact that his letter is unsigned is not peculiar, because the District Attorney's office has a long history of releasing unsigned letters and court pleadings. In ADA Hautanen's papers to dismiss she included an unsigned 1991 petition to the Supreme Judicial Court.[130] 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."[131] This fraud charge is further undercut by her earlier admission that materials previously in her files "aren't there anymore."[132] Since Lemire's disputed letter could very well have been among those alleged missing files, the prosecution's assertions of fraud are unwarranted. Prison regulations [103 CMR 403 Inmate Property] limit the volume of legal material of all prisoners to one cubic foot. When LaGuer discovered this disputed letter as a result of writing a bibliography of materials, he made public use of it. However, this pretrial offer has been in the public domain since November 1987.[133] It was not until prosecutors felt a need to find an issue to deflect the focus from prosecutorial malfeasance that they decided to allege fraud. After November, 1987 LaGuer has argued this plea offer at all his parole hearings. When their purpose is so clearly defined to have LaGuer's Motion

[130] See Exhibit 10 of Commonwealths motion to dismiss of 8 September 2011.
[131] Memorandum of Decision on Defendant's Motion for New Trial and Evidentiary Hearing and Commonwealth's Motion to Dismiss 27 February 2012, p. 13
132 Transcript 9 January 2002, pp 14-15

[133] *Supra*, note 9.

for a New Trial dismissed, this claim of fraud should be taken with a lot more skepticism than it was afforded. At a minimum, LaGuer should have been granted an evidentiary hearing and a reasonable time to prepare, challenger the affiants Ettenberg and Lemire about matters that might expose their weakness of recollection, bias, and possible collusion with prosecutors. The finds of this Court merit reconsideration.

In conclusion, LaGuer respectfully requests for all the reasons set forth that he be granted an evidentiary hearing according to Massachusetts Rules Of Criminal Procedures 30(c)(7) and ultimately a new trial.

Respectfully submitted,
BENJAMIN LAGUER

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CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of April, 2012, a copy of Defense Motion for Reconsideration of Denial of Motion for a New Trial was served in hand to Worcester County District Attorney Joseph D. Early, Jr., Courthouse, Room G301, 225 Main Street, Worcester, MA 01608.

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Robert E. Terk, Esq.