

COMMONWEALTH OF MASSACHUSETTS
SUPERIOR COURT DEPARTMENT
FOR THE TRIAL COURT

Worcester, ss

Criminal Docket
Nos.:83-03391-

Commonwealth

v.

Benjamin LaGuer

DEFENSE
MOTION TO STAY EXECUTION OF
SENTENCE PENDING FINAL JUDICIAL
ADJUDICATION

Now comes Benjamin LaGuer, through his counsel, in the above-entitled matter , who petitions this Honorable Court, pursuant to Massachusetts Rules of Criminal Procedure 31(a) for his life sentence to be stayed pending the final adjudication of his April 2011 Motion For A New Trial.

The guidelines for a superior court judge to issue a stay of sentence pending appeal are established by DiPietro v. Commonwealth, 369 Mass. 964 (1976); Commonwealth v. Allen, 378 Mass. 489 (1979); Commonwealth v. Hodge, 380 Mass. 851 (1980); Hagen v. Commonwealth 437 Mass. 374 (2002) and its progeny of cases.

The standard rests within the sound discretion of this Honorable Court and which may be exercised if the “circumstances warrant without a requirement that there be a finding made of a reasonable likelihood of success on appeal” quoting Allen, supra. This Court may order a stay of LaGuer’s sentence if two elements which guide its discretion are fully met. Both are met in this instant case. The First, the requirement does not demand that LaGuer’s defense establish that his appeal is more likely than not to be successful, only that he presents “an issue which is worthy of presentation to an appellate court, one which offers some reasonable possibility of a successful decision in the appeal.” Commonwealth v. Hodge, 380 Mass. 851, 855 (1980) In this respect, the Massachusetts practice is more liberal than its federal counterpart. Compare 18 U.S.C. 3143(b)(B)(the defendant must establish that the appeal actually “raises a substantial question of law or fact likely to result in” a favorable outcome.) The other fact that informs a judge’s exercise of discretion in granting a stay is the question of security: whether the defendant will flee, commit another crime or present a danger to the community. Id., at 855.

A. BENJAMIN LAGUER'S MOTION FOR A NEW TRIAL CONTAINS MERITORIOUS ISSUES OF FACT AND LAW SUCH THAT A STAY OF HIS SENTENCE IS APPROPRIATE

In this case, LaGuer has more than met his burden of demonstrating meritorious issues of newly discovered and withheld evidence “worthy of presentation to an appellate court, one which offers some reasonable possibility of a successful decision in the appeal.” *Id.* In its briefs, the Commonwealth does not dispute the materiality, relevancy or credibility of the newly discovered evidence of Annie K. Demartino. The objection of prosecutors rest on the issue of whether LaGuer, his lawyer or investigators had sufficient notice as a matter of law to trigger a due diligence obligation to discover this alleged newly discovered evidence prior to a ninth motion for a new trial. The argument prosecutors have posited is clearly contrary to well established and long settled common law. In its response, the Commonwealth asserted “Your Honor, we didn’t know about her” referring to the identity of Demartino, the complainant’s caretaker. It logically flows that if the prosecution was wholly unaware of Demartino, then LaGuer would have had even less an opportunity to discover her or what potentially exculpatory evidence she would have averred. The forensic DNA evidence is hugely problematic with its evidence of prosecutorial fraud. The forensic evidence, which was part of a post-conviction effort to uncover potentially exculpatory evidence, is far from a settled matter. This forensic evidence awaits judicial findings of fact and law as well as competent forensic opinion.

The newly discovered and withheld evidence in this case can be said to be more significant because, despite prosecution claims of “very strong and compelling” evidence of guilt to the contrary, the Supreme Judicial Court held, in 2007, “What is exculpatory is that the Commonwealth could not place the defendant in the victim’s apartment by means of any evidence, including fingerprints or any other physical evidence.” See *Commonwealth v. LaGuer*, 448 Mass. 585 (2007) LaGuer’s conviction life rests firmly on the altar of a single eyewitness account.

Both parties have submitted lengthy briefs and responses sufficient for this Court to conclude that LaGuer has met and more than exceeded his burden of demonstrating “an issue which is worthy of presentation to an appellate court, one which offers some possibility of a successful decision in the appeal.” See *Hodge*, *supra.*, at 855.

B. BENJAMIN LAGUER HAS NO HISTORY OF VIOLENCE OR DEFIANCE THAT WOULD DISQUALIFY HIS RELEASE ON A STAY OF SENTENCE, IN FACT HE HAS SHOWN AN UNCOMPROMISING BELIEF IN OUR CRIMINAL JUSTICE SYSTEM

The legal criterion that LaGuer will be a responsive and dutiful citizen, not flee, commit crimes or present a danger to the community if released, is one critical burden he can easily meet. In September 2010, the Massachusetts Department of Corrections published the scores of a nationally recognized evidence-based risk assessment tool entitled the Correctional Offender Management Profiling for Alternative Sanction, or COMPAS (Exhibit 1). Benjamin LaGuer scored the lowest measurable risk (1 out of a 10 point scale) predictor for violence and recidivism.¹ LaGuer has strong family ties and roots in the community. He graduated magna

¹ Northpointe Institute, Correctional Offender Management Profiling for Alternate Sanctions, Overall Risk Potential, Screener Larry Lombardi, 20 September 2010; Dr. Lawrence Hipshman, State Forensic Pathological Evaluation Report of 17 February

cum laude from Boston University. He has a variety of housing, employment and education options within the legal jurisdiction of this Court. LaGuer has never been diagnosed with a mental disorder. He has no history of deviance or violence.²

Benjamin LaGuer, 48 years of age, has been claiming actual innocence for a quarter of a century. LaGuer grew up in New York City 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. He attended high school in Leominster; was elected President of Latino Student Body; and was a member of the drama class. In 1979 he enlisted in to the Army's elite 82nd Airborne Division, and later served in Germany. LaGuer was disciplined for being present when a soldier sold a \$20 cube of hashish. In June 1983 he was honorably discharged. He completed college applications.

In conclusion, the trial judge imposed a life sentence that made LaGuer presumptively paroled after fifteen years of prison confinement at MCI Walpole. He has completed his 28th year in prison owing to the integrity of his factual innocence claims and respect for the dignity of his father's name. He could have been released long ago upon his admission of guilt, if not years sooner upon acceptance of a pretrial plea bargain offer. The newly discovered and withheld evidence of Annie K. Demartino is meritorious and exceeds the factual and legal threshold for this Court to confidently exercise its discretion to stay the execution of LaGuer's sentence pending final adjudication. The DNA evidence will permit LaGuer on retrial to establish his factual innocence beyond a reasonable doubt. On behalf of Benjamin LaGuer, his defenders, and public advocates all pray this Court orders his release under such terms as this Court deems fit and appropriate.

Respectfully submitted;

Benjamin LaGuer,

Dated: January 9, 2012

By His Counsel

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1984. To prepare his report, Dr. Hipshnan met with the twenty-year old inmate for three hours and reviewed (with LaGuer's consent and signed waivers) the Department of Mental Health's (DMH) case file. DMH psychologists had been collecting observational and evaluative data on LaGuer from his July, 1983, pretrial detention through his February, 1984, sentencing. (Tr 610-611); Dr. Daniel Weiss, State Forensic Psychological Evaluation Report, Not Sexually Dangerous Report of 22 May 1984: "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."; 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)

² Judge Robert V. Mulkern commented that LaGuer "doesn't have a background of crime or violence." (Tr. 617)

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 9th day of January, 2012, that a true copy of the within 'Defense Motion to Stay Execution of Sentence Pending Final Judicial Adjudication', by mailing same, first class postage prepaid to Jane Sullivan, Esq., Chief Appeals Unit, c/o District Attorney Joseph D. Early, Jr., Judicial Regional Courthouse, Room G301, 225 Main Street, Worcester, MA 01608.

Robert E. Terk, Esq.