COMMONWEALTH OF MASSACHUSETTS

WORCESTER, *ss.* SUPERIOR COURT DEPARTMENT
OF THE TRIAL COURT
INDICTMENT NOS. 83-103391 to -94

COMMONWEALTH OF MASSACHUSETTS)
)
v.) COMMONWEALTH'S
) RENEWED OPPOSITION
) AND MOTION TO RECONSIDER
BENJAMIN LAGUER,) ALLOWANCE OF "LIVE
DEFENDANT) TESTIMONY"

FILED
SEP 08 2011
ATTEST: CLERK

The Commonwealth hereby (1) renews its request that the Court summarily deny defendant's **ninth** motion for new trial without a hearing in accord with Superior Court Rules 9 and 61A and Mass. R. Crim. P. 30 (c) (3), because the motion fails to comply with the mandatory procedural rules for filing new trial motions "and has **no factual support**" (*see* "Commonwealth's Opposition to Laguer's Ninth Motion for New Trial and Evidentiary Hearing" (Docket # 172)), and (2) respectfully asks the Court to reconsider its order of 9/1/11 allowing defendant to present "live testimony" from **27 possible defense witnesses** (*see* "Defendant's Request For Evidentiary Hearing To Establish The Following Testimony And Evidence From These Listed Witnesses" (Docket # 175)) without first requiring defendant to **demonstrate that the witnesses would "provide material testimony,"** by means of **sworn "affidavit[s] stating what [the witnesses'] testimony would be or whether [they] would be willing to testify,"** *Commonwealth v. Colantonio*, 31 Mass. App. Ct. 299, 302 (1991), as mandated by Mass. R. Crim. P. 30 (c) (3).

ARGUMENT

Because defendant has filed **no sworn affidavits** or other admissible evidence showing that his claims have merit and that any of his 27 "Listed Witnesses" would provide material testimony **and** are willing to testify on his behalf, pursuant to Mass. R. Crim. P 30 (c) (3) **he is not entitled to an evidentiary hearing with "live testimony,"** and **his ninth Motion for New Trial should be summarily denied.**

A new trial may be granted "at any time if it appears that justice has not been done," Mass. R. Crim. P. 30 (b), and the judge must make "such findings of fact as are necessary to resolve the defendant's allegations of error of law." *Id.* (emphasis added).

"A judge has considerable discretion as to the method by which a motion for a new trial is to be decided." *Commonwealth v. Huenefeld*, 34 Mass. App. Ct. 315, 323, *rev. denied*, 415 Mass. 1103 (1993). "'A party has no right to insist that oral evidence be heard,'" and "[t]here is no constitutional error in deciding the motion for new trial on affidavits." *Commonwealth v. Stewart*, 383 Mass. 253,259,260 (1981) (citations omitted). Rule 30 (c) (3) mandates that "**[m]oving parties shall file and serve affidavits where appropriate in support of their respective positions,** and that "[t]he judge may rule on the issue or issues presented by such motion **on the basis of facts alleged in the affidavits without further hearing if no substantial issue is raised by the motion or affidavits.**" Mass. R. Crim. P. 30 (c) (3) (emphasis added), *quoted in Stewart*, 383 Mass. at 257. *See* Superior Court Rules 9 & 61A. In fact, "'[t]he primary purpose of [Rule 30 (c) (3)] is to encourage disposition of post conviction motions upon affidavit.'" *Stewart* at 260 (quoting Mass. R. Crim. P. 30, Reporter's Notes 1979).

Under Mass. R. Crim. P. Rule 2, rules of criminal procedure such as Rule 30 (c) (3) "**shall** be construed to secure simplicity in procedure, fairness in administration, and the elimination of expense and delay." Mass. R. Crim. P. 2 (a) (emphasis added). "The word 'shall' in this context, where substantive rights are involved, indicates that the action is mandatory." *Commonwealth v. Kennedy*, 435 Mass. 527, 530 (2001).

The procedural rules are not "merely guidelines or suggested procedures to which courts and counsel need adhere only as will further their particular interests. **They have the force and effect of law.**" Mass. R. Crim. P. Rule 2, Reporter's Notes (emphasis added).

As with prosecutors, "a high standard of conduct is demanded of defense counsel. *See* S.J.C. Rule 3:22A, [*Disciplinary Rules Applicable to Practice as a Prosecutor or a s Defense Lawyer*] . . . ." Mass. R. Crim. P. 2, Reporter's Notes. "**A disregard for these rules of court or a failure to adhere to their provisions are abuses of the system** which can be expected to produce problems in the administration of justice and unfairness to the Commonwealth, defendants, and the public, and which, therefore, should not be tolerated by either the trial or appellate courts." *Id.* (emphasis added). This is especially true as to this defendant, who has filed

eight (8) previous new trial motions and numerous appeals since his 1984 trial; by this time, he should know what the rules require.

Applying the rules of criminal procedure, it is clear that defendant is **not** entitled to an evidentiary hearing on any of the issues raised in Laguer's Motion or Laguer's Memorandum of Law (Docket # 168), for the following reasons.

Defendant's **ninth** new trial motion sets forth **two** nebulous claims: (1) "The laboratory biological evidence and analytical assumptions underlining the result of Forensic Science Associates (FSA) is [sic] partly exculpatory and partly invalid because prosecutors withheld key evidence" (Laguer's Motion at 1); and (2) "Annie K. Demartino, a former mental health aide, has revealed a previously undisclosed relationship between complainant and [a] third party suspect . . . ; her use of antipsychotic pharmaceuticals and; her indiscriminately (falsely) accusing other colored man of the same disputed offences [sic]." (Laguer's Motion at 1).

First, because defendant's **ninth** motion new trail fails to comply with the requirements of Superior Court Rule 61A, which mandates that "[t]he motion **shall** . . . contain **(5)** a statement identifying **all proceedings for direct review of the conviction and the orders or judgment entered and (6)** a statement identifying **all previous proceedings for collateral review of the conviction and the orders or judgments entered,"** Superior Court Rule 61A (emphasis added),[1] it is unclear whether any of the issues raised in Laguer's Motion or in the meandering tangle of arguments set forth in Laguer's Memorandum of Law are procedurally barred by waiver or collateral estoppel -- issues that must be considered in light of Laguer's **eight previous new trial motions and multiple related appeals**. *See, e.g, Commonwealth v. Laguer*, 20 Mass. App. Ct. 965 (1985) (holding in part that (1) the motion judge did not abuse his discretion in denying defendant's motion for psychiatric examination of complainant; (2) judge acted within bounds of sound discretion in delimiting period of psychiatric records examination to reasonable period before and after rape and subsequent identifications; and (3) defendant was not prejudiced by trial judge's ruling that defendant could not inquire of physician as to complainant's earlier psychiatric history).

Second, "in a rule 30 (b) motion after trial [and particularly in a **ninth** new trial motion] the initial burden is on the moving defendant to present some articulable reason that the motion

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[1] *See* "Commonwealth's Opposition to Laguer's Ninth Motion for New Trial and Evidentiary Hearing," (Docket # 172)), incorporated herein by reference.

judge deems a credible indicator that the presumptively proper trial proceeding was constitutionally defective or created a manifest injustice, above and beyond credulity-straining contentions." *Commonwealth v. Wheeler*, 52 Mass. App. Ct. 631, 638 (2001); 30B Kent B. Smith, *Massachusetts Practice: Criminal Practice & Procedure* § 41.18 (3d ed. 2007 & Supp. 2010) (in a new trial motion, **defendant has the burden of proving "facts which are neither agreed upon nor apparent on the record"**) (emphasis added). "In posttrial proceedings, the defendant bears the burden to rebut the presumption that [he] had a fair trial." *Commonwealth v. Edward*, 75 Mass. App. Ct. 162, 164 (2009).

In this case, as in *Wheeler*, defendant failed to meet his burden of proof and "failed to raise a substantial issue necessitating [an evidentiary] hearing," *id.*, because "the adequacy of [defendant]'s factual showing [is] wanting." *Wheeler*, 52 Mass. App. Ct. at 639. As such, defendant is not entitled to an evidentiary hearing or a new trial.

"Reliance upon unsubstantiated facts appearing only in memoranda of law is improper." *See Zuroff v. First Wis. Trust Co..*, 41 Mass. App. Ct. 491, 492 (1996). As with an appeal, a party filing a motion for new trial under Rule 30 (b) has "a duty to assist the court in its consideration of that [motion]." *Cameron v. Carelli*, 39 Mass. App. Ct. 81, 85-86 (1995).

Defendant has failed to meet his burden, because both Laguer's Motion and Laguer's Memorandum of Law are "confusing, prolix, and contain[] many unsupported factual allegations," *Brossard v. West Roxbury Div. of the Dist. Ct. Dept.*, 417 Mass. 183, 184 n.2 (1994), and his five (5) volumes of "exhibits" are simply "a confusing mélange of copies of documents." *Id.* at 184.

Defendant has included no table of contents, no index, no page numbers, and no dividers or tabs to organize and identify his "exhibits," and the "exhibits" as arranged in the five (5) bound volumes filed with the Court fail to correspond to either his **118-item "list of exhibits"** (Docket # 174) or the **138 footnotes** in Laguer's Memorandum of Law.

It is not the Court's duty, or the duty of opposing counsel, "to ferret from the [] papers in the record" those documents that may support defendant's claims. *Kunen v. First Agric. Natl. Bk.*, 6 Mass. App. Ct. 684, 690-91 (1978). Defendant's hodgepodge of unidentified, unorganized, duplicative, and often irrelevant "exhibits" provides no adequate basis for the Court to consider his claims. Compare *Callahan v. Board of Bar Overseers*, 417 Mass. 516, 520 (1994) ("The 'record' is rife with irrelevant, confusing, repetitive, and inflammatory memoranda, . . .

letters, and other documents which were haphazardly 'organized'" and "in no way are related to the issues in this appeal, except that they helped us to conclude that this appeal is frivolous"); *Shawmut Community Bk., N.A., v. Zagami*, 411 Mass. 807, 810-12 (1992) (where a party's "appendix was a 'diffusely arranged' collection of material containing some documents that were incomplete, irrelevant, duplicative, or illegible," and the pages "were not numbered consecutively nor was the material arranged in chronological order," the court found that "'[t]he grave and almost universal failure to present an adequate appendix prevent[ed] a characterization of inadvertence,'" but compelled "'a conclusion that there ha[d] been serious "negligence or a lack of attention and negligence,"'" which justified court's refusal to consider most of the issues) (citations omitted).

Next, even if defendant's five (5) volumes of "exhibits" were properly organized and identified and properly cited in defendant's filings, the "exhibits" do not support the need for either an evidentiary hearing or a new trial, because they include **no sworn affidavits from any of the 27 "listed witnesses" whose names defendant recently filed with the court.** (*See* Docket # 175). These "listed witnesses" include the Governor of Massachusetts, Deval L. Patrick; sitting Superior Court Associate Justice James R. Lemire; former District Attorney John J. Conte; Leominster Mayor Dean Mazzarella; Attorney James C. Rehnquist; Assistant District Attorney Katherine E. McMahon; and Massachusetts State Police Colonel Maureen J. McGovern (Docket # 175), some of whom cannot be summonsed without complying with special procedures.

Defendant is not entitled to testimony from **any** of these 27 witnesses. He has made **no showing** "that [any of these witnesses] would provide material testimony" on his behalf, because his motion "was **not accompanied by an affidavit** stating what [the witness's] testimony would be or **whether [he or she] would be willing to testify.**" *Commonwealth v. Colantonio*, 31 Mass. App. Ct. 299, 302 (1991) (emphasis added), and cases cited. Rule 30 (c) (3) mandates that "[m]oving parties **shall file and serve affidavits where appropriate in support of their respective positions.**" Mass. R. Crim. P. 30 (c) (3). Because defendant has failed to comply with Rule 30 (c) (3), he has not met his burden of proving "facts which are neither agreed upon nor apparent on the record," 30B Smith, *supra*, § 41.18, and therefore has "failed to raise a substantial issue necessitating [an evidentiary] hearing." *Wheeler*, 52 Mass. App. Ct. at 638.

Next, as to the two specific issues raised in the **ninth** new trial motion, as to defendant's vague DNA and evidence-collection claim, in deciding a new trial motion raising claims of "withheld evidence" (Laguer's Motion at 1), the Court must determine whether undisclosed evidence "might have affected the outcome of the trial." *Commonwealth v. Tucceri*, 412 Mass. 401, 405 (1992). In 2000, defendant filed a motion for DNA testing (Docket # 86), which was conducted at his own expense by his own chosen expert, Forensic Science Associates, and the DNA test results -- which have never been admitted into evidence but were simply sent to the Court pursuant to Judge Hillman's procedural orders -- showed that **defendant's DNA profile, which occurs in fewer than 1 in 100 million people, matched the male DNA profile found in the pooled sperm taken from the victim.** *See Commonwealth v. Laguer*, No. 83103391, 2001 WL 1194619, at *4 (Mass. Super. Ct. May 2, 2001); *Commonwealth v. Laguer*, 2001 WL 34048060, at *4 (Mass. Super. Ct. Feb. 22, 2001).

Even if the DNA test results had been admitted into evidence in this case, the DNA tests confirmed defendant's guilt and supported the jury's verdict. As such, defendant has no right to testimony from any of the 23 "listed witnesses" who, according to defendant's wishful thinking, would testify about issues relating to evidence collection and DNA testing, namely: Deval L. Patrick, James R. Lemire, John J. Conte, Theodore Kessis, William C. Siegel, Daniel L. Hartl, Edward T. Blake, Dr. Lawrence Koblinsky, Dean Mazzarella, Kathryn M. Leclair, William P. Kokocinski, Timothy E. Monahan, Mark T. Grant, Lt. Francis J. Ptak, Lt. Arthur Caisse, Sandra P. Wysocki-Capplis, Katherine E. McMahon, Gwen Boisvert-Pino, Colonel Maureen J. McGovern, Carl Matthew Selavka, Peter J. Ettenberg, Ann M. McCarthy, and Richard Slowe. (Docket # 175).

As to defendant's claims based on memories "revealed" by Annie K. Demartino, Laguer's Motion at 1, any "newly discovered evidence" must "have been **unknown to the defendant or his counsel** and **not reasonably discoverable by them at the time of trial (or at the time of the presentation of an earlier motion for a new trial),**" *Commonwealth v. Grace*, 397 Mass. at 303, 306 (1986) (emphasis added), and "**[t]he defendant has the burden of proving that reasonable pretrial diligence would not have uncovered the evidence.**" *Id.* (emphasis added). To date, since his trial in 1984, defendant has filed **nine (9)** motions for new trial. Nowhere in Laguer's Motion or Laguer's Memorandum of Law does he even mention this burden of proof set forth in *Grace*, much less offer sworn affidavits or any other evidence to

meet his burden. *Grace* at 306. As such, defendant has no right to testimony from the remaining 4 "listed witnesses," who allegedly would testify about evidence that may or may not qualify as "newly discovered," namely: Annie K. Martino, Dr. John Silber, James C. Rehnquist, and Eric Goldscheider. (Docket # 175). The alleged testimony from Dr. John Silber, James C. Rehnquist, and Eric Goldscheider, who have no personal knowledge of what Annie K. Demartino may remember from the early 1980s, also would be barred as hearsay.

In addition, although defendant's "exhibits" include typed transcripts of two **unsworn** interviews involving "listed witness" Annie K. Demartino, defendant has filed no sworn deposition transcript, and **no sworn "affidavit** stating what [Annie K. Demartino's] testimony would be or **whether [she] would be willing to testify.**" *Commonwealth v. Colantonio*, 31 Mass. App. Ct. 299, 302 (1991).

In short, because (1) defendant's DNA results have not been admitted into evidence in this case, and, in any event, confirm his guilt; (2) defendant has failed to even mention, much less meet, his burden of showing that his alleged "newly discovered evidence" was "unknown to the defendant or his counsel and not reasonably discoverable by them at the time of trial (or at the time of the presentation of an earlier motion for a new trial)," and "that reasonable pretrial diligence would not have uncovered the evidence," *Grace*, 397 Mass. at 306; and (3) defendant has filed no sworn affidavits from **any** of his 27 "listed witnesses" (Docket # 175) as required by Rule 30 (c) (3), defendant has failed to raise any "substantial issue" supported by reliable, admissible evidence in his **ninth** motion for new trial, and, for the ninth time, has failed to "rebut the presumption that [he] had a fair trial." *Edward*, 75 Mass. App. Ct. at 164. Therefore, as in its original opposition (Docket # 172), the Commonwealth again respectfully asks the Court to summarily deny defendant's **ninth** motion for new trial **"without further hearing** [because] **no substantial issue is raised by the motion or [by any] affidavits.**" Mass. R. Crim. P. 30 (c) (3) (emphasis added).

Finally, it was the Commonwealth's understanding that the hearing scheduled for September 9th would be **non-evidentiary** in nature; the Commonwealth did not receive notice of the Court's September 1st order allowing "live testimony" until Tuesday, September 6th, which allowed little time to prepare for an evidentiary hearing with **27 possible defense witnesses.** *See* Mass. R. Crim. P. 30 (c) (7) ("The parties shall have at least 30 days notice of any hearing . . .").

As stated in the Reporter's Notes for Mass. R. Crim. P. 30 (c) (7), "[i]n light of the fact that the Commonwealth need not respond to every new trial motion, since some may be denied on their face as without merit, the primary objective of this provision is to avoid the problem of having the Commonwealth placed in the position of having to respond to a new trial motion without adequate time to prepare." Mass. R. Crim. P. 30 (c) (7), Reporter's Notes. In fairness to the Commonwealth and in the interests of justice, if the Court should decide that defendant's **ninth** new trial motion has sufficient merit to allow the presentation of "live testimony" despite defendant's failure to file any sworn affidavits in compliance with the mandatory requirements Mass. R. Crim. P. 30 (c) (3), the Commonwealth would ask for additional time to prepare for "live testimony" by witnesses who will actually appear for the defense.

CONCLUSION

In sum, for all of the reasons set forth above and in the Commonwealth's original opposition (Docket # 172), but primarily because, in his **ninth** new trial motion, defendant not only failed to comply with the procedural requirements of Superior Court Rules 9 and 61A, he failed to file any **sworn affidavits from any of his 27 "listed witnesses"** (Docket # 175) as required by Rule 30 (c) (3), defendant's **ninth** motion raises no "substantial issue" that would merit "live testimony."

Therefore, the Commonwealth respectfully (1) asks the Court to reconsider its order of 9/1/11 allowing defendant to offer "live testimony," and (2) again asks the Court to summarily deny defendant's **ninth** motion for new trial "**without further hearing** [because] **no substantial issue is raised by the motion or [by any] affidavits.**" Mass. R. Crim. P. 30 (c) (3).

Respectfully submitted,
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