
COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT FOR THE COMMONWEALTH
No. SJC-09765

COMMONWEALTH OF MASSACHUSETTS,
COMMONWEALTH-APPELLEE,

- v. -

BENJAMIN LAGUER,
DEFENDANT-APPELLANT.

On Further Appellate Review of a Decision
of the Appeals Court

**REPLY BRIEF OF DEFENDANT-APPELLANT BENJAMIN LAGUER
AND SUPPLEMENTAL APPENDIX**

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I. INTRODUCTION

The issue raised in Mr. LaGuer's opening brief is very clear - the Appeals Court erred in affirming the trial court's denial of Mr. LaGuer's motion for new trial because the Commonwealth violated Mr. LaGuer's constitutional rights by first suppressing, and then losing or destroying, exculpatory fingerprint evidence. Rather than address this argument head-on, however, the Commonwealth spends most of its brief misstating the record, emphasizing the horrific nature of the crime, and relying on post-trial allegations in an effort to persuade the Court to ignore the Commonwealth's clear violation of Mr. LaGuer's constitutional rights. The Commonwealth's flagrant attempt to inflame the passions and prejudices of the Court should not be tolerated.

Even the Commonwealth's arguments as to the relevant issues are meritless. First, contrary to the Commonwealth's assertion, Mr. LaGuer's trial counsel did not make a "tactical" decision to proceed to trial without the report despite knowing that the report existed. Indeed, it is clear from the record that the prosecution misrepresented to defense counsel the nature and extent of the evidence taken from the crime

scene; at no point was Mr. LaGuer's trial counsel aware that four fingerprints taken from the telephone in the victim's apartment definitively did not match Mr. LaGuer's. Second, the Commonwealth mistakenly argues that the suppressed fingerprint evidence was "cumulative" of that presented at trial. On the contrary, the record makes clear that the evidence known to Mr. LaGuer's trial counsel was quantitatively and qualitatively different than the evidence the Commonwealth wrongfully suppressed. Finally, the Commonwealth misstates the law concerning lost or destroyed evidence, and tries to impose an inappropriate and insurmountable legal burden on the defendant.

For the reasons presented in Mr. LaGuer's initial brief and in this Reply Brief, this Court should grant the requested relief to Mr. LaGuer.

II. ARGUMENT

A. THE COMMONWEALTH IGNORES ITS OBLIGATION TO TURN OVER EXCULPATORY EVIDENCE TO THE DEFENSE.

Incredibly, the Commonwealth leads its opposition by arguing that, despite the Commonwealth's suppression of the exculpatory fingerprint report for over eighteen years, Mr. LaGuer's trial counsel

somehow knew that this crucial report existed but made a tactical decision to proceed to trial without it. Comm. Br. at 31-36.¹ This argument not only is factually flawed, but also ignores well-established legal precedent requiring the Commonwealth to turn over all exculpatory evidence to the defendant.

First, the Commonwealth distorts the factual record to advance this argument. Contrary to the Commonwealth's suggestion, Mr. LaGuer's trial counsel did not know that the fingerprint report existed, or that the report showed that four fingerprints were found on the base of the telephone that did not match Mr. LaGuer's fingerprints. R. 194 (Ettenberg Aff. ¶ 5). At the time of trial, the only fingerprint evidence that Mr. LaGuer's trial counsel believed existed was falsely described by the prosecution as being a "partial" fingerprint recovered from the telephone that "could not be matched" to Mr. LaGuer. *Id.* Without the benefit of the fingerprint report, Mr. LaGuer's trial counsel understood that the "small partial" fingerprint described by the prosecutor (and

¹ References to the record appendix submitted with Mr. LaGuer's initial brief are cited "R. ____". References to the trial transcript are cited "Tr. ____". References to Mr. LaGuer's initial brief are cited "LaGuer Br. at ____". And references to the Commonwealth's Opposition are cited "Comm. Br. at ____".

by Det. Carignan during his trial testimony) was insufficient to make a match to anyone's fingerprints - which (as explained more fully below) is materially different than the actual fingerprint report's content, which shows that four fingerprints were found and that those fingerprints did not match Mr. LaGuer's fingerprints. Any suggestion that Mr. LaGuer's trial counsel knew about the report but made a "tactical decision" to proceed to trial without it is simply belied by the record.

Second, the Commonwealth asserts that Mr. LaGuer's counsel should have done more to seek out this crucial evidence. Comm. Br. at 34. Setting aside the fact that, as explained above, Mr. LaGuer's trial counsel did not know this evidence existed, the Commonwealth's argument is patently absurd, given that Mr. LaGuer's trial counsel made multiple written and oral requests, to no avail, specifically for this type of evidence. Further, the Commonwealth's argument completely ignores well-settled precedent affirmatively requiring the prosecution to turn over to a criminal defendant all potentially exculpatory evidence in its possession, even if not requested. *United States v. Agurs*, 427 U.S. 97, 103-104 (1976); *Brady v. Maryland*,

373 U.S. 83, 87 (1963); *Commonwealth v. Tucceri*, 412 Mass. 401, 404-05 (1992). In making these arguments, the Commonwealth tries to shift to the defendant the burden of seeking out exculpatory evidence. That view, however, is plainly at odds with the Commonwealth's constitutional obligations. The Commonwealth's suggestion that the law obligates defense counsel to do more than make multiple specific requests for exculpatory evidence is untenable.

Finally, the Commonwealth tries to absolve itself by claiming that the fingerprint report was never in the trial prosecutor's possession. Comm. Br. at 33. Even if true, though, this claim is irrelevant because the report itself reflects that both the State Police crime lab and Det. Carignan knew of the four non-matching prints and the report. *Commonwealth v. Martin*, 427 Mass. 816, 824 (1998) (holding prosecutor's knowledge irrelevant where police laboratory possessed undisclosed evidence); *Commonwealth v. Gallarelli*, 399 Mass. 17, 20 n.4 (1987) (same).

In short, the Commonwealth's suggestion that Mr. LaGuer's trial counsel knew about this evidence but made a "tactical" decision to proceed to trial without it is both legally and factually flawed. Accordingly,

Mr. LaGuer is entitled to a new trial.

B. THE COMMONWEALTH'S ARGUMENT THAT THE SUPPRESSED FINGERPRINT EVIDENCE WAS "CUMULATIVE" OF EVIDENCE PRESENTED AT TRIAL IS WITHOUT MERIT.

The Commonwealth argues that its wrongful suppression of the exculpatory fingerprint evidence did not prejudice Mr. LaGuer's constitutional right to a fair trial because the evidence was "cumulative of other evidence before the jury that failed to link the defendant to the crime. . . ." Comm. Br. at 38 (internal quotations omitted). This argument fails because it rests on a fundamental misunderstanding of this Court's prior holding on "cumulative" evidence, the nature of the evidence that was suppressed, and the arguments made by Mr. LaGuer. In actuality, it is legally and factually impossible to characterize the suppressed fingerprint evidence as "cumulative," because it was the best available evidence on the central disputed issue in the case, and is materially different from the other evidence presented at trial on that issue.

In *Tucceri*, this Court placed an important qualification on what can be deemed "cumulative" evidence - a qualification that the Commonwealth fails

to acknowledge in its brief. Specifically, this Court held that "[i]f . . . the undisclosed evidence is more credible than any other evidence on the same factual issue and bears directly on a crucial issue before the jury . . .", then such evidence would have influenced the jury's deliberations, and, therefore, cannot be considered cumulative. *Tucceri*, 412 Mass. at 414 (emphasis added). The suppressed fingerprint evidence satisfies this limiting definition, and thus, as a matter of law, cannot be deemed cumulative.

The only evidence at trial affirmatively identifying Mr. LaGuer as the assailant was the victim's identification purportedly based on her memory of the assault. However, this Court has repeatedly expressed serious concerns about the accuracy of such testimony, especially in the context of cross-racial identification, as occurred here. See *LaGuer Br.* at 34 n.12. These concerns are only amplified when one considers the facts surrounding the victim's identification of Mr. LaGuer. See *LaGuer Br.* at 6 (describing victim's limited ability to see the assailant), 7-10 (describing victim's initial inability to identify the perpetrator at all). By contrast, this Court has often acknowledged the value of fingerprints

in identifying wrongdoers. See, e.g., *Commonwealth v. Morris*, 422 Mass. 254, 257 (1996) (describing fingerprints as "powerful evidence"). Therefore, the suppressed evidence was "more credible" than the other evidence presented at trial on the question of the assailant's identity. *Tucceri*, 412 Mass. at 414.

Further, there is no doubt that the suppressed fingerprints bore "directly on a crucial issue before the jury." *Id.* The identity of the perpetrator was the central issue at trial, a fact acknowledged by Judge Mulkern. R. 314 ("identification is a crucial matter in this case"). And the suppressed fingerprints were recovered from an object almost certainly grasped by the perpetrator to obtain the cord used to bind the victim's hands. See *Morris*, 422 Mass. at 257 (holding that fingerprints found on object touched during commission of crime supports inference that the individual was present at the time of the crime). Accordingly, based on this Court's definition, the suppressed fingerprint evidence cannot be cumulative.

Even if the Commonwealth could resolve this legal inconsistency (it cannot), the suppressed fingerprint evidence still cannot be deemed cumulative because it is materially different from the other evidence known

to the defense at the time of trial. The Commonwealth mistakenly argues that the only value the suppressed fingerprint evidence has is as further proof that no physical evidence was available at trial linking Mr. LaGuer to the crime. But this argument both diminishes the importance of the suppressed evidence and completely misstates Mr. LaGuer's claim of prejudice.

Mr. LaGuer does not claim, and has never claimed, that the absence of his prints on the telephone *per se* proves his innocence. Comm. Br. at 39. Rather, it is the presence of someone else's prints on an instrumentality of the crime that supports his theory that another individual committed the assault. It is beyond question that there was only one perpetrator. If Mr. LaGuer could have demonstrated at trial that an unauthorized person was in the victim's apartment, and that that person grasped the base of the phone from which the cord used to bind the victim's hands was obtained, it would have substantially aided his defense that someone else - and not Mr. LaGuer - committed the crime for which he is now imprisoned.

The Commonwealth argues that suppression of the fingerprint evidence did not handicap Mr. LaGuer's defense because he only needed one non-matching print

to create a defense. Comm. Br. at 41. This argument, however, mischaracterizes the evidence at issue. The evidence known to the defense at the time of trial did not affirmatively point to another individual as the assailant. The suppressed fingerprint evidence did. All the physical evidence available at trial, including the alleged partial print², was understood by defense counsel to be inconclusive. The most that defense counsel was able to do with this inconclusive evidence was to suggest that it was left by another person, such as Jose Gomez. Mr. LaGuer did not have any direct evidence at trial affirmatively supporting his theory that Gomez or another unauthorized individual had entered the victim's apartment.

By contrast, the suppressed fingerprint evidence *conclusively* did not match Mr. LaGuer, meaning that it *conclusively* matched someone else. Had the Commonwealth disclosed this evidence prior to trial, as was its duty,

² As noted in his initial brief, Mr. LaGuer disputes that a "partial print" ever was recovered from the crime scene. LaGuer Br. at 16 n.8. Contrary to the Commonwealth's claim that Det. Carignan left a partial print with the State Police at the same time he left the victim's phone and Mr. LaGuer's fingerprint card for analysis, Comm. Br. at 2, the only analysis of fingerprints in the record refers to four fingerprints on the victim's phone - no mention is made of a "partial print." Moreover, despite the Commonwealth's repeated references to a Pepsi can recovered from the crime scene on which a partial print allegedly was found, the record contains no evidence that any such "partial print" was ever analyzed.

Mr. LaGuer could have tested these prints against prints from others, and may have been able to demonstrate to the jury that someone else, perhaps even Jose Gomez, had entered the victim's apartment and grasped the base of the victim's phone. The Commonwealth's suggestion that Mr. LaGuer needed unidentified prints to support his defense is nonsensical. Evidence actually demonstrating the presence of Gomez or any other suspect in the victim's apartment would have been a far more effective defense than merely suggesting the possibility.³

C. THE COMMONWEALTH MISSTATES THE LAW CONCERNING LOST OR DESTROYED EVIDENCE.

Contrary to this Court's holding in *Commonwealth v. Olszewski*, 401 Mass. 749 (1988), the Commonwealth argues that Mr. LaGuer must demonstrate the exculpatory nature of the lost or destroyed fingerprint evidence to obtain relief. Specifically, the Commonwealth

³ The suppressed fingerprint evidence also is materially different from the trial evidence because it would have enabled him to impeach Det. Carignan's testimony. See LaGuer Br. at 48. The Commonwealth argues that its suppression caused no prejudice because Mr. LaGuer "attacked the quality of the police investigation" at trial. Comm. Br. at 41. But the quality of the police investigation is a different issue from the veracity of the lead investigator's testimony. Defense counsel had no reason to suspect at trial that Det. Carignan's testimony that only a "small partial" print had been recovered was false. Disclosure of the suppressed fingerprint evidence, however, would have revealed the inconsistency in Det. Carignan's testimony.

asserts that the fact that the fingerprint evidence "could have" been linked to another individual "is not a substitute for concrete evidence." Comm. Br. at 46 (internal quotations omitted). If "could have" is insufficient, only "would have" is adequate in the Commonwealth's view. But requiring Mr. LaGuer to show that the lost or destroyed evidence "would have" linked Gomez or another suspect to the crime is exactly what this Court rejected in *Olszewski*. 401 Mass. at 753.⁴

The danger of the Commonwealth's position to defendants' constitutional right to a fair trial is particularly evident in this case. For eighteen years, the Commonwealth suppressed from Mr. LaGuer evidence implicating another individual. In the course of suppressing that evidence, the Commonwealth lost or destroyed the back page of the report and the actual fingerprints themselves, denying Mr. LaGuer any opportunity to examine that evidence for its exculpatory value. Then, upon finally revealing that the evidence exists, the Commonwealth attempts to use the prejudice it created against Mr. LaGuer by arguing

⁴ See also *Olszewski*, 401 Mass. at 757 (finding that lost belt was potentially exculpatory where it "could have had fingerprints" which "could have proved that some other person was present").

that Mr. LaGuer can only speculate as to the benefit the evidence might have provided to his defense. This perverse logic is essentially a blueprint for the Commonwealth's violation of defendants' constitutional rights with impunity - turning the disclosure duties of *Brady* and *Tucceri* into, as the Court feared, an "empty promise." *Olszewski*, 401 Mass. at 754.

Further, the Commonwealth's argument falls short because Mr. LaGuer did provide concrete evidence as to why the lost or destroyed fingerprint evidence was potentially exculpatory. Based on the record, we know that the perpetrator bound the victim's hands using a cord obtained from the victim's trimline telephone, we know that the State Police found four fingerprints on the base of that telephone, and we know that those prints conclusively did not match Mr. LaGuer. This is considerably more concrete than the lost belt at issue in *Olszewski*, which the defendant speculated might have had fingerprints that might have demonstrated the presence of another suspect. *Id.* at 757.⁵

⁵ The Commonwealth also argues that "[n]othing shows the report had a 'back page.'" Comm. Br. at 46. In doing so, however, the Commonwealth neglects to mention that at the bottom of the fingerprint report's front page is a typewritten notation that reads "(Over for Additional)", which was inserted by the individual preparing the report. R. 349. The Commonwealth

D. THE COMMONWEALTH ATTEMPTS TO DISTRACT THE COURT FROM THE ISSUES RAISED IN THIS APPEAL BY MISSTATING THE FACTUAL RECORD AND EMPHASIZING IRRELEVANT POST-TRIAL ALLEGATIONS.

Astonishingly, despite repeated admonitions during earlier stages of this appeal, the Commonwealth persists in misstating the factual record and making irrelevant post-trial allegations. At this stage, such conduct leaves one only to conclude that the Commonwealth aims to distract the Court from the issues in this appeal.

Because a comprehensive list of the Commonwealth's misstatements and irrelevant post-trial allegations would consume far more space than a Reply permits, what follows are only a few of the many egregious misstatements and mischaracterizations that render the Commonwealth's brief untrustworthy.

The Commonwealth asserts that the victim's purported identification of Mr. LaGuer as the assailant was "consistent[]," "immediate[]," and "unhesitating[]." Comm. Br. at 16, 43. The record, however, shows that the victim initially was unable to give any description of the assailant, R. 119, and subsequently was able to give only a "scant" physical description. R. 116.

offers no explanation, nor could it, why Trooper Martin would write that if the report was completed on the first page.

Only later, when Det. Carignan told the victim to "pick out anyone she knew" from a photo array did she identify her neighbor, Mr. LaGuer. R. 224-225, 269.⁶

The Commonwealth asserts that the victim said that Mr. LaGuer had recently buzzed her apartment and that she had seen him enter the neighboring apartment. Comm. Br. at 5, 15. But the victim herself testified that she was "putting [her] hand to the bible" to swear that she never told Det. Carignan that she had seen Mr. LaGuer several times before or had seen him enter or exit the neighboring apartment. R. 237-238. The Commonwealth tries to explain away the victim's inability to identify her assailant as caused by fear of retribution. Comm. Br. at 14. In reality, though, the victim's inability shows, as the trial judge noted, that the victim's efforts to identify her assailant were "unclear." Tr. 109:22-23.

The Commonwealth asserts that the crime scene was "brightly-lit" by security lights that "reflected all

⁶ The Commonwealth attempts to strengthen the victim's purported identification of Mr. LaGuer by quoting statements she made at trial claiming she "knew" the assailant's facial features - such as his nose, mouth, and face. Comm. Br. at 16. However, when the victim was interviewed by police in the days following the attack, she did not tell the investigators anything about the assailant's eyes, nose, mouth, or facial scars. Tr. at 372:1-9. Yet, by the time of trial, the victim had been shown Mr. LaGuer's photograph three separate times. R. 226, 240.

over." Comm. Br. at 8, 45. But, as the Commonwealth's own witnesses testified, in actuality the crime took place at night, the assailant had turned off the light, the window shades were partially drawn, and the only available light was outside and directed away from the victim's apartment. R. 88, 93-94, 96, 114. Thus, the Commonwealth's assertion that the victim "spent eight hours in a small, well-lit room ... face-to-face with the defendant," Comm. Br. at 42, is incorrect and is directly undercut by the victim's inability to identify her assailant in any detail and her own testimony that she did not see her assailant at all until after he socked her in the face, threw her to the floor, and shut off the lights.⁷ R. 94-96.

The Commonwealth implies that the police found a tube sock in the victim's apartment that matched the sock that Mr. LaGuer was wearing on the night of the crime and socks seen in Mr. LaGuer's apartment. Comm. Br. at 13, 15-16. But the sock found at the victim's apartment was itself excluded from evidence precisely because the trial court found no "nexus" between it

⁷ In light of clear record evidence showing that the victim's apartment was not lit during the crime, the Commonwealth's assertions that the assailant "made almost no effort to conceal his identity," Comm. Br. at 42, are insignificant.

and Mr. LaGuer, R. 127-128, and, in any case, the Commonwealth admitted at trial that the police found no socks in Mr. LaGuer's apartment that had the same colors as the sock found at the crime scene. R. 125. Thus, the Commonwealth is disingenuous when it argues that "the prosecution did in fact present 'physical evidence' that linked [the defendant] to the crime scene," Comm. Br. at 44, because the jury never had any socks to consider in its deliberations.⁸

The Commonwealth asserts that the victim had "a lot of blood in the area of [her] fingernails from scratching at defendant," Comm. Br. at 10, and that such evidence is consistent with the "very deep scratch" on Mr. LaGuer's back. Comm. Br. at 17. But the Commonwealth fails to cite to a single piece of physical evidence linking the victim's scratching to Mr. LaGuer. In fact, there is much doubt whether the victim even scratched the assailant. R. 102, 108, 111, 124. Even if she did scratch the assailant, the trial court ordered the jury to disregard testimony that the scratch on Mr. LaGuer's back was "deep," R.

⁸ Furthermore, the allegation that Mr. LaGuer's outfit matched the assailant's, Comm. Br. at 7, 13, 16, is unsupported by the record. In fact, there are conflicting accounts as to what the assailant was wearing. Compare R. 213, 237 with R. 141.

264-265, and the Commonwealth does not - and cannot - cite to any record evidence eliminating the possibility that the scratch mark on Mr. LaGuer was caused by something other than the victim's fingernails, as Mr. LaGuer has maintained. R. 143-144.⁹

Beyond its reliance on numerous misstatements and mischaracterizations, the Commonwealth tries to justify its suppression of exculpatory evidence by repeatedly making post-trial allegations concerning DNA testing, blood testing, saliva substitution, and a published essay by Mr. LaGuer. Comm. Br. at 4-5, 8 n.2, 17 n. 7, 27-28, 47-50. Even if the Commonwealth could substantiate these allegations (it cannot),¹⁰ this

⁹ Also, the suggestion that Mr. LaGuer stole the victim's keys from her apartment door lock because his apartment was in close proximity to hers is absurd. Comm. Br. at 6-7. First, anyone that had access to the apartment complex could have taken the victim's keys, including alleged perpetrator Jose Gomez. Second, the Commonwealth cites no evidence whatsoever that Mr. LaGuer stole keys from the victim's apartment door. Third, Detective Carignan's own testimony that the police had found the victim's door "jimmied," and that the assailant had "chip[ped] away at the door" and "may have played around with the locking assembly," Tr. 359:3-17, implies, contrary to the Commonwealth's assertion, that the assailant did not have a key to the victim's apartment.

¹⁰ For example, the Commonwealth alleges that other physical evidence recovered from the crime scene would have been linked to Mr. LaGuer but for his alleged substitution of another inmate's saliva sample for his own, Comm. Br. at 48-49, but neither cites (nor can cite) to any record evidence supporting that allegation. Similarly, the Commonwealth's suggestion that a childhood experience described in a January 2004 essay motivated Mr. LaGuer to perpetrate the crime at issue only

Court still could not consider them for two reasons. First, federal and state common law limit the scope of evidence that courts can consider in adjudicating a motion for new trial based on a constitutional violation to evidence that "might have affected the outcome of the trial," *Tucceri*, 402 Mass. at 405 (internal quotations omitted and emphasis added) and none of the allegations could have affected the outcome of Mr. LaGuer's trial because the alleged evidence on which they rest did not exist at the time of trial. See R. 174 n.14. Second, no court has yet considered the relevance and admissibility of such evidence (indeed, no court has ever seen any purported DNA report), and issues such as reliability and chain of custody must be addressed under *Commonwealth v. Lanigan*, 419 Mass. 15, 26 (1994), before such evidence may be considered. R. 174 n.14, 380. Indeed, the very fact that the Commonwealth has never sought to admit any DNA-related laboratory or analytical reports before any court cautions against this Court's consideration of any such alleged evidence now.¹¹

exposes the extent of the Commonwealth's desperation to preserve its indefensible conviction of Mr. LaGuer.

¹¹ The Commonwealth's references to the lower courts' findings with respect to the DNA testing merit no attention, as the

In short, the Commonwealth's persistent misstatements of fact and irrelevant post-trial allegations are nothing more than attempts to provide misinformation and to distract the Court from the issues in this appeal. Such attempts should not be rewarded. Thus, the decision below should be reversed.

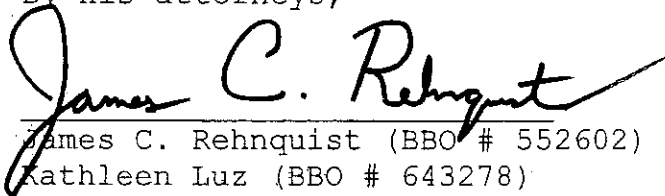
III. CONCLUSION

For the reasons set forth herein, defendant-appellant Benjamin LaGuer requests that this Court reverse the Appeals Court's decision and enter an order granting his Motion.

Respectfully submitted,

BENJAMIN LAGUER

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lower courts' supposed findings are based not on any review of the test documentation, but rather on nothing more than the mischaracterization of the testing that the Commonwealth presents in its Opposition to Mr. LaGuer's Motion for New Trial. Compare R. 369 with 389, 667 n.19.