COMMONWEALTH OF MASSACHUSETTS

WORCESTER, ss. SUPERIOR COURT DEPT.
OF THE TRIAL COURT

COMMONWEALTH Criminal Docket WOCR1983-03391

V.

BEN LAGUER

Supplemental Memorandum in Support of LaGuer's Motion for a New Trial and Evidentiary Hearing

Per order of this Court on the 9th day of September 2011, Ben LaGuer is filing this supplemental memorandum to address pertinent questions of the Court. After a thorough review of the newly discovered proffered testimony of Anne K. Demartino, this Court made a factual finding that her evidence is material and credible. This Court asked LaGuer to brief in memorandum how her testimony was not previously discoverable by reasonable due diligence.[1]

Since a DNA test result that does not eliminate LaGuer as a possible source of a stain was part of the posttrial evidence and prosecutors are opposing any effort to introduce the DNA report in evidence, this Court asked LaGuer to brief in what manner this analysis aids the Court in deciding whether to afford LaGuer a new trial. This Court asked LaGuer to brief how extraneous evidence from his apartment became entwined with specimens used in the DNA analysis, and further asked in what manner one set of genetic data is exculpatory and other sets are invalid due to fraud in the laboratory work and analytical assumptions.

There are stunning similarities between the DNA testing methods in LaGuer's case and those of Amanda Marie Knox, a young woman from Seattle (USA) recently exonerated by a Court of Appeals in Italy. "The international protocols for inspection,

[1] To provide a simple and clear narrative of the pertinent questions, LaGuer has chosen to omit unnecessary repetition of citations, and refers this Court to his better-annotated April 28, 2011 motion for a new trial.

collection, and sampling of items were not followed; It cannot be ruled out that the results obtained derived from environmental contamination and /or contamination in some phase of the collection and/or handling of the item." 145 Report Carla Vecchiotti and Stefano Conti of the University of Rome to the Corte di Assis di Apello of Perugia, Italy, regarding DNA evidence in the case against Amanda Marie Knox and Raffaele Sollecito (Criminal case No. 10/2010 R.G.) of 29 July 2011.

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In all three of thier opposition briefs, DA Joe Early's office made no attempt to dispute that the DNA profile of LaGuer was created with tainted samples previously mingled with his hairs and under clothes taken from his apartment in a warrantless manner.[2]

In their May 2004 opposition brief to an eighth motion for a new trial, ADA Hautanen and ADA Reilly averred that if the trial evidence had left any doubt about LaGuer's guilt, then "the DNA tests he requested in 2000 erased any doubt whatsoever."[3] They also fraudulently averred that LaGuer's DNA had been found "on cotton swabs used to obtain evidence from the victim's vaginal, rectal, and oral cavities" as if the DNA had proven LaGuer guilty in the exact acts of coitus charged in the indictment.[4] "Since no spermatozoa and no male DNA were recovered from the Plante vaginal/rectal swabs," Forensic Science Associates (FSA) concluded in August 2000, "this evidence is not relevant to the genetic information of Plante's assailant."[5] The Q-Tip swab used to transfer her pubic hairs yielded no blood or sperm fractions.

After this Court approved an evidentiary hearing on September 1, 2011, Hautanen and Reilly argued that LaGuer had incredibly no right to assail the validity of a DNA report which they had not yet put into evidence. This is one pretty odiferous legal maneuver.

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[2] Commonwealth's Renewed Opposition and Motion to Reconsider Allowance of "Live Testimony" September 8, 2011; Commonwealth's Opposition to LaGuer's Ninth Motion for New Trial and Evidentiary Hearing, June 17, 2011; Commonwealth's Motion to Dismiss LaGuer's Ninth Motion for a New Trial Due to "Fraud on the Court" 9 September 2011.
[3] Commonwealth's Opposition To Defendant's Eighth Motion For A New Trial, May 2004, pp 10-11.
[4] Id.
[5] Report Number 1, FSA, 15 August 2000, p.9

The evidence that discredits this 2002 DNA test result – a fair and accurate interpretation of the genetic data assumes that a truthful chain of custody record -- stems from the improper use of tainted specimens. While the violations of LaGuer's rights under the United States Constitution and Massachusetts Declaration of Rights is significant insofar as the police had illegally pilfered LaGuer's underclothes, what matters most is that police and prosecutors withheld this material even beyond the point where their actions wreaked havoc on the DNA analysis.

The Partly Withheld and Partly New Discovered Evidence of Anne K. Demartino is Verdict Determinative and Not Previously Discoverable with Every Exercise of Reasonable Diligence

The defense and prosecution are not in disagreement over the following facts. Demartino's name does not appear on any report or legal pleading provided to the defense either pretrial or post trial. She was not publicly identified as complainant's aide by any media. While the trial prosecutor recently claimed in a 30 Apri1 2010 affidavit (Paragraph 6) that in the months before the trial he was "concerned that the victim might not be able to testify due to her fragile medical condition," he did not disclose Ms Demartino as the source of his concern under rule 14(b). Ms. Demartino's name does not appear on a list of possible witnesses Leominster Police Department Detective Ronald N. Carignan provided the trial prosecutor. The prosecutor did not name Ms. Demartino on his list of prospective witnesses provided pretrial to LaGuer. When the trial judge read the final witnesses to the jury venue for the purpose of identifying any possible jurors who might be excused for cause, Ms. Demartino's name was not read. Her name does not appear on any HealthAlliance hospital records released to LaGuer pretrial. Any possible reference to Ms. Demartino in complainant's psychiatric records is unknown and unknowable because those records were denied to LaGuer. Since a witness sequestration order was put in effect early in the trial and LaGuer was detained pretrial, LaGuer never had an opportunity to observe complainant. Since his counsel was seated with LaGuer when complainant walked into the courtroom, escorted by an assistant district attorney, counsel would have equally no opportunity to notice Ms. Demartino. Demartino's identity was not revealed in any testimony or exhibits presented to the grand jury. At

trial, the prosecutor did not reveal her identity, either in his closing or opening statements to the jury. The prosecutor did not reveal her identity on any sidebar conference.

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The defense first became aware of Anne K. Demartino when current Counsel of Record, Robert E. Terk, (whom was then the First Assistant Registrar of the Worcester Family and Probate Court) coincidently met her at a political fundraiser in the fall of 2006. Ms. Demartino expressed that she knew of the LaGuer's case, which was a subject in the gubernatorial race. Ms. Demartino had long assumed her relationship with complainant might be protective under some patient privilege. (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.) Terk informed LaGuer of this possible witness. LaGuer passed along this information to his lawyer, led by James C. Rehnquist of Goodwin Procter, who had filed his eighth motion for a new trial in 2004. This litigation end until March 2007, when the Supreme Judicial Court affirmed all lower court rulings. "If I went out in public with her," Demartino told journalist Eric Goldscheider in February 2007, "anybody she 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." LaGuer deferred a parole hearing for three years based on a State Police Crime Laboratory review of the DNA report that was directly requested by Governor Deval L. Patrick in 2007. In 2008, Attorney Rehnquist interviewed Demartino.[6] In 2008, Isaac Borenstein undertakes a review of the DNA analysis.[7] In 2009, Borenstein produces a

[6] Valley Advocate, Tragedy Times Two by Eric Goldscheider 5 April 2007; Transcript of Annie K. DeMartino interview with attorneys James C. Rehnquist, Kathy Luz, Joshua Stayn of Goodwin Proctor, Boston, Along with Dr. John Silber, Professor of Law, President Emeritus Boston University 17 April 2008; Sunday Telegram, New LaGuer Trial Supported/DeMartino Raises Question of ID, by Matt Bruun 8 April 2007.

[7] Letter from Isaac Borenstein to Ben LaGuer of 20 November 2008 ("I am now familiar with the sequence of events that led to the DNA mishap. I am confident that we can argue that the DNA analysis provides evidence that actually contradicts the victim's account, and therefore, additional exculpatory evidence for a new trial.… It is my opinion that the DNA evidence fails to meet even basic Daubert—Lanigan admissibility criteria.")

memorandum for State Representative Ellen Story.[8] On April 28, Terk filed this instant motion. By any measure, the proffered testimony of Demartino is newly discovered evidence. To suggest that LaGuer knew and wantonly ignored Demartino as a potentially valued witness earlier is uncharacteristic of this legendary tenacious young man.

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In Massachusetts, the governing legal standard for newly discovered evidence is set forth in Commonwealth v. Grace, 491 N.E.2d 46, 379 Mass 303, at 305—306 (1986)

> "A defendant seeking a new trial on the ground of newly discovered evidence must establish both that the evidence is newly discovered and that it cast real doubt on the justice of the conviction...The evidence said to be new not only must be material and credible ...but also must carry a measure of strength in support of the defendant's position...Thus newly discovered evidence that is cumulative of admitted at the trial tends to carry less weight than new evidence that is different in kind. Moreover, the judge must find this is a substantial risk that the jury would have reached a different conclusion had the evidence been admitted at trial...The motion judge decides not whether the verdict would have been different, but rather whether the new evidence would probably have been a real factor in the jury's deliberations.. .This process of judicial analysis requires a thorough knowledge of the trial proceedings....and can, of course, be aided by a trial judge's observation of the events at trial..."

According to the trial prosecutor, the complainant had not suffered from any psychotic symptoms, nor taken any antipsychotics for at least two years prior to her assault. The newly discovered evidence of Demartino refutes the veracity of these material statements. Commonwealth v. LaGuer, 20 Mass. App. Ct. 965, 966 (1985) ("The record indicates that the complainant may have suffered a nervous breakdown some fourteen years prior to the attack upon her and subsequently underwent drug treatment, which (according to the uncontradicted statement of the district attorney) ended roughly two to two and a half years prior to the attack . . .)" In order for the trial prosecutor to assert that complainant was not on any antipsychotics either at the time of her pretrial photographic identification or trial testimony, reasonable due diligence required him to personally review her psychiatric or medical records. Demartino would have changed the outcome of the pretrial motions relating to accessing her psychiatric

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[8] Memo from I. Borenstein to State Representative Ellen Story, June 10, 2009. ("We have spent hundreds of hours reviewing his voluminous case file. This exhaustive analysis convinces us that Ben is innocent, and that the Commonwealth's case against him contains significant human error in the collection, handling, labeling, and processing of the forensic evidence.")

records and admissibility of psychiatric history.[9] The pretrial rulings precluded any discovery of DeMartino.[10]

In a 2003 television interview with PBS, Elizabeth Barry revealed that her mother was diagnosed as schizophrenic in the 1950's, two decades prior to what the trial prosecutor had averred in 1984. In a 2007 print magazine interview, Demartino was quoted expansively for the first time about complainant's mental fitness that have never been made public.

With respect to LaGuer's constitutional rights, due process requires that the prosecution disclose all favorable evidence in its possession that could materially aid him against pending charges. See United States v. Agurs, 427 US 97, 103-104 (1976); Brady v. Maryland, 373 US 83 (1963); Commonwealth v. Tucceri, 412 Mass 401 (1992) Where, as here, LaGuer made a specific request for the partly withheld and partly discovered psychiatric evidence, his defense is entitled to a new trial if "a substantial basis exists for claiming prejudice from the nondisclosure" Tucceri, at 412. Such a basis exists if the undisclosed evidence "might have affected the outcome of the trial" Id. at 404. There can be no doubt that the trial prosecutor had been very well acquainted with Demartino. The trial prosecutor had complainant brought to the courthouse prior to trial to familiarize her with the courtroom layout. By the trial prosecutor's own admission, he had grown very concerned about the health of complainant and her ability to withstand the hardship of the trial, an opinion he probably formulated with input from Demartino.

The language of Commonwealth v. Grace, 397 Mass 303 (1986) mandating that any "newly discovered evidence" must "have been unknown to defendant or his counsel and not reasonably discovered by them at the time of trial (or at the time of the presentation of an earlier motion for a new trial)," at 306, does not emphatically envision Ben LaGuer undertaking the sort of extraordinary and probably controversial steps that

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[9] The only records Judge O'Neill reviewed were from the Herbert Lipton Mental Health Center, limited to the period of April 1, 1983 to September 30, 1983. Ms. Demartino's statement, however, refers to records kept at Burbank Hospital , the Lipton Center, and the Wright Nursing Home.

[10] The SJC stated, "[Nothing] in the record demonstrates that there was evidence available to trial counsel that the victim's mental condition at the time of the attack or at the time of the trial" was relevant. Commonwealth v. LaGuer, 410 Mass. 89, 93-94 (1991) (emphasis added). This makes clear that the DeMartino allegations raise issues concerning the victim's schizophrenia that were not, and would not reasonably have been, known to defense counsel in the past.

Worcester District Attorney Joseph D. Early's office argued on September 9, 2011. It is unreasonable to fault LaGuer for not previously discovering Demartino because, as ADA Hautanen suggested, his lawyers could have dispatched private investigators to spy on the staff who once cared for complainant in a private psychiatric facility. To suggest that LaGuer should have spied on Demartino in some remote chance that she had this qualitative material would, as a general rule, seriously endanger the privacy interest of victims. To require extraordinary steps for material that prosecutors should have disclosed pretrial would result in torrents of discovery abuses. Since LaGuer was forbidden access to complainant's psychiatric records, DA Early's suggestion is similar to that rejected in Commonwealth v. Kobrin, 893 N.E.2d 384, 403—404 (2008) "The Commonwealth's insistence that it would not have been impossible for counsel to have uncovered the evidence before trial is wide of the mark. A defendant need not jump quite so high a hurdle. Kobrin was only required to--and did--show that reasonable diligence would not have led his trial counsel to the material." Id. "The judge may consider.....the timing of the declaration and the relationship between the declarant and the witness...the reliability and character of the declarant...whether other people heard the out of court statement., whether there is any motive for the declarant to misrepresent the matter...and whether and in what circumstances the statement was repeated." Commonwealth v. Weichell, 847 N.E.2d 1080 (2006) "The judge should not, however, assess a proffered witnesses' credibility and should leave that task to the jury." In the final analysis, Demartino's testimony carries "a measure of strength in support of" LaGuer's mistaken identity defense and, in a case so heavily dependent on identification, this Court must find that her newly discovered evidence "would probably have been a real factor in the jury's deliberation." Grace, at 305-306.

One Set of Post-trial Genomic Data is Exculpatory and other sets are invalid Due to Errors in the Laboratory Work and False Analytical Assumptions

Since March 2002 the Worcester County District Attorney's office has not missed a single opportunity to issue press releases, statements to the Parole Board, the Trial Court, Appeals Court and Supreme Judicial Court to trumpet a DNA test that they said inculpated LaGuer. This orchestrated effort has greatly prejudiced LaGuer. In his 2007

oral arguments before the Supreme Judicial Court, Associate Justice John M Greaney probably spoke for others when he asked Rehnquist, "Isn't this some mere academic exercise, since the DNA evidence is going to sink LaGuer on retrial?"

In the absence of the DNA report, prosecutors did all within their powers to prejudice appellate judges against LaGuer with wildly exaggerated and unsubstantiated claims.[11] "We decline the Commonwealth's invitation to consider the deoxyribonucleic acid (DNA) test result, which is said to have pointed directly to the defendant's guilt." Commonwealth v. LaGuer, 65 Mass. App. Ct 617 at n19 (2006) "In reaching this conclusion, we have not considered the fact that a deoxyribonucleic acid (DNA) test, performed after the trial at the request and conducted by an independent forensic scientist of the defendant's selection, apparently, "pointed directly to the defendant's guilt," Commonwealth v. LaGuer 448 Mass 585 at n34 (2007)

After trumpeting for a decade the DNA result as proof of LaGuer's guilt, the actual report merely shows LaGuer cannot be excluded as a source of a cellular stain, DA Early shrewdly recoiled from those previous assertions. The fact that FSA used tainted specimens, which had been mingled with samples the police had pilfered from LaGuer, cannot be disputed. On September 9, 2011, prosecutors even objected to LaGuer's effort to put in evidence the DNA report as part of 118 other exhibits. This Court was prompted to retort that no report had yet been marked. Despite no efforts spared, DA Early has no affidavit that authenticates the DNA specimens are genuine crime scene evidence. No State Police official is willing to sign such certificate. On retrial, DA Early is unlikely to put in evidence the DNA report out of fear that other abuses might be exposed before the trial even begins, when the DNA analysis will suffer its first serious challenge in a pretrial Daubert/Lanigan motion. In September, prosecutors argued that since they had never admitted the DNA report LaGuer was not entitled to subpoena witnesses or challenge its result. But LaGuer has the right to offer evidence of fraud that alters the genomic interpretation to show factual innocence.

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[11] Letter from James C. Rehnquist to Supreme Judicial Court 24 January 2007 ("Indeed, independent reviews of the DNA testing procedures by several forensic science experts have raised legitimate questions as to whether the DNA evidence at issue here was contaminated prior to testing."); Letter from ADA Sandra L. Hautanen to Supreme Judicial Court 30 January 2007 ("Naturally, the Defendant is dissatisfied with the DNA test results showing that he is the rapist; now, however is not the time to try to impeach his own handpicked DNA expert who did the testing that the Defendant requested.")

A warrantless collection of physical evidence from LaGuer and his apartment, not to mention the false police reports and perjured police trial testimony sketched to cover up the abuses and excesses of a warrantless search is exculpatory material of the highest order. The police pilfering of samples from LaGuer then lying to cover up transgressions is enormously damaging to the chief police investigator Ronald N. Carignan, whose credibility was a key issue. This exculpatory evidence is still available in reports and other material formats for LaGuer to use on retrial.

Respectfully, LaGuer is entitled to offer exhibits and testimony that exposes a range of police and prosecutorial abuses of authority.

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This is a case in which the parties agree on virtually nothing except that complainant was assaulted in some way. Her ability to observe her assailant for eight hours in is determinative factors.[12]

LaGuer could do little to challenge the trial prosecutor's summary that complainant "who was brutalized for eight hours by this man [and who] could see this man during the time of that incident, during that brutalizing of hers. The Commonwealth suggests that man's face is imprinted in that woman's brain. It will be there for the rest of her life. A man that did everything to her. She saw that man for eight hours. She'll

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12 "The defendant challenged the victim's mental state and her ability to see, with any clarity, the face of her assailant. The parties disputed the amount and quality of light (from an outside source that could have illuminated the inside of the victim's apartment." Commonwealth v. LaGuer, 65 Mass. App.Ct 612 n5 (2006) "To further his defense of misidentification, the defendant challenged the victim's testimony about the adequacy of the lighting in her apartment as well as her memory, eyesight (she did not have her reading glasses on at the time of her attack or when she selected the defendant's photograph in the hospital), physical condition (one eye was swollen shut from being beaten), mental stability, and reactions to medications." Commonwealth v. LaGuer, 448 Mass 585 at n17 (2007) More significant, complainant testified that she did not tell Detective Ronald N. Carignan that her assailant lived next door. (Tr.181)

remember that face until she dies. Who did she say it was, Benjamin LaGuer." (Tr. 567) In jury deliberation, one juror asked how could have a man raped for eight hours, and a second juror speculated "Spics screw all day and night" as if the alleged sexual prowess of LaGuer's blackness was the only substantive evidence to answer this verdict-determinative question.

With the current availability of forensic DNA analysis, LaGuer is able to show that complainant was not continuously sexually assaulted for eight hours, because her blood would have been detected on swabs (even as small as a few particles) collected soon afterwards as part of the rape kit evidence collection. Dr. Edmund C. Meadows, her physician in 1983 noted, "anus showed no blood, abrasions, or lacerations" when he physically examined her. Her vaginal swabs only confirmed a "rare yeast" infection so advanced that in 1983 her nurse noted Plante was discharging a "yellowish" pus.[13] Dean Wideman says, "If Mr. LaGuer in fact had sexual intercourse with [complainant], 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."[14] LaGuer's underpants revealed no female yeast cells, blood, vaginal secretions or feces.[15] The absence of her blood on her rectal swabs cast substantial doubts that aren't only reasonable but haunting over whether she (an actively hallucinating schizophrenic) was actually raped.

In contrast to the clearly inadmissible interpretation of genomic data that relies for its result on improperly grouping sterile rape kit specimens with specimens previously mixed with those pilfered from LaGuer, the analysis LaGuer seeks to admit——confirming the absence of complainant's blood on her swabs—cast substantial doubts over the centerpiece issues of her supposedly eight hour identification and its reliability. A defendant seeking a new trial bears the burden of demonstrating that any newly discovered evidence is admissible. Commonwealth v. Weichell, 847 N.E.2d 1080 (2006) This newly discovered genomic data has a "measure of strength in support of defendant's

13 Leominster Hospital, Lab Report of specimen from Lennice 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.")
14 Analytical forensic report from Wideman to state representative Ellen Story of 30 March 2006.
15 MSPCL Pretrail Benchnotes of M.T. Grant, p.1; MSPCL Nov. '83 report, item No 21.

position" and "would probably have been a real factor in the jury's deliberation," Grace at 305-306.

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Leominster Police Detective Ronald N. Carignan averred in his police report, [16] search warrant [17] and trial testimony [18] that "nothing" was taken during a search of LaGuer's apartment. Lemire had assured the Court that a drawer of tube socks in LaGuer's bedroom was not seized.[19] All false. In May 2000 a state police crime laboratory (MSPCL) inventory revealed "eight" tube socks and "underclothes from suspect" linked to LaGuer's apartment.[20] The MSPCL recovered biological evidence from the "interior crotch" of LaGuer's underpants.[21] The inventory also revealed a jersey LaGuer had on the day of his arrest.[22] With MSPCL Gwen Boisvert Pino's November 2001 affidavit,[23] FSA congregate DNA from "3 hairs" of a "yellow pullover" with other specimens to create a usable DNA profile.[24] But, the "yellow pullover" is a truncated description of the "yellow cotton jersey" with "3 hairs" that LaGuer had at the police station. These hairs, in 2000, had DNA.[25]

This Court asked LaGuer to brief how extraneous evidence from his apartment became entwined with specimens used in the DNA analysis, so that the genetic data underlying the now-infamous result is fundamentally invalid as exculpatory evidence. The May 2000 MSPCL report is salient insofar as Pino found three (3) slides wrapped in

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16 Follow Up, Investigative Report of July 14, 1983 by Detective Ronald N. Carignan.
17 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.
18 Tr. 344, 379
19 Tr. 261
20 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
21 MSPCL Pretrail Benchnotes of M.T. Grant, p.1.
22 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")
23 Affidavit from Gwen Boisvert Pino of 6 November 2000, paragraph 15
24 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, item N.
25 Report, Cellmark Diagnostics, J.J. Higgins, 5 September 2000 p.2 ("Unknown stain, morphology of cellular material not recognized for identification.")

a brown paper towel with the markings of pubic hairs, hairs from yellow pullover and hairs from green pillow.[26] She resealed the slides.[27] Pino had inadvertently mingled what was actually LaGuer's jersey/pullover hairs with Plante's pubic hairs. According to international guidelines, "contact between the victim and suspect samples must be avoided at all times." See. 38-39 Report of Vecchiotti-Conti regarding the DNA evidence in the case against Knox and Sollecito July 2011, quoting **Interpol Handbook on DNA Data Exchange and Practice – Recommendations from the Interpol DNA Monitoring Expert Group** – second edition 2009. ADA Hautenen did not dispute in April 2010 that MSPCL had LaGuer's jersey hairs, only that FSA never had a single strand of his on its workstation.[28] But Grant had jumbled these hairs with LaGuer's pilfered hairs, tube socks, underpants and underclothes in October 1983.

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

"I might run two or three cases at once in order to save time." Grant had no manual on the handling of forensic samples.[29] 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."

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[26] State Police, Evidence Inventory and Documentation Report of 12 May 2000 by Gwen Pino, item 6.
[27] Id.
[28] Testimony State Parole Board 22 April 2010. (Audio tape available in attorney's files.);
[29] Letter from MSPCL supervisor Gwen B Pino to state legislator Ellen Story 27 August 2003. (Ms. Pino said "the crime laboratory did not have a manual governing the handling of evidence in 1983.").

The attempt to conceal articles not mentioned in the warrant did not negatively impact LaGuer until the defense began assessing each piece.[30] On September 27, 2001, Ed Blake of FSA told the Telegram, "This is very difficult evidence, there's no question about it." The rape kit held no inculpatory DNA, so these specimens played no part in amplifying the DNA profile.[31]

Since no individual sample had sufficient DNA for a usable genotype, following a court order, FSA congregated nanoparticles from other samples (most previously mixed with samples taken from clothing in LaGuer's apartment) in a Frankensteinian stain.[32] LaGuer's DNA was never matched to DNA either from her body or the crime scene evidence. The quantity of DNA congregated to sequence a profile of LaGuer was less than 0.03 nanograms.[33] This low scale DNA is less than DNA kit manufacturers recommend, less than validation studies recommend for optimal reliability, and even far less than the Rome experts invalidated in the Knox case. "Numerous validation studies have been conducted on commercial kits for DNA typing, and the conditions in which these kits produce reliable results have been clearly defined (Micka K.A. et al., 1999; Cotton E.A. et al., 2000; Krenke B.E. et al., 2002; Holt C.L. et al., 2002; Collins P.J. et.al., 2004; Mulero J.J. et al., 2008). The optimal quantities of template are thus well-defined, and range usually varies between 0.5-2ng of template DNA (1 ng is usually considered the optimal quantity of most commercial kits." See, 82 Report of Vecchiotti-Conti regarding the DNA evidence in the case against Knox and Sollecito.

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

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[30] 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 Lennice Plante. 1 tube sock with black and yellow stripes to match one left behind in the Plante apt."
[31] 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."); 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.")
[32] 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.
[33] FSA, Report 2, Table 1, Profiler Plus Genes, P4 (February 2001).

that could be consistent with contamination."[34] ("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.")[35]

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The charges of evidence tampering stem from when the DA himself accused then attorney Robert Cordy (currently an Associate Justice of the Supreme Judicial Court) of improperly accessing the courthouse storage.[36] The defense then accused prosecutors of trying to include specimens of dubious origins.[37] Blake said, "You do the work blindly, you publish the work blindly—before you do the reference samples—then you do the reference samples. And the guy's either in or he's out." [38] To create that aura of forensic integrity, Blake is kept in the dark about these epic feuds.[39] In May 2000, ADA Reilly said: "[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."[40] Surely, Blake did not get Reilly's cautionary memoranda.

It was not until LaGuer began to publicly defend himself against the result that Blake first heard of these feuds. In his March 2002 Telegram interview, "The time to make those claims was on Day One," Blake said. "If this 'frame job' was evident in the police reports, why did he waste David Siegel's time for three years?"[41] In 2004, Blake was still erroneously defiant in his belief that "nobody" had alleged contamination prior to the testing.[42]

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[34] 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.
[35] Testimony of D.D. Riley (Essex 9777CR-0196) (11/24/98) p. 11
[36] 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. At worst, evidence may well have been contaminated beyond the point of obtaining valid test results.")
[37] 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."
[38] Telegram, "More Rely on Miracle of DNA Tests by Matthew Bruun, July 16, 2000.
[39] 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," Siegel said, explaining why FSA was presenting the analysis of the 1983 evidence before testing the reference sample from LaGuer.)
40 ADA Joseph J. Reilly, III, 15 May 2000 pg 17,19
41 Telegram, DNA finding difficult to rebut by Matt Bruun 31 March, 2002
42 Telegram, Conte Rejects LaGuer's Claim by M Bruun 15 February 2004

LaGuer's argument is not that his DNA was deliberately stolen two decades before DNA testing became a forensic tool.[43] His claim is that police misled the MSPCL about these pilfered hairs and underclothes, thus, Grant did not (as he should have) preserved each specimen to international forensic guidelines.

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Grant reviewed all police reports.[44] Patrolman Timothy E. Monahan quoted emergency room physician Dr. William C. Siegel in his police report as advising police to discard self-abuse because she had semen in her vagina and throat. Dr. Siegel has denied ever making this statement to the police. The defense proffers that instead of serological work, Grant simply affected Monahan's fabricated sperm claim as his own analysis. How could Grant detect a 0.03 nanogram stain when nanoparticles could not be detected until the advent of DNA sequencing machines? According to Dr. Ed Blake, "Twenty years ago, scientists would not have been able to detect the evidence."[45]

This Court Should Not Dismiss a Motion for a New Trial Based on Patently Frivolous Fraud Charges, which Prosecutors have Desperately kindled to Diffuse Abuses of Prosecutorial Authority

After LaGuer charged fraud with regard to the DNA, the District Attorney now 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, Ettenberg has provided prosecutors with an affidavit alleging that he first saw this letter in 2010. Ettenberg's affidavit of September 6, 2011, is distinct from his previous affidavits and client correspondences insofar as he had always spelled "LaGuer" with the "G" capitalized, but in this document, spells it "Laguer", as prosecutors have customarily done. (The Superior Court docket spells his name as "Benjamin LaGuer".) It may be inferred that

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[43] Telegram, DNA finding difficult to rebut by Mat Bruun 31 March, 2002 ("Twenty years ago, [Blake] said, scientist would not have been able to depict the evidence, rendering the theory that someone would have deliberately planted such an amount incredible."; Telegram, media fell for tactics of LaGuer by Dianne Williamson 2 April, 2002 ("To believe Mr. LaGuer's ludicrous theory that someone had stole his underwear and sperm 20 years ago, you'd have to believe that a resourceful cop anticipated the advent of DNA testing two decades before its used.")

[44] 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

[45] 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)

Ettenberg signed an affidavit drafted by prosecutors to advance their own agenda. (A request of District Attorney Early's government server should reveal their e-mail draft affidavit to Ettenberg.) 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 (sic) 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."

In view that Ettenberg had not seen his trial file in twenty-eight years, his affidavit that he vividly remembers not receiving Lemire's letter is not credible. On February 20, 2001, Ettenberg responded to LaGuer's inquiry about a 1983 letter that Ettenberg had 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." Their discussions of a possible plea of 20 years in Concord is supported by other sources, including Ettenberg's own April 2010 affidavit. 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. Most recently, a May 1994 memoranda the District Attorney sent the Supreme Judicial Court, included in ADA Hautanen's motion to dismiss ninth motion for a new trial is unsigned. (See Exhibit 10 of Commonwealths motion to dismiss of 8 September 2011.) Further undercutting this fraud charge is Hautanen's 2002 admission that Lemire had reviewed her office file, and told her that materials previously in those files "aren't there anymore."[46] If the District Attorney's files are admittedly missing, Hautanen is hardly credible when her charge is so self-servingly aimed to have LaGuer's motion dismissed. 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. (If prosecutors feel so strongly about this issue, they are free to seek "indictment" and prove their unprovable allegations in a court of law.)

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

District Attorney Joseph Early's office should not act as if it is unaware of the often dirty nature of criminal trials, in which defendants lie for inexplicable reasons, experts dual over how to interpret evidence, prosecutors withhold evidence and police fail to pursue all suspects. As with all his previous motions for a new trial based on withheld evidence, he promptly reported all of his discoveries. This is a ninth instance of his office withholding evidence. Had prosecutors first provided all exculpatory evidence pretrial, as they should have, the verdict would have been different.

DA Early's office attempts today to sully the journalistic integrity of John King of CNN (formerly of Associated Press, Boston) and John Strahinich of the Boston Herald (formerly executive editor of Boston Magazine) who exposed racial bias in the jury deliberation. To indirectly accuse King and Strahinich of lobbying jurors on LaGuer's behalf is deeply callous. Moreover, DA Early's aim is to cast LaGuer swapping his saliva with another inmate in the worst light, but it's not exactly clear that he was incorrect in suspecting a police setup. While Early intently focuses this Court on LaGuer's behavior, this Court should not let him skirt the larger truth of the matter: how would a genuine saliva sample undercut LaGuer's claim of factual innocence? According to the source of this claim, Esquire magazine, "if he [LaGuer] had given authorities a legitimate saliva sample, the result would have provided evidence of his innocence rather than a false impression of his guilt." (Esquire May 1994) The O Type perspiration recovered from the culprit's tube sock exculpates a B Type LaGuer.[47] In a desperate maneuver to shun other abuses of prosecutorial authority, finally, Early's claims seem designed to beguile this Court away from the central issues.

CONCLUSION

This Court would be within its discretion to reverse the verdict and order a new trial on the basis of Demartino's newly discovered evidence without any further demands to address the DNA issue. If this Court affords a new trial on the basis of Demartino,

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47 LaGuer's fear of submitting a saliva sample has a context of police discounting, distorting, and destroying evidence. Hautenen argues that LaGuer thwarted their ability to inculpate him with a B Type blood on napkins found near complainant. But FSA genetically linked that blood to her in 2001. For Hautenen to present this discredited pretrial analysis in 20011 only lends further credence to LaGuer's fear of false evidence. If ADA Lemire had argued that the B Type blood on the napkins inculpated LaGuer, an independent analysis (already requested in a letter to Lemire 24 October 1983) would have exposed the blood as actually her O-Type blood.

LaGuer would have no basis for claiming prejudice. However, if this Court does not grant a new trial and LaGuer cannot further present the proffered 27 witnesses and 118 exhibits, then LaGuer reserves the right to assign error insofar as this Court would be retracting its September 1st Order affording him an evidentiary hearing.

Since DA Early has made a strategic choice to oppose any admission of the DNA report, this Court may agree to put the DNA on deep freeze until a retrial. LaGuer can then argue how a genomic data set is exculpatory and other sets are invalid due to fraud in the laboratory work and analytical assumptions. This is the moment for LaGuer to present proof of documentable fraud, since he is likely to suffer irreparable harm if this evidence is simply shrugged off.

Advocates and supporters of the District Attorney, such as Leominster Mayor Dean Mazzarella, are starting a public campaign to prejudice the pool of future jurors. Mazzarella recently told a newspaper that a lot of possible witnesses for a retrial are dead. But District Attorney Early has no valid claim to prejudice as a result of limited witnesses, because all a jury will require on retrial to convict LaGuer is DNA proof that a 0.03 nano-particle stain is (a) sperm, (b) sperm from LaGuer and, (c) sperm that is directly linked to complainant's body through the rape kit. If DA Early fails in this task, if the jury credit evidence that the DNA relied upon tainted genomic data from samples pilfered from LaGuer, than all of these decade long claims of DNA proving LaGuer's guilt will turn farcical.

In conclusion, LaGuer has presented clear and convincing evidence of factual innocence. Exculpatory DNA discredits a State Police blood typing result that falsely incriminated him. The absence of male DNA or female DNA from blood on her perineal swabs creates doubts that are not only reasonable, but haunting. Evidence of her indiscriminately accusing colored men of the disputed rape eviscerates her eyewitness. As a result of spurious claims, FSA was misled about the presence of LaGuer's pilfered hairs and underclothes. The MSPCL misreported a sperm analysis. The presence of third party suspect Jose Gomez in complainant's studio reanimates the withheld fingerprint dispute. Withheld police reports substantially supports complainant's testimony that she did not lead police to LaGuer, a critical mistaken identity defense issue. On behalf of

Ben LaGuer, his defenders pray this Court will not allow the verdict to survive another sunrise.

The injustice done against LaGuer long ago is still reverberating in our lives. “The past is not dead. In fact, it’s not even past.” (William Faulkner)

Respectfully submitted,

BENJAMIN LAGUER

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CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of October, 2011, a copy of this Supplemental Memorandum in Support of LaGuer’s 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.