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COMMONWEALTH OF MASSACHUSETTS

WORCESTER, ss.

SUPERIOR COURT
CRIMINAL ACTION
No. 83-103391-94

COMMONWEALTH

vs.

BENJAMIN LAGUER

MEMORANDUM OF DECISION ON DEFENDANT'S MOTION FOR NEW TRIAL AND EVIDENTIARY HEARING AND THE COMMONWEALTH'S MOTION TO DISMISS

The defendant, Benjamin LaGuer (LaGuer) was convicted on January 30, 1984 of unarmed robbery, breaking and entering, assault and battery, and aggravated rape for which he received a life sentence on the aggravated rape charge. Since his conviction, LaGuer has filed eight motions for a new trial. Denials of these motions have been affirmed by the Appeals Court or Supreme Judicial Court in five published decisions.[1] In this, LaGuer's ninth motion for a new trial, he essentially raises two issues: (1) whether the laboratory biological evidence and analytical assumptions underlining the results of DNA testing by Forensic Science Associates (FSA) are partly exculpatory and/or partly invalid due to Commonwealth malfeasance or misfeasance in its handling and storage of evidence, and (2) whether the alleged testimony of Annie K. DeMartino (DeMartino) is newly discovered and casts real doubt on the validity of the convictions. Commonwealth v. LeFave, 430 Mass. 169, 176 (1999).

[1] See, Commonwealth v. Benjamin LaGuer, 20 Mass. App. Ct. 965 (1985); 410 Mass. 89 (1991); 36 Mass. App. Ct. 310 (1994); 65 Mass. App. Ct. 612 (2006); and 448 Mass. 585 (2007).

In support of his Motion for New Trial and Evidentiary Hearing, LaGuer identified twenty-seven (27) prospective witnesses for the hearing and submitted five (5) bound volumes of exhibits. Over the written objections of the Commonwealth that LaGuer's motion did not entitle him to an evidentiary hearing with "live testimony," this court ordered a hearing for September 9, 2011. On September 1, 2011 this court set forth a clarification regarding the nature of the upcoming hearing in an order that read,

> "A hearing on defendant's motion for new trial is scheduled for September 9, 2011 at 2:00 PM. The parties may submit live testimony, memoranda and arguments as they deem appropriate."

Surprisingly, neither party presented witnesses at the hearing and it proceeded upon the arguments of counsel and/or LaGuer.[2] At the conclusion of all arguments the court raised two issues upon which it requested further briefing by the parties. These issues were: (1) the relevancy of alleged proof of a flawed DNA testing, in light of the fact that no forensics were used against defendant at trial; and (2) why testimony of DeMartino, in the exercise of due diligence, was not discoverable by the defense long before the filing of the motion. Additionally, at the September 9th hearing, the Commonwealth filed a Motion to Dismiss LaGuer's Ninth Motion for New Trial Due to "Fraud on the Court." The court indicated that this motion, which was not argued at the hearing, should also be further briefed as the parties felt necessary. The parties have done so.

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[2] The court originally ruled that since LaGuer was represented by attorney Robert E. Terk, only attorney Terk would be able to address the court upon the motion. This resulted in attorney Terk making an oral motion to withdraw as counsel which the court denied. Subsequently, as it became evident that only LaGuer was prepared to argue the issues presented, the court granted leave for him to do so.

BACKGROUND

On the evening of July 12, 1983, a man broke into the Leominster apartment of 59 year old Lennice Plante (Plante). The intruder brutally assaulted and raped Plante over an eight hour period. Her hands were tried with the telephone cord. At one point during this period, the attacker placed a plastic bag over Plante's head, tightened it, causing her to "[go] out of the picture" for awhile. After robbing Plante, threatening to kill her if she identified him and tying her hands and feet with her own appliance cords, the assailant left her on the floor where she was found at approximately 5:10 a.m. on July 13th by the police. Plante told police that the attacker was a smallish, dark man wearing only jogging shorts and white socks, possibly with stripes on the top. One such sock was found at the scene. Plante maintained that the sock was used by the assailant to gag her.

Thereafter, Plante identified LaGuer, who was then occupying the apartment next to hers, as the perpetrator. When confronted and arrested by police on July 15th, LaGuer answered his door wearing only jogging shorts and white tube socks. The police observed and photographed the fresh scratches on his arm and back. Subsequent investigation failed to link any of the physical evidence at the scene to LaGuer. A saliva/blood test of LaGuer, made to determine if his blood matched blood found at the scene, or the sperm cells or fluid found on the victim's pubic hairs, was determined to be "inconclusive."[3] As a result, no forensics were used against LaGuer at the trial. The trial proceeded and the verdicts were returned upon Plante's identification of LaGuer as her assailant.

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[3] See, infra pg. 14.

Applicable Standards

A motion for a new trial pursuant to Mass. R. Crim. P. 30(b) may be granted if it appears that justice may not have been done. Commonwealth v. Pike, 431 Mass. 212, 218 (2000); Commonwealth v. Stewart, 383 Mass. 253, 257 (1981). The granting of a motion for a new trial is addressed to the sound discretion of the court. Commonwealth v. Moore, 408 Mass. 117, 125 (1990); Commonwealth v. Stewart, 383 Mass. at 257. The defendant argues that irregularities in the DNA testing and the newly discovered evidence of DeMartino's testimony requires a new trial, without which his rights under Massachusetts decisional case law, the Massachusetts Declaration of Rights, and the United States Constitution, would be violated.

A defendant seeking a new trial on the basis of newly discovered evidence must establish both that the evidence is newly discovered and that it casts real doubt on the validity of the conviction. Commonwealth v. LeFave, 430 Mass. 169, 176 (1999); Commonwealth v. Grace, 397 Mass. 303, 305 (1986). Evidence is "newly discovered" if it was unknown to the defendant or his counsel and not reasonably discoverable by them at the time of the trial or at the time of the presentation of an earlier motion for a new trial. Commonwealth v. LeFave, 430 Mass. at 176; Commonwealth v. Grace, 397 Mass. at 306. The defendant carries the burden of proof that in the exercise of reasonable diligence such evidence would not have been uncovered at an earlier time. Commonwealth v. Grace, 397 Mass. at 306.

To warrant a new trial any evidence determined to be newly discovered must be material and credible and carry a measure of strength in support of the defendant's position. Commonwealth v. Pike, 431 Mass. at 218; Commonwealth v. Moore, 408 Mass. at 126; Commonwealth v. Grace, 397 Mass. at 305. The court must find that a substantial risk exists that the jury would have reached a different conclusion had the evidence been admitted at trial. Commonwealth v. Lowe, 428 Mass.

45, 53 (1998); Commonwealth v. Grace, 397 Mass. at 306. It is not necessary that the judge conclude that the verdict would have been different; instead, the court must find that the new evidence would probably have been a real factor in the jury's deliberations. Commonwealth v. Moore, 408 Mass. at 126; Commonwealth v. Grace, 397 Mass. at 306. Such analysis requires the judge to have a thorough knowledge of the trial proceedings, as the probative value of newly discovered evidence depends largely on the strength of the case against the defendant. Commonwealth v. Moore, 408 Mass. at 126; Commonwealth v. Grace, 397 Mass. at 306.

DISCUSSION

1. The DNA testing. On January 12, 2000, LaGuer filed a motion for the DNA testing of physical evidence seized by the police and in the possession of the clerk's office. Thirteen months later, after numerous hearings and preliminary findings, evidenced by fifty-two court docket entries, the court, Hillman, J., allowed the motion. The ten page order, *inter alia*, reviewed the preliminary quantitative analysis to be performed by Cellmark Diagnostics, Inc. (Cellmark) of the biological material available. Since all parties and technicians were acutely aware of the limited amount of biological material available for replicate DNA testing, and were concerned that when dealing with old, small or degraded samples, an analyst "must proceed very cautiously to insure that the integrity of the evidence is maintained," Judge Hillman's order went to great detail to prescribe the handling, transportation and the division of the biological material to allow for replicate DNA testing by the selected laboratories of the Commonwealth and defendant. Additionally both parties were provided "the right to designate a representative of their choosing to observe, in a non-intrusive manner, any testing conducted pursuant to [the] Order."

The reports of the qualitative analysis performed by defendant's chosen laboratory, Forensic Science Associates (FSA) dated February 4, 2001 and March 21, 2002, concluded that from the defendant's DNA profile, which occurs in fewer than one in one hundred million members of the caucasian and black populations and in fewer than one in ten million of the Mexican American population, LaGuer could not be eliminated as the source of the male DNA profile found in the "pooled sperm" including "sperm fractions" of the collected pubic hair, swabs and slides. The majority of these samples originated from Plante's matted pubic hair specimens recovered shortly after the attack. The FSA report of March 21, 2002 further stated that "[t]hese findings fail to support Benjamin LaGuer's claim of factual innocence in the rape . . . of Lenice [sic] Plante."

LaGuer, in the present motion, seeks a new trial due to the alleged flawed procedure of the DNA testing. This argument is made despite the fact that it was his own chosen laboratory, FSA, that made the qualitative determination of a statistical match of LaGuer's DNA with the samples taken from the scene. LaGuer's argument is basically that DNA samples stated as being recovered from the scene had been purposefully or negligently "jumbled" and mixed with samples of LaGuer's DNA recovered from clothing taken from his apartment. The court finds that, upon this motion record, there is no evidentiary support for this assertion.

Moreover, this court's query of counsel following the September 9, 2011 hearing was not whether or not the DNA testing was in fact flawed. The inquiry was what difference would a flawed DNA test make in determining whether a new trial is required of a guilty verdict rendered upon no forensic evidence whatsoever, but instead, rendered upon the victim's identification of her assailant. Certainly, if the DNA testing had exculpated the defendant, it clearly would have been a real factor in the jury's deliberations. But the testing did not exculpate the defendant. Conjecture or surmise about the procedures of the testing, which procedures FSA had the opportunity to observe at all

stages, and which in fact, were largely performed by FSA, falls well short of the requirement that the proposed new evidence would have been a real factor in the jury's deliberations. See, Commonwealth v. Moore, 408 Mass. at 126-127 (the motion judge, relying upon his knowledge of the trial and "the inherent lack of convincing force in the defendant's position" properly found that the evidence would not have been a real factor in the jury's deliberations).

Here, the defendant has not established that the testing procedure was flawed or that evidence of a flawed result would have substantial effect on the jury's determination rendered almost entirely upon the victim's identification of the defendant as her assailant.

2. The testimony of Annie K. DeMartino. LaGuer argues that a new trial should be ordered upon the newly discovered evidence of the testimony of Annie K. DeMartino (DeMartino). LaGuer alleges that he first became aware of DeMartino when his legal counsel met her at a political fundraiser in the fall of 2006. It is alleged by defendant that DeMartino's expected testimony is "partly newly discovered and partly withheld evidence." DeMartino had not been listed as a witness at trial by the Commonwealth and there has been no credible evidence put forth that the district attorney's office or the police knew of her existence, or her testimony, at any time prior to her discovery by LaGuer.

DeMartino's presumed testimony is set forth in two unsigned and unverified transcripts of taped interviews of DeMartino conducted on February 13, 2007 and April 17, 2008 by representatives of the defendant. These transcripts reveal that DeMartino would likely testify that, in 1983 to 1984, she was a Mental Health Technician or house aide for the Herbert Lipton, Pleasant Street House, a halfway house for the mentally ill. She was assigned to provide aid and care for Plante in January, 1984 when Plante was discharged from the Leominster Hospital following her assault and rape. Upon her discharge, Plante came to Pleasant Street House as a full-time resident.

DeMartino was aware of Plante prior to this, as Plante had been a member in 1983 of the Herbert Lipton Day Treatment Program. However, DeMartino had never really become involved with her during that period. After her assignment she developed a relationship with Plante as she provided assistance and companionship on a 24/7 basis, every other week.[4]

DeMartino describes Plante as being, prior to the assault, an educated, stately woman who "walked tall" and had a somewhat imperious attitude. Although friendly and generally lucid, she suffered primarily from periods of delusions of grandeur, in which she would occasionally make statements that, for example, the deceased former President, John F. Kennedy, was her friend and would be visiting. Despite these delusions, DeMartino found Plante to be one of the most highly functioning residents of the House.

Following the assault, hospitalization thereafter and trial, DeMartino found Plante to be a very traumatized, frightened woman who suffered terrible nightmares. She then was very leery of men generally and men of color specifically. When outside of the House with DeMartino, she would become frightened by black or Hispanic males, saying words to the effect, "that's the man who raped me." She made such comments on about 5-6 occasions while with DeMartino outside of the House. She was treated at that time, DeMartino believes, with a number of medications, including Haldol.

DeMartino's statements also reveal that Plante was, prior to the assault, friendly with a younger Hispanic male who lived in the same apartment complex with his mother. On occasion this male and Plante would sit on a park bench, smoking cigarettes and talking. On at least one occasion, when this male's mother would not let him into her apartment due to his ingestion of alcohol, Plante allowed him to sleep in her apartment.

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[4] When on duty, DeMartino lived at the Pleasant Street House. Florence Robertson was the Mental Health Technician who alternated weeks with DeMartino in the care of Plante.

Generally, following the horrific trauma of the sexual assaults, Plante never truly recovered. Although DeMartino saw moments of improvement where Plante might smile or laugh a little, she remarks that "we never actually got her back in the true sense . . . we never got the whole Lennice back. Never." DeMartino cared and assisted Plante for about two years following her arrival at the Pleasant Street House as a resident.

The issue of Plante's competency to testify at trial was hotly contested. The defense sought, in a properly filed motion, the production of Plante's psychiatric records. After an in camera review by Judge William O'Neil of Plante's treatment records of April 1 through September 30, 1983 (spanning the three months before and after the assault), Judge O'Neil, in his order dated January 5, 1984, found nothing to justify the release of these records to the defense and no basis for the defense's motion for an independent psychiatric examination of Plante. Thereafter, the trial judge, Robert J. Mulkern, upon the prosecutor's oral, on-the-record motion in limine that Plante's psychiatric history not be brought forward during the trial, ruled that he would not "inhibit [the defenses's] cross examination with respect to her mental condition at the time of the alleged incident . . . nor at the time of any identification procedures. [The defense is] entitled . . . to explore what, if any, medication she was taking at the time of these events [supported by] some kind of testimony as to the effect, if any." Judge Mulkern expressed his concern, however, about the "remoteness" of any evidence of psychiatric illness in the past and stated that voir dire examination would be necessary before such evidence was offered. On the third day of trial, Judge Mulkern ruled that "on the present state of the evidence, given the witness on the stand, the prior history of any psychosis is not to be explored before the jury," Judge Mulkern continued to rule, however, that defense counsel could explore the effect upon her cognitive abilities of certain psychiatric drugs that Plante was taking. These rulings were subsequently upheld by the Appeals Court. Commonwealth v. LaGuer, 20 Mass. App. Ct. 965 (1985).

The prominence of the issue of Plante's competency, and the attention devoted to it by both counsel and the court, belies any argument that the defendant was not acutely aware of this issue. Plante's prior treatment within the Herbert Lipton system was well known. Even if the defense was not aware of DeMatino's role in Plante's care, this fact was learnable. Indeed, DeMartino was present with Plante at court throughout the entire trial. DeMartino as a witness, if her testimony was deemed not to be privileged,[5] was equally available to the defense and prosecution. As stated previously, I find that the Commonwealth was also unaware of DeMartino as a potential witness.

Furthermore, the trial judge never hampered the defense in their exploration of any lack of cognitive ability of Plante as the result of her medications at the time of the attack, at the time of her identification of the defendant as the assailant or at the time of trial.[6]

The defendant has the burden of establishing that despite an exercise of reasonable diligence the evidence of DeMartino's testimony would not have been uncovered at an earlier time. Commonwealth v. Grace, 397 Mass. at 306. If the evidence could have been reasonably discovered at the time of trial or at the presentation of LaGuer's prior eight motions, DeMartino's testimony cannot be deemed "newly discovered." Commonwealth v. LeFave, 403 Mass. at 176. In LeFave the Supreme Judicial Court reversed the trial judge's determination that post-trial studies made by an expert child psychologist of the effect of suggestive interviewing techniques upon children were

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[5] At times during both statements, DeMartino expressed concern that anything she might say could be considered privileged. The defendant's representatives assured her that they would confirm to her thereafter that since she was not providing mental health *treatment*, encounters with Plante would not be privileged under the law. DeMatino was told that her statements would not be used until such confirmation was provided. The court is unaware whether this occurred.

[6] At the time of Judge Mulkern's ruling that, upon the evidence offered at that point in the trial, Plante's prior psychiatric history was not to be gone into by counsel, he also ruled that "the two drugs, Demerol and Compazine, based on the evidence that I have head may have an effect upon the cognitive ability of a person who is using those drugs. What effect, if any, it may have had upon [Plante] is ultimately for the jury. But both counsel can explore with the Doctor."

newly discovered, finding that testimony of such studies did not differ in kind from the testimony offered by other experts at trial. Id. at 176-177.

I find that the purported testimony of DeMartino is not newly discovered evidence or sufficiently strong for a new trial to be ordered. First, the purported testimony of DeMartino, as submitted in the motion record lacks attributes of reliability. Neither statement has been sworn to, confirmed or even signed by DeMartino.[7] The court has no knowledge whether DeMartino ever saw or approved of the transcripts.[8] Second, as set forth above, this information from DeMartino was not newly discovered evidence for the reason that it was, at all times previous to this motion, available and discoverable. Third, the testimony of DeMartino does not provide a measure of strength in the proof that a substantial risk exists that the jury would have reached a different verdict had the evidence been admitted at trial. Commonwealth v. Lowe, 428 Mass. at 53; Commonwealth v. Grace, 397 Mass. at 306. Basically, DeMartino's testimony, if the statements can be taken as accurate representations, would be that Plante suffered from some psychiatric issues prior to the attack, but was one of the more higher functioning residents of the House. She received medications and was functioning, living in her own apartment and receiving services in the Day Treatment Program. This was all known and open to development at trial.

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[7] Rule 30(c)(3), Mass. R. Crim. P. states that "[m]oving parties shall file and serve . . . affidavits where apropriate in support of their . . . positions." See Commonwealth v. Hubbard, 371 Mass. 160, 174-175 (1975) (the practice in the Commonwealth is that motions for new trial are heard on facts presented by affidavit). Commonwealth v. Colantonio, 31 Mass. App. Ct. 299, 302 (1991) (court warranted in dismissing motion for a new trial unaccompanied by affidavit).

[8] DeMartino was told that her taped statements were necessary to present her information to the court in support of a motion for a new trial. Further she was told that "an Affidavit is something that is, you know, is essentially a statement that you would sign, and if we get to the point we're comfortable doing that, we would draft something and send it to you and you would have every opportunity to review it and make sure it was accurate and then sign it." No signed affidavit of DeMartino was presented in support of defendant's motion for a new trial and the court is unaware if DeMartino ever reviewed the statements submitted.

DeMartino's testimony regarding Plante's condition following the attack establishes that Plante suffered severely from the trauma that she experienced. LaGuer, being a man of color, certainly does not benefit from DeMartino's observations of Plante's palpable fright of darker complected males following the attack.

It also appears that LaGuer asks this court to find a basis for a third-party culprit defense. Presumably the Hispanic male with whom Plante developed a friendship prior to the attack would be such a culprit. The court makes no such finding. Far from establishing a connecting link between this male and the crime, DeMartino's testimony supports that Plante was not frightened by and, in fact, was a friend of a man of color *prior* to the attack, but became extremely fearful thereafter. As such, this testimony is not the basis for an order for a new trial.

3. The Commonwealth's motion to dismiss. The Commonwealth moved at the September 9, 2011 hearing that LaGuer's motion for a new trial be dismissed due to an alleged "fraud on the court." "A 'fraud on the court' occurs where it can be demonstrated, clearly and convincingly, that a party has sentiently set in motion some unconscionable scheme calculated to interfere with the judicial system's ability impartially to adjudicate a matter by improperly influencing the trier of fact or unfairly hampering the presentation of the opposing party's claim or defense." Hug v. Gargano & Associates, P.C., 76 Mass. App. Ct. 520, 527-528 (2010). A fraud on the court may be found where "a party lies to the court and his adversary intentionally, repeatedly, and about issues that are central to the truth-finding process." Passlogix, Inc. v. 2FA Tech, LLC, 708 F.Supp. 2d 378, 393 (S.D.N.Y. 2002).

The Commonwealth submits in support of its claim of fraud, a certain letter found within LaGuer's Volumes of Exhibits filed with the court on July 5, 2011 in support of his motion for a new trial. Reportedly, after arguing at an April 22, 2010 parole hearing (and also at a parole hearing in

2003) that the former assistant district attorney James Lemire had offered him, LaGuer, a pre-trial plea bargain, and after the Commonwealth responded strenuously against this contention by a May 3, 2010 letter to the Parole Board, an unsigned copy of a letter from ADA Lemire to defense counsel Peter Ettenberg dated January 17, 1984, was produced for the first time by defendant. The letter reads in pertinent part:

> Per our conversation at the courthouse, this office is prepared to offer the defendant a twenty year Concord sentence[9] in exchange of [sic] his guilty plea. The victim's family is quite concern [sic] over her physical and mental health. They are in agreement with this recommendation. The police department has no opinion. We expect no objections from Mr. John J. Conte, given the delicate circumstances and possibly his own inclination to spare us all the grief of a trial.

The Commonwealth asserts, in no uncertain terms, that this letter is fraudulent and is part of an ongoing scheme of a fraud on the court. The Commonwealth points to this letter being unsigned and the unusual situation of defendant, or defendant's counsel, having an unsigned letter from the trial ADA. This letter was only brought forward on or about June or July 2010 and inexplicably had not been submitted at the 2003 or 2010 parole board hearing. More importantly, both ADA James Lemire and Attorney Peter Ettenberg deny the above contents of the letter in sworn affidavits submitted to the court. ADA Lemire states that, although he had general conversations with Attorney Ettenberg about the case, Plante insisted on going forward with the case and testifying. He swears that he never asked District Attorney Conte to approve any plea offer. He states further that he is "certain that no plea offers were ever made to Benjamin LaGuer." Attorney Ettenberg, in his

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[9] By passage of the Truth in Sentencing Law, which became effective July 2, 1994, the "Concord Sentence," so-called, was eliminated. The premise of such a sentence was the ordering of a lengthy sentence with an early parole eligibility date. Presumably such an arrangement resulted in a long period of parole accountability upon release after a relatively short incarceration.

affidavit dated April 29, 2010 states that he spoke generally to ADA Lemire about the possibility of a plea agreement. He states further that a joint recommendation for a twenty year Concord sentence came up in discussion, but that it went no further because the defendant was unwilling to plead guilty. In his more recent affidavit of September 6, 2011, Attorney Ettenberg states that ADA Lemire "never made a formal written plea offer to [him] in regard to Benjamin Laguer," and that he never received or saw the 1984 letter in issue until 2010. Moreover, at sentencing this prior plea offer was not mentioned. In defendant's Motion to Stay Execution of Sentence, and LaGuer's pro se affidavit submitted in support of the motion, no mention of a plea offer was made.

In ruling upon this motion to dismiss the defendant's motion for a new trial based upon this letter, the court does not rule in a vacuum. Indeed, the court is required, especially when the judge hearing the motion for a new trial was not the trial judge, to have a thorough knowledge of the trial and other proceedings that preceded the filing of the motion. See Commonwealth v. Moore, 408 Mass. at 126; Commonwealth v. Grace, 397 Mass. at 306.

The prior record of post-trial proceedings has shown that LaGuer has in fact previously tampered with evidence and submitted evidence that was less than reliable. The Commonwealth was deprived of the ability to use forensics in the prosecution of this case due to LaGuer's intentional tampering with his own blood-type testing. In the parole board hearing in 2003, LaGuer admitted that he intentionally tainted his court-ordered saliva sample, from which his blood type was to be determined, by "mixing his own [saliva] with that of another inmate." Commonwealth v. LaGuer, 65 Mass. App. Ct. 612, 616-617 and n.9 (2006). The subsequent test found his blood-type to be "inconclusive," a fact LaGuer has raised at subsequent hearings despite knowledge of his intentional actions to render the results invalid. LaGuer's actions of deception in regard to his saliva sample and his putting forth the resulting invalid results as a fact that the court should consider in its evaluation

of motions for a new trial are intentional acts performed to subvert the truth-finding process. They are fraudulent. Passlogix v. 2FA Tech, LLC, 708 F. Supp. at 393.

On February 24, 1989 LaGuer filed a motion for a new trial based primarily on the alleged ineffective assistance of trial counsel. After the trial judge denied this motion's claims that defense trial counsel had provided ineffective assistance, the Supreme Judicial Court, upon appeal, remanded the matter to the trial court for further hearings on the issue of whether ethnic prejudice of the jury tainted the verdict so as to require a new trial. This ruling of remand by the Court was based almost exclusively on an affidavit of one juror, William P. Nowick (Nowick) dated July 18, 1988. Judge Mulkern had analyzed Nowick's affidavit and applied the dictates of Commonwealth v. Fidler, 377 Mass. 192 (1979). He found that the assertions set forth by Nowick did not relate to specific factual information that might influence reasonable jurors. Instead he found the revelations in Nowick's affidavit to be indicative of matters of the jurors' attitudes. Despite agreeing with Judge Mulkern's determination that the jury was not "exposed to extraneous matter within the rule of Fidler," the Supreme Judicial Court remanded the matter for a hearing to "determine the truth or falsity of so much of Nowick's affidavit as bears on jurors' ethnic bias." Commonwealth v. LaGuer, 410 Mass. 89, 94-97 (1991).

On remand, Judge Mulkern held evidentiary hearings over multiple sessions during August 26 through 29, 1991. Testifying witnesses included four jurors, although eleven jurors appeared for the hearing as possible witnesses, the twelfth juror having died prior to the hearing. All jurors, upon Judge Mulkern's order, were free to be interviewed by either side prior to the hearing. Juror Nowick testified as well as the juror (juror X) to whom Nowick attributed the two racist statements set forth

in Nowick's affidavit.[10] LaGuer and his legal adviser, attorney Robert Terk,[11] testified. Judge Mulkern found that these alleged statements, as well as other allegations set forth in the Nowick affidavit, were not corroborated by the jury foreman or by any other jurors despite the fact that Nowick's affidavit sets forth they were made during jury deliberations.

Judge Mulkern found juror X to be an elderly man who projected a posture of "somewhat confused indignation that he is being charged with racial bias." As to Nowick, in his testimony he disavowed much of what had been set forth in the affidavit that he admittedly signed when three representatives of LaGuer appeared at his home seeking his signature.[12] Judge Mulkern found that Nowick had become, following the guilty verdict, "personally involved in LaGuer's cause." Nowick wrote to LaGuer by a February 15, 1988 letter, six months before he signed his affidavit, expressing "wonderment at the disposition of blood tests . . . "[13] and assuring LaGuer that he could provide LaGuer "interesting testimony to your benefit." However, after having met with representatives of LaGuer, and having signed the affidavit as was presented to him, Nowick stated in a court authorized interview that he "felt like he had been baited and hooked." Judge Mulkern, in applying "the usual and customary tests of believability and credibility," found the purported ethnic statements to be "not essentially true." Judge Mulkern's findings and his denial of the Motion for New Trial was affirmed

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[10] The statements attributed to this juror were (1) "the goddamned spic is guilty just sitting there; look at him. Why bother having the trial," and (2) referring to juror questioning how anyone could be raped all night, that "spics screw all day and night." This juror was referred to as juror X in both the Supreme Judicial Court decision and the subsequent Appeals Court decision. That title for this juror is followed herein.

[11] Despite having signed and presumably filed this Motion for New Trial and Evidentiary Hearing, attorney Terk has maintained throughout the proceedings in the early 90's and currently that he is LaGuer's "adviser" not his "legal counselor," and that LaGuer is the "boss."

[12] This signing was after other meetings with Nowick at which Judge Mulkern found he had been subject to "serious lobbying by advocates for LaGuer (which included, on his testimony, a showing of a photograph of the 'actual rapist') that the guilty verdict was error."

[13] Of course Nowick, as well as everyone else, was unaware at that time of LaGuer's role in the falsification of the blood test results.

by the Appeals Court. Commonwealth v. LaGuer, 36 Mass. App. Ct. 310 (1994) (Fine, J. dissenting).

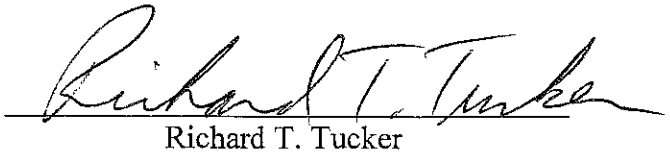
Against this backdrop of two known instances where LaGuer skewed evidence, LaGuer sets forth little of substance in addressing the issue of the January 17, 1984 letter. He argues that his trial attorney's affidavit that he has no memory of receiving a formal plea offer from the ADA "is not credible," and that "[i]t may be inferred that Ettenberg signed an affidavit drafted by prosecutors to advance their own agenda." I draw no such inference from attorney Ettenberg's affidavit and credit his statement that he never saw the letter until 2010.

LaGuer further argues that it would not be unusual for him to have an unsigned copy of an assistant district attorney's letter to his trial lawyer, but not the signed original. Moreover, LaGuer claims that it is the District Attorney's "aim . . . to cast LaGuer swapping his saliva with another inmate in the worst light . . .," and that had he submitted his own saliva it would have provided evidence of his innocence. This court does not agree.

I find the January 17, 1984 letter to be unauthentic and its knowing use in this proceeding is an attempt to again interfere with the judicial system's ability to impartially adjudicate the matter. Hug v. Gargano & Associates, P.C., 75 Mass. App. Ct. at 527-528. This letter, along with the tampered saliva and Nowick's affidavit, clearly demonstrate a pattern of behavior by the defendant to perpetrate "a fraud on the court." Id. The Commonwealth's Motion to Dismiss LaGuer's Ninth Motion for New Trial Due to "Fraud on the Court" is ALLOWED.

ORDER

For the above stated reasons, the defendant Benjamin LaGuer's Motion for New Trial and Evidentiary Hearing is DENIED.



Richard T. Tucker
Justice of the Superior Court

DATED: February 27, 2012