

To: State Representative Ellen Story (D – Amherst)

From: Hon. Isaac Borenstein (Ret.)
Lisa Billowitz

Re: Unreliable DNA Evidence in *Commonwealth v. Benjamin LaGuer*

Date: June 10, 2009

On behalf of Ben LaGuer, we would like to thank you for asking us to produce this memorandum. Ben's story is widely known from extensive media coverage. 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.

In 1983, Ben was convicted of rape and sentenced to life in prison. No physical evidence tied him to the crime scene; his conviction rested solely upon the unreliable cross-racial identification of the victim, whose long history of mental illness was not disclosed to the jury. Over the years Ben has established that his trial was infected with errors, including racist commentary by the jurors who convicted him and the withholding of fingerprint evidence that inculpated another individual in the crime. However, no court has yet ruled that such errors warranted a new trial.

In 2000, the Massachusetts Superior Court ordered DNA testing of the crime scene evidence in Ben's case. The testing was completed in 2002. One series of tests is consistent with Ben's innocence because they show *no male DNA* on the vaginal or rectal swabs taken directly from the victim's body, and *none of the victim's blood* on the rectal swabs. These findings bely the Commonwealth's account of a brutal eight-hour vaginal and anal rape.

A separate test yielded a miniscule amount of Ben's DNA from pooled samples said to be from the crime scene, some labeled "of unspecified origin." This test has been discredited, however, by several forensic experts. As explained below, these experts believe that (1) the "pooling" methodology was flawed and (2) material taken directly from Ben and/or his apartment likely contaminated the crime scene evidence.

This memo is only intended to provide a brief summary of evidentiary issues relevant to the DNA testing, detailed below. Our research and investigation continues as to other potential errors in the handling of evidence, whether provable by direct or circumstantial evidence; this may include, but not be limited to, the possibility that the mislabeling of Ben's clothing as crime scene evidence resulted in contamination. We are also investigating other grounds for a new trial based on newly discovered evidence. We will keep you regularly updated as our strategy progresses.

I. Improprieties in 1983 testing

On July 20, 1983, an evidence log shows that the lead detective, the late Ronald Carignan, delivered evidence from the crime scene and hospital specimens from the victim to the MSP crime lab. Two weeks later, Carignan delivered an item called “underclothes from suspect.” (These underpants were not retrieved from the crime scene. As discussed in more depth below, they may have seized illegally from Ben’s apartment.)

The lab notes of Mark Grant, a state police chemist, show that he examined the “interior crotch” area of Ben’s underpants at the same time that he was handling other evidence in the case, including the rape kit. It does not appear that he cleaned his instruments or changed his gloves in between testing the items. According to an independent forensic review, Grant failed to follow “generally accepted practice and standard operating procedure” to prevent contamination. Thus, it is entirely possible that biological material from Ben’s underpants contaminated the crime scene evidence.

The 1983 lab procedures are of particular concern to the reliability of the DNA testing. The National Research Council’s The Evaluation of Forensic DNA Evidence Report (1996) makes clear “the potential of DNA evidence and the relative ease with which it can be mishandled or manipulated by the careless or unscrupulous, the integrity of the chain of custody is of paramount importance.”

Indeed, according to the forensic experts who have reviewed the DNA testing in Ben’s case, the genomic data were more consistent with contamination than with the eight-hour continuous rape that was alleged. The amount of cellular DNA material that was used for the result was based on less than 0.03 nanograms. (A nanogram is a billionth of a gram; according to one expert’s illustration, “When a flashlight shines in a darkened room, most of the specks of dusts seen floating in the air weigh more than a nanogram.”)

It is also critical to note that the DNA directly traceable to Ben derived from “pooling” cellular material from several different samples believed to contain male DNA. As forensic expert Dean Wideman wrote;

Many of the “pooled” samples that were used to obtain the DNA results were of “unspecified” or unknown origin. . . . these “unspecified” or unknown samples could have come directly from Mr. LaGuer during improper handling and testing of his underwear and/or these “unspecified” samples could have come into contact with items known to have originated with Mr. LaGuer.

Accordingly, Wideman and other experts have concluded that this portion of the DNA

testing used flawed methodology. For this reason alone, the test results from the pooled specimens are unreliable and should not be used to draw any factual or legal conclusions.

II. Possible Police and Prosecutorial Misconduct

On July 14, 1983, one day after the crime, Carignan searched Ben's apartment. Ben was not home, and would not be arrested until the following day. In his police report, Carignan described seeing several tube socks in the apartment. He swore in the search warrant return and trial testimony that he seized "nothing" during the search.

Eighteen years later, socks fitting Carignan's description showed up in evidence. In 2001, the Commonwealth made an inventory of the evidence at the outset of the process that led to DNA testing. It shows that there were eight socks in the box of evidence corresponding closely to the socks seen in Ben's apartment. Moreover, as discussed above, Carignan delivered underpants taken from Ben to the state police for testing. This suggests that Carignan seized the socks and underwear from Ben's apartment, contrary to his sworn statements in the search warrant return and on the stand.¹

In 1989, Ben filed a motion for a new trial. One element of that motion was that he wanted to see the underwear referred to as "belonging to the suspect." On April 27, 1989, the prosecutor, James Lemire, told Superior Court Judge Robert Mulkern that he was unable to locate the evidence from the case. Yet two weeks later, Fitchburg Attorney Robert E. Terk found the alleged missing evidence at the Leominster Police station.

In anticipation of a hearing held on May 22, 1989, the district attorney's office dispatched State Trooper William Kokocinski to collect the evidence from the Leominster Police. Lieutenant Francis Ptak made an inventory of the evidence before releasing it. The inventory shows the presence of three (3) pairs of underwear and a number of socks in the evidence. When prosecutors presented the evidence in court five days later, however, there were only two (2) pairs of underpants. The inventory was withheld until Ben obtained his Leominster Police file in April 2001. This is the last time this underwear appears in any evidence chain of custody documents. The disappearance of the underwear while in the Commonwealth's custody -- evidence that was critical to the motion for new trial then being adjudicated -- raises troubling questions about misconduct.

III. Error in Serological Testing

One key piece of crime scene evidence was a group of bloody tissues from the victim's couch, which Grant identified as Group B human blood. This group B is similar

¹Carignan's credibility is seriously undermined by the fact that he destroyed his contemporaneous investigative notes and substituted them with reports he wrote weeks after Ben's arrest. As Wideman noted in his forensic review, "It is not an acceptable procedure to discard or destroy original notes generated during a criminal investigation."

to Ben's blood type, and the SJC later cited this purported link in affirming the denial of a new trial in 1991.

In August 2001, DNA tests on that same blood showed that in fact it belonged to the victim, who is known to have O type blood. In other words, Grant's identification of the blood as type B was wrong. This raises questions about the reliability of Grant's work as a whole, especially as this was the only blood in all of the evidence for which he claimed to be able to determine a blood type.²

IV. Missing Evidence

The problems with the chain of custody, apart from the Commonwealth's repeated failures to disclose key information to the defense, is amply illustrated by the evidence that is missing, untested or undisclosed. As the SJC acknowledged in 2007, "There is no question that some evidence has been lost or destroyed."

When police arrived at the crime scene, the victim told them that the intruder had a knife. The police saw the knife on the nightstand, but the knife was never introduced into evidence. A hairdryer, whose cord was used by the assailant to bind the victim's feet, was dusted for fingerprints. A partial print found on a Pepsi soda can in the victim's apartment was sent to the state police crime lab for analysis. *The Commonwealth has not disclosed fingerprint or other test results for any of this evidence.*

Moreover, the trial evidence included the culprit's tube sock with type O perspiration. After May 1989, the tube sock disappeared from all subsequent lists and chain of custody papers.

Significantly, four fingerprints were recovered from the base of the telephone whose cord was used to bind the victim. These fingerprints were tested in 1983 and were found *not* to match Ben's. These results were not shared with Ben until 2001, at which point the fingerprints had been destroyed, precluding comparison with other suspects.

V. Evidence Storage

There are a number of problems in the storage and handling of the evidence that may discredit certain DNA results as well the propriety of the police investigation and prosecutorial conduct.

On April 27, 1989, before the hearing on Ben's motion for a new trial, the prosecutor, James Lemire, told the Court that he could not locate the evidence. Yet two weeks later, on the day of an evidentiary hearing, Terk walked into the Leominster police

²Before Grant completed his reports, he reviewed Carignan's reports – again, reports that were generated after Carignan destroyed his original notes.

station and found the box of evidence sitting on a shelf.

On May 17, 1989, State Trooper Kokocinski retrieved the evidence from the Leominster Police Department. After the court hearing on May 22, Judge Mulkern ordered the box of evidence sealed with tape and had Terk and Lemire sign their names across the seal. From there, apparently it went to the attic of the Worcester Superior Court -- not a climatically controlled environment.

Nine years later, an Assistant District Attorney, Sandra Wysocki, apparently conducted an *ex parte* search for the evidence. On November 18, 1999, defense attorneys located the evidence at the courthouse. However, the physical seal that Judge Mulkern had ordered to be placed on the evidence boxes in 1989 had been broken at some earlier, unknown time. The socks that apparently had been illegally seized from Ben's apartment were loose in a box with other evidence, not bagged; these may have contaminated the evidence from the crime scene.

VI. Conclusion

The irregularities described herein either independently or cumulatively cast a shadow over the integrity of the Commonwealth's work in this case. Therefore, the state police should undertake a full and accurate forensic accounting of the physical evidence to confirm or dispel these errors and take corrective measures. The MSPCL has a legitimate interest in the ultimate question of whether a citizen is unjustly incarcerated.

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