

Review Of Factors In The Case Of *Commonwealth Of Massachusetts v. Benjamin LaGuer* That Suggest It May Represent A Miscarriage of Justice

The following is a general review of some key factors suggesting a miscarriage of justice occurred when Benjamin LaGuer was convicted of aggravated rape, robbery, burglary, and assault and battery, related to events that allegedly occurred in the Leominster, Massachusetts apartment of 59-year-old Lennice Plante during the late evening of July 12, and early morning of July 13, 1983. ¹ The eleven factors reviewed are:

1. LaGuer's Identification
2. Stolen Items
3. Juror Racism
4. Fingerprint Evidence
5. Blood Evidence
6. Sperm Evidence
7. DNA Evidence
8. Plante's Mental State
9. Missing Evidence
10. Police Misconduct/Criminality
11. Prosecutorial Misconduct

1. LaGuer's Identification

There are no independent witnesses placing Benjamin LaGuer in Lennice Plante's apartment during the time of the incident, even though she claimed she was assaulted over a continuous period of eight hours.

After a neighbor found Plante in her apartment with her ankles and wrists respectively bound with a hairdryer cord and telephone wire, Plante told police on the scene that she could not identify the lone man responsible for what she said was an eight-hour sexual assault that included vaginal and anal intercourse. She vaguely described the man as "very dark skinned," and as a "black man very short and small in build." Plante also told several medical personnel at the hospital she was taken to that she could not identify her alleged assailant.

Plante later identified LaGuer, but there are suspicions that she did so after being shown only a picture of him, and not a photo array of multiple possible suspects. The questionable circumstances surrounding LaGuer's identification are supported by the fact that he did not match any detail of Plante's description of her lone assailant: he is not "short", but at least six inches taller than Plante; he is not "very dark skinned", but has a light-olive skinned complexion; and he was not "small in build," but had a muscular build after his discharge three weeks earlier from

the Army. Additionally, Plante said her assailant spoke clearly and without an accent, while LaGuer had spoken with a severe stutter since childhood and he had a distinct ethnic accent. Neither did Plante's description of her assailant include LaGuer's tattoos or scars.

In addition, Plante denied ever telling police that she saw her assailant go into or out of LaGuer's apartment, even though police made that claim in an affidavit used to obtain a warrant to search LaGuer's apartment.

The veracity of Plante's identification of LaGuer during his trial is undermined by the fact that he was the only non-white sitting at the defense table and she had already seen at least one picture of him. Furthermore, her poor eyesight may have been the reason she initially told police and hospital personnel that she couldn't identify her assailant. Fourteen years after LaGuer's trial the prosecutor, James Lemire, told a Criminal Law class he taught at Assumption College in Worcester, Massachusetts, "the victim [Plante] had poor vision, she could not see close up or far away." (Affidavit of Michelle L. Chafitz, April 10, 2001, ¶9)

2. Stolen Items

Plante told police investigators that the intruder removed two rings from her left hand and her handbag was missing from her apartment. Neither the missing rings nor the handbag were found when LaGuer's apartment was searched.

3. Juror Racism

There were no non-whites on LaGuer's jury. After LaGuer's conviction evidence surfaced that there was significant racial prejudice against LaGuer amongst the jurors. A July 18, 1988, affidavit by juror William P. Nowick indicated the judgment of LaGuer's guilt by some jurors was based on ethnic stereotyping and a negative attitude toward his ethnicity: not on a reasoned consideration of the prosecution's evidence. These allegations eventually resulted in a remand in 1991 by the Supreme Judicial Court of Massachusetts for a hearing before the trial judge to determine the veracity of the allegations about juror prejudice. (*Commonwealth v Benjamin LaGuer*, 571 N.E. 2d 371, 410 Mass. 89 (05-14-91)) Although Nowick and a man publicly identified only as Juror X both recollected that jurors made prejudicial ethnic statements about LaGuer, the judge ruled against ordering

Massachusetts State Representative Ellen Story, 3rd Hampshire District, requested that The Justice Institute analyze the case of *Commonwealth of Massachusetts v. Benjamin LaGuer* (Case No. 83-103391), which concerns events that allegedly occurred on July 12-13, 1983, in the Leominster, Massachusetts apartment of 59-year-old Lennice Plante. This is the report of that analysis that was sent to Rep. Story on September 6, 2006.

a new trial. Even though the Supreme Judicial Court had indicated that evidence of juror bias entitled LaGuer to a new trial, in 1994 the Appeals Court of Massachusetts upheld the judge's denial of a new trial. (*Commonwealth v Benjamin LaGuer*, 630 N.E.2d 618, 36 Mass. App. Ct. 310 (03/31/94). See dissent by Judge Fine). Prosecutor Lemire later confirmed the substance of the racial allegation in Norwick's affidavit, and in doing so he exposed that the prosecution had not argued in good faith against the effect of the juror prejudice on LaGuer's due process right to a fair trial. During the Criminal law class Lemire taught at Assumption College: "Mr. Lemire said there was not a lot of evidence. ... the jury did not like Mr. LaGuer because he was black." (Affidavit of Michelle L. Chafitz, April 10, 2001, ¶6)

4. Fingerprint Evidence

Prior to LaGuer's trial his lawyer was informed that a "small partial" fingerprint had been recovered from the telephone from which the phone cord used to tie-up Plante had been obtained. During LaGuer's trial, Detective Ronald N. Carignan described the print as insignificant "in quality." (Tr 398-399, 402)

What LaGuer's attorney wasn't told by the prosecution, was that an additional four fingerprints had been lifted from the telephone and that on July 16, 1983, one day after LaGuer had been taken into custody, a Massachusetts State Police analyst excluded him as the source of the prints. However, those four exculpatory fingerprints were not disclosed to LaGuer until more than 18 years later – in November 2001.

5. Blood Evidence

Although there have been different claims concerning alleged blood evidence related to the events in Plante's apartment, LaGuer's blood type "B" is not linked to the case's blood evidence.

6. Sperm Evidence

Plante's rape kit included her vaginal and rectal swabs collected at the hospital she was

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taken to from her apartment. A Massachusetts Department of Public Safety (MDPS) lab technician tested the vaginal and rectal swabs for the presence of seminal fluid or spermatozoa. He concluded that neither was present on the swabs, and likewise none was detected on Plante's underwear. The rectal swab also had an absence of blood. Those conclusions were confirmed by Forensic Science Associates' (FSA) DNA testing of the swabs almost two decades later. DNA testing of a swab in a container with Plante's pubic hair also tested negative for the presence of any blood or sperm. Tests of the vaginal swab did show, however, that Plante was afflicted with a serious yeast infection.

7. DNA Evidence

The 2001 and 2002 DNA testing by FSA of items recovered from Plante's apartment, uninventoried items seized during a search of LaGuer's apartment, and clothing police officers saw LaGuer putting on in his apartment the day he was taken into custody (July 15, 1983), has been reviewed by Dr. Theodore D. Kessiss (Report to Rep. Ellen Story, dated November 1, 2005), Dean A. Wideman (Forensic Case Review: *Commonwealth of Massachusetts v. Benjamin LaGuer*, March 30, 2006), and Professor Daniel L. Hartl, Harvard Dept. of Organismic and Evolutionary Biology (Letter to Rep. Ellen Story, dated August 21, 2006). Their analyses raise serious questions about the evidentiary value of those DNA tests considering the items fractured chain of custody; the mishandling of the items by police, prosecutors, crime lab and/or FSA lab personnel; the intermixing of items collected from Plante's apartment and her rape kit with items seized from LaGuer's apartment and the clothing he was wearing when taken into custody on July 15, 1983; and the irregular procedures used to test some of those items. It is notable that in spite of the questions raised by the DNA testing procedure, LaGuer was not implicated by the individual testing of items identifiable as originating from him or Plante. As detailed by the above named experts, the complete breakdown in the reliability of the hyper-sensitive PCR DNA testing technique occurred when items of indeterminate origin were exposed to contamination by intermixing. The PCR process is so susceptible to returning a false positive due to contamination that an FSA technician's DNA was detected in one of the tested samples.

8. Plante's Mental State

Plante experienced a mental breakdown 14 years before the incident in her apartment,

and she underwent drug therapy for many years afterwards. The day of the incident Plante's daughter told police at the hospital that her mother "had not been right since" the breakdown. (Investigation Report by Timothy E. Monahan, July 13, 1983, p.3.). During the Criminal Law class he taught at Assumption College, prosecutor "Lemire said he thought the victim [Plante] was mentally ill." (Affidavit of Michelle L. Chafitz, April 10, 2001, ¶8)

9. Missing Evidence

There are at least two items of missing physical evidence found by police investigators in Plante's apartment that could possibly cast light on the identity of the intruder and/or exclude LaGuer. One is a Pepsi can with an identifiable fingerprint on it that was sent to the MDPS for examination. The report of that print's analysis has never been disclosed to LaGuer. The second item is a knife found in Plante's apartment. She said that the intruder entered holding a knife and police investigators determined that her locked door had been "jimmied" open. No report about possible fingerprints or other tests that may have been conducted on the knife has been disclosed to LaGuer, nor has any information concerning a possible investigation into where it was purchased or who may have done so. If the whereabouts of the Pepsi can and the knife is known, the prosecution is concealing that information. However, if those items implicated LaGuer it is unreasonable to think test results would not be disclosed or the items provided by the prosecution.

10. Police Misconduct/Criminality

Detective Carignan committed actions during his investigation of the incident in Plante's apartment that at the very least are describable as grave misconduct, and that may have crossed the line into criminality. Among these are the following:

- 1) Carignan targeted LaGuer as a suspect without any evidence he was involved, and knowing that he did not match Plante's description of her intruder. LaGuer was targeted because he lived across the hall from Plante, and the police had a two-sentence report from three years earlier (Oct. 1980) that he and several friends (including one who became a Leominster police officer) were stopped and asked about a burglary.
- 2) Carignan obtained a search warrant for LaGuer's apartment based on his evidently false claim in an affidavit that Plante said she saw her intruder go into and out of LaGuer's apartment. During her testimony Plante vigorously denied making such a statement.

3) Carignan falsely testified during his August 1983 grand jury testimony that LaGuer's apartment was the scene of Plante's assault. He also falsely testified, possibly to make Plante's injuries seem much more severe than they were, that she was found in a pool of blood, when he knew she wasn't.

4) Carignan destroyed his contemporaneous investigation notes (that included crime scene and witness interview notes) after LaGuer was taken into custody. He then composed his investigative reports from his possibly selective or contrived remembrance of what he observed and was told.

It should be noted that Carignan was not the only police officer involved in LaGuer's case who may have engaged in misconduct and/or criminality.

11. Prosecutorial Misconduct

Immunity from liability for virtually all prosecution related acts and the free pass trial and appellate judges invariably grant prosecutors for their prejudicial pre-trial, trial and post-trial conduct, means that most well-founded accusations of prosecutorial misconduct have the effect of being little more than expressions of moral and ethical outrage. Regardless of the likely reluctance of a judge to hold LaGuer's prosecutors accountable, their concealment of the exculpatory fingerprint evidence from LaGuer for 18 years, and their numerous misstatements of fact related to court proceedings and filings since 1983 have directly contributed to obstructing justice by sabotaging discovery of the truth about what happened in Plante's apartment on July 12-13, 1983. The gravity of the prosecution's obstruction is further indicated by prosecutor Lemire's 1998 statement that "he questioned Mr. LaGuer's guilt." (Affidavit of Michelle L. Chafitz, April 10, 2001, ¶8)

Summary of the Eleven Factors

- Benjamin LaGuer was not credibly identified as the intruder into Lennice Plante's apartment on July 12-13, 1983.
- Several of the jurors, and possibly more, decided on LaGuer's guilt based on his ethnicity and racial stereotyping, and not after considering whether the prosecution had met its burden of proving him guilty beyond a reasonable doubt.
- None of the items stolen from Plante was found in LaGuer's possession.

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- Prosecutors failed to disclose for 18 years that four of the lone intruder's fingerprints do not match LaGuer.
- The blood evidence recovered from Plante's apartment does not match LaGuer's blood type.
- No sperm was detected on Plante's vaginal, rectal or public hair swabs, or on her panties, and no blood was detected on the rectal swab.
- The DNA testing of segregated evidence does not implicate LaGuer, and the testing of a mixture of items containing LaGuer's and/or Plante's DNA does not produce an evidentially reliable result.
- Plante had serious mental problems for many years preceding the incident in her apartment on July 12-13, 1983, and her state of mind may have contributed to her embellishment of that incident by claiming she had been sexually assaulted for eight hours. It may also have heightened her susceptibility to agreeing when shown LaGuer's picture that he was her assailant, even though he didn't match any particular of her previous vague description to the police, and she had previously told the police and hospital personnel that she couldn't identify the intruder.
- Evidence from Plante's apartment is missing that could possibly exclude LaGuer and/or identify Plante's intruder, and if fingerprint or forensic testing of that evidence has been conducted, the results have not been disclosed to LaGuer.
- After selecting LaGuer as a suspect because of his proximity to Plante's apartment and a vague police report three years earlier concerning an unrelated property crime, one or more police officers fabricated evidence and/or testimony to implicate LaGuer as the intruder.
- Prosecutors may have pursued charges against LaGuer knowing they had no reasonable basis to believe he was the intruder into Plante's apartment.

Conclusions

Benjamin LaGuer was excluded as the source of the fingerprints on the telephone from which the cord used to bind Lennice Plante's wrists was obtained. The source of those fingerprints was the intruder into Plante's apartment, and that person was not LaGuer. That explains why Plante's

identification of LaGuer was fraught with suspicious aspects and the case's physical evidence does not implicate him.

The DNA testing in LaGuer's case conducted in 2001 and 2002 is illustrative that the most advanced scientific techniques cannot be assumed to generate infallibly reliable results. Particularly due to its level of sophistication, the outcome of a DNA test is particularly subject to the old adage: 'garbage in, garbage out.' For any number of reasons, a DNA test can accidentally, or even be deliberately sabotaged to produce a false positive.

LaGuer's presumption of innocence and his due process right to a fair trial was subverted by the prosecution's concealment, and possible continued concealment of evidence supporting that he was not the intruder into Plante's apartment on July 12-13, 1983. Compounding that situation is the insidious effect of racial prejudice on LaGuer's right to a fair trial, which makes his conviction a late twentieth-century version of a nineteenth-century lynching.

Another disturbing aspect to LaGuer's conviction is the physical evidence contradicts Plante's claim that she was sexually assaulted vaginally and anally, much less over an eight-hour period of time. Consequently, the evidence supports that LaGuer was convicted of an aggravated rape that never happened.

If LaGuer was represented by competent counsel during a retrial it is nigh near inconceivable that reasonable and racially unbiased jurors would not lack reasonable doubt and vote to acquit him, after exposure to the new evidence, and the evidence as a whole.

Opposition by the prosecution to the granting of a retrial to LaGuer, and the likely subsequent dismissal of the charges against him, cannot reasonably be attributed to the prosecution's genuine belief in his guilt. It is not reasonable to think LaGuer's prosecutors are unaware the credible evidence of his guilt is on par with evidence that the Earth is flat.

The prosecution's opposition to LaGuer's retrial may be due to a combination of two factors. One, is their abhorrence to admit that LaGuer was not just wrongly convicted, but that he should not even have been considered a serious suspect. Two, is that dismissal of the charges against LaGuer opens up the prosecution's client government entity to significant civil liability, as well as exposing other government entities, agencies and employees to possible civil liability. Thus, as

long as LaGuer's conviction remains intact, the prosecution does not have to experience embarrassment or expose to civil liability the government entities, agencies and employees responsible for LaGuer's predicament of being imprisoned for 23 years for crimes the evidence substantiates were committed by someone else.

The actual perpetrator, that "someone else," was effectively granted a free pass by the prosecution from accountability for his crimes.

After reviewing a cross-section of the factors involved in Benjamin LaGuer's case, the most reasonable conclusion is his conviction was not merely a tragic error by an imperfect system, but it was a grave and avoidable miscarriage of justice.

The Justice Institute
By Hans Sherrer, President
September 6, 2006

Endnote:

1 This Review is in response to a request by Massachusetts State Representative Ellen Story, 3rd Hampshire District, to analysis the case of *Commonwealth of Massachusetts v. Benjamin LaGuer* (Case No. 83-103391) which concerns events that allegedly occurred on July 12-13, 1983, in the Leominster, Massachusetts apartment of 59-year-old Lennice Plante. The observations and opinions outlined in this review are based on case information which includes, but is not limited to, the timeline of events, police reports, statements, affidavits, evidence inventory reports, appellate court rulings, court filings, and forensic laboratory reports.



John Spirko Update

John Spirko's first-person story of being on Ohio's death row when there is evidence he was over 100 miles from the scene of Elgin, Ohio Postmistress Betty Jane Mottinger's 1982 abduction and murder, was in *Justice Denied* Issue 27, Winter 2005.

On October 6, 2006, Ohio Attorney General Jim Petro requested that Governor Bob Taft order a fifth stay of Spirko's execution. Petro's request was for a four-month stay of Spirko's execution date of November 29, 2006. A.G. Petro requested the stay to allow time to complete DNA testing of the painting tarp and duct tape wrapped around Mottinger's body, and 30 to 100 cigarette butts found near her body. for the presence of the killer's DNA. A witness has identified the killer is a house painter who the witness also claims was the tarp's owner.

If Taft agrees to the delay, it means consideration of clemency for Spirko would be by whoever is elected governor in November 2006 to replace Taft, who leaves office in January 2007.