

The Commonwealth of Massachusetts
Executive Office of Public Safety and Security

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Timothy P. Murray
Lieutenant Governor

Mary Elizabeth Heffernan
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Advisory Board of Pardons

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August 29, 2012

Attorney Robert E. Terk
Attorney at Law
Five Almount Terrace
Fitchburg, MA 01420

RE: Benjamin LaGuer's Commutation Petition

Dear Attorney Terk:

Per your request of August 22, 2012, for a photocopy of the Board's report regarding the above-captioned individual, please find enclosed said report.

Sincerely,

A handwritten signature in cursive script, appearing to read "Julie Pease".

Julie Pease
Executive Clemency Coordinator

Cc: Benjamin LaGuer's File
File

**COMMUTATION PETITION OF
BENJAMIN LAGUER, W40280 / ECU# 12-C-29
CASE SUMMARY**

Benjamin LaGuer has petitioned His Excellency, the Governor, for executive clemency in the form of a commutation of sentence. This is Mr. LaGuer's second petition for commutation of sentence.

PRIOR PETITION

On January 18, 2008, the Board voted to deny Mr. LaGuer's initial commutation petition. In reaching its decision, the Advisory Board of Pardons noted that Mr. LaGuer had an administrative remedy available through his upcoming parole hearing in June 2008. Therefore, he did not meet the threshold requirements set forth in the 2007 Governor's Guidelines.

OFFENSE(S) FOR WHICH A COMMUTATION IS SOUGHT

On January 30, 1984, in Worcester Superior Court, Benjamin LaGuer was convicted of aggravated rape, unarmed robbery, breaking and entering in the night time with intent to commit a felony, and assault and battery. Mr. LaGuer was sentenced to life in prison for the aggravated rape conviction. On the unarmed robbery and breaking and entering charges, Mr. LaGuer received sentences of twelve to fifteen years at the Massachusetts Correctional Institution at Cedar Junction to run concurrently with the sentence on the aggravated rape charge. The conviction for assault and battery was filed with Mr. LaGuer's consent. The effective date of sentence was July 16, 1983, making the initial parole eligibility date July 15, 1998.

Mr. LaGuer convictions were affirmed by the Appeals Court; *see Commonwealth v. LaGuer*, 20 Mass.App.Ct. 965 (1985), and further appellate review was denied, *see Commonwealth v. LaGuer* 396 Mass. 1103 (1985). On October 15, 1985, Mr. LaGuer filed a second motion for a new trial.

On December 31, 1986, he filed his third motion for a new trial. On March 27, 1987, a fourth motion for a new trial was filed and on September 27, 1987, a joint motion was filed to obtain the defendant's blood type. On December 11, 1987, Mr. LaGuer filed a fifth new trial motion and a federal magistrate recommended summary dismissal of defendant's habeas corpus petition. On November 8, 1988, the U.S. District Court for Massachusetts dismissed the petition, *LaGuer v. Bender*, Civil Action No. 86-1237-WF, 1988. On February 24, 1989, Mr. LaGuer filed a sixth new trial motion, which raised a jury bias claim based on an affidavit signed by Juror Nowick alleging that jurors made ethnic slurs during deliberation. On June 2, 1989, Judge Mulkern denied the motion, but the Court remanded the matter for an evidentiary hearing "solely" to determine the truth of juror Nowick's affidavit alleging "ethnic bias". After a full evidentiary hearing, the judge denied the claim of jury bias in *Commonwealth v. LaGuer*, 410 Mass. 89 (1991). Mr. LaGuer appealed and the Appeals Court affirmed the decision on March 31, 1994, in *Commonwealth v. LaGuer*, 36 Mass App. Ct. 310; and on May 26, 1994 the SJC denied further review in *Commonwealth v. LaGuer*, 418 Mass. 1103 (1994). On May 22, 1997, Mr. LaGuer filed a seventh new trial motion on which the judge refused to act. A motion to reconsider was denied and Mr. LaGuer appealed. On January 19, 1999, the Appeals Court affirmed Judge Travers' refusal to act in *Commonwealth v. LaGuer*, 46 Mass. R. Ct 1108. On March 26, 1999, the SJC denied further review in *Commonwealth v. LaGuer*, 429 Mass. 1103 (1999). On February 11, 2003, Mr. LaGuer filed an eighth motion for new trial. On September 22, 2004, Judge Hillman denied the motion without a hearing and issued a memorandum of decision. On January 5, 2005, the judge denied Mr. LaGuer's motion to reconsider. On August 8, 2005, Mr. LaGuer filed notices of appeal and on March 2, 2006, the Appeals Court affirmed the denials of the eighth motion for new trial and the

motion to reconsider, in Commonwealth v. LaGuer, 65 Mass. R. Ct. 612, 623 (2006). On June 7, 2006, Mr. LaGuer's motion for further review was denied.

PAROLE HEARING

On June 29, 1998, Mr. LaGuer had his initial parole eligibility hearing, however, since the full complement of the Board was not present for that hearing, a rehearing was held on April 5, 2000. On July 25, 2000, the Board voted to deny Mr. LaGuer's parole. The Board noted that Mr. LaGuer was a convicted sex offender not in treatment, and that his account of his involvement in the offense lacked credibility. The Board set a review of five years.

On June 19, 2003, at his review hearing the Board voted to deny Mr. LaGuer's parole with a five year review date. The Board noted that despite Mr. LaGuer's achievements relative to institutional programming, he took no responsibility for his crimes. The Board further noted that Mr. LaGuer has not attended programming to address the nature of this offense. Given the fact that this crime was an extremely violent and vicious rape of a victim over an eight hour period of time the Board was of the opinion that he was a risk to the community. Mr. LaGuer was scheduled to have his review hearing in June 2008, however, he requested a postponement, which was subsequently allowed. On April 22, 2010, Mr. LaGuer has his next review hearing. On May 20, 2010, the Board voted to deny parole with a five year review date. The Board noted that Mr. LaGuer has not attended programming to address the nature of this offense; had accumulated 6 disciplinary reports since his last parole hearing and his failure to take responsibility for his crimes. A copy of the April 22, 2010 record of decision is attached for the Board's review. Mr. LaGuer is schedule to have his next review hearing in April 2015.

OFFICIAL VERSION

The official version of this incident is derived from Commonwealth v. LaGuer, 448 Mass. 585 (2007). The facts are as follow: At approximately 9:00 p.m. on July 12, 1983, a man broke into the victim's apartment, turned off the light, "socked the side" of the victim's face, threw the victim to the floor, and raped her vaginally, anally, and orally for the following eight hours, ending at about 5:00 a.m., July 13, 1983. The rapist severely beat the victim and, before leaving, stole her jewelry, money and a purse. The rapist bound the victim's hands with a cord from her telephone and her feet with a cord from a hair dryer. The victim fought and struggled with her assailant. The victim was able to see the man's face as the room was illuminated by outside security lights. The rapist made no attempt to hide his face, except when he went to the bathroom. He warned the woman that if she identified him, he would kill her.

PETITIONER'S REASONS FOR SEEKING A COMMUTATION

Attorney Robert Terk submitted a commutation petition¹ on behalf of Mr. Benjamin LaGuer. Attorney Terk indicated in his memorandum that the premise of this petition is Mr. LaGuer's absolute claim of "actual innocence." Attorney Terk's memorandum focuses on the legality and procedural aspects of Mr. LaGuer's trial.

Under M.G.L. c. 127, §154, ... "said Board shall not review the proceedings of the trial court, and shall not consider any questions regarding the correctness, regularity or legality of such proceedings, but shall confine itself solely to matters which properly bear upon the propriety of the extension of clemency to the petitioner." Furthermore, Attorney Terk also referenced in his memorandum that under Herrera vs. Collins, 506 US 390 (1993), His Excellency has the constitutional power, vested in the powers to grant executive clemency, to vacate a verdict based on real evidence of factual

¹ Petitioner originally emailed an unsigned petition to the Board in May 2012. Petitioner was advised that in order to process his petition he must submit a signed copy. On June 13, 2012, the Board received a signed petition.

innocence.² Attorney Terk stated that this petition is accompanied with a bibliography and other supporting documents showing police and prosecutorial abuses resulting in 24 years of false imprisonment, however, the supporting documentation was not provided with the original memorandum Attorney Terk submitted.

On July 9, 2012, Attorney Terk was informed via email that to further process Mr. LaGuer's commutation petition he would need to provide all the supporting documents mentioned in his memorandum, a copy of said email is attached for the Board's review. This delay on the part of petitioner tolled the timeframe in processing the petition.

On July 30, 2012, this office received via UPS the supporting documentation mentioned in Attorney Terk's memorandum.

INSTITUTIONAL ADJUSTMENT

According to the Department of Correction Classification Report dated May 22, 2012, Mr. LaGuer is a 49-year-old man incarcerated at North Correctional Center Institute, a medium security facility, where he receives regular visits from his sister, friends and supporters. Mr. LaGuer receives positive housing evaluation, however, he is not program involve or employed at this time. This report also reveals that Mr. LaGuer has a total of 28 disciplinary reports and 2 minor infractions. The most recent was on September 25, 2011, where Mr. LaGuer picked up an informal infraction for leaving his movement card causing a bad count number to be submitted ruing a census count conducted by 109 West Yard. However, prior to the September 25, 2011, informal infraction, on June 24, 2009, Mr. LaGuer received a disciplinary report and sanction with a written reprimand for possession of any photographic material. This report also states that Mr. LaGuer continues to participate in the following institutional structured activities: Chapel services, Narcotics Anonymous; Alcoholics Anonymous meetings, inmate general library, weight-gym, and recreation yard. This report further states that Mr. LaGuer's prior programming included Spanish Narcotics Anonymous, college courses and one-on-one counseling. According to this report, Mr. LaGuer's work assignment included being a clerk and volunteering at the law library.

With respect to Mental and Medical Health Issues, according to the UMASS Correctional Health Medical/Parole Contact Sheet dated August 2, 2012, Mr. LaGuer has been diagnosis with Hepatitis C, Hypotension; GERD; Diabetes, Liver Masses; and Liver Cirrhosis. There is a reference to petitioner undergoing cancer treatments. The sheet also revealed that Mr. LaGuer has an outpatient Clinic Appointment at Tufts to see a Liver Specialists. According to the Department of Correction Classification Report dated May 22, 2012, on May 22, 1984, Mr. LaGuer was found not to be a sexually dangerous person by Daniel Weiss, M.D. It also indicated that Mr. LaGuer has no history of mental health issues.

MILITARY

With respect to Military service, Attorney Terk stated that Mr. LaGuer was recruited by the Army in 1980 and that he was in the Army for two years. Attorney Terk also stated that while in the Army Mr. LaGuer worked in the air conditioning and refrigeration field and received a general discharge under honorable conditions. A copy of Mr. LaGuer's DD214 is attached for the Board's review.

REFERENCE

² This case based in Texas, involved a habeas corpus petition seeking immediate release based upon a claim that the petitioner was innocent. As a side note, the court mentioned that Texas clemency guidelines allowed for granting clemency on the grounds of innocence. Massachusetts guidelines contain no such section, however do not preclude the granting of clemency to individuals who claim innocence. The grant of a commutation, however, would not "vacate" the sentence as argued in the petition.

With respect to references, neither Mr. LaGuer nor his Attorney submitted letters of support or reference with his commutation petition.

OPPOSITION

On June 28, 2012, this office received a letter from Assistant District Attorney Sandra L. Hautanen, which states that the Worcester County District Attorney's Office strongly opposes the Petition for Executive Clemency filed by Benjamin LaGuer. Assistant District Attorney Hautanen states that Mr. LaGuer has failed to meet several of the threshold requirements for executive clemency set forth in the 2007 Governor's Guidelines as such Mr. LaGuer's petition has no merit and should be denied. A copy of Assistant District Attorney Sandra Hautanen's letter of opposition and exhibits are attached for the Board's review.

PRIOR OPPOSITION

On December 11, 2007, this office received a letter from Assistant District Attorney Jane A. Sullivan, Chief of the Appeals Unit who stated that the Worcester County District Attorney's Office strongly opposes the Petition for Executive Clemency filed by Benjamin LaGuer. This letter states that Mr. LaGuer is serving a second degree life sentence for Aggravated Rape and as such he has other adequate administrative or judicial remedies available to him. Therefore; the need for a pardon will not generally meet the compelling need standard.

APPLICABLE LAW AND GUIDELINES

The Governor's Guidelines state that the petitioner bears the responsibility of demonstrating, by clear and convincing evidence, that:

- Petitioner has made exceptional strides in self-development and self-improvement and would be a law-abiding citizen.
- Petitioner is suffering from a terminal illness or severe and chronic disability, which has been verified by a licensed medical doctor that would be substantially mitigated by release from prison.

In addition, the Governor "will very rarely, if ever grant commutation relief where":

- There is an adequate administrative or judicial remedy available.

Furthermore, MGL Chapter 127, Section 154, which states:

- The said Board shall not review the proceedings of the trial court, and shall not consider any questions regarding the correctness, regularity or legality of such proceedings, but shall confine itself solely to matters which properly bear upon the propriety of the extension of clemency to the petitioner.

Due to the fact that Mr. LaGuer has not demonstrated that he has made exceptional strides and self-improvement since his incarceration and that he has an administrative remedy available through the parole process in April 2015, he does not meet the threshold requirement set forth in the 2007 Governor's Guidelines. Furthermore, Mr. LaGuer is disputing the 2nd degree life sentence he received for rape. According to MGL Chapter 127, Section 154, "...The Board shall not review the proceedings of the trial court and shall not consider the correctness, regularity or legality of such proceedings..." For these reasons, I respectfully recommend that Mr. LaGuer's petition for executive clemency be denied.

**COMMUTATION PETITION OF
BENJAMIN LAGUER, W40280 / ECU# 07-C-92
CASE SUMMARY**

Benjamin LaGuer has petitioned His Excellency, the Governor, for executive clemency in the form of a commutation of sentence.

Mr. LaGuer is seeking a commutation based on an absolute claim of "actual innocence." Mr. LaGuer states that under the United States Supreme Court ruling in Herrera vs. Collins, 506 US 390 (1993), His Excellency has the constitutional power, vested in the powers to grant executive clemency, to vacate a verdict based on real evidence of factual innocence.¹ Mr. LaGuer stated that this petition is accompanied with memoranda, a bibliography and other supporting documents showing police and prosecutorial abuses resulting in 24 years of false imprisonment.

On January 30, 1984, in Worcester Superior Court, Benjamin LaGuer was convicted of aggravated rape, unarmed robbery, breaking and entering in the night time with intent to commit a felony, and assault and battery. Mr. LaGuer was sentenced to life in prison for the aggravated rape conviction. On the unarmed robbery and breaking and entering charges, Mr. LaGuer received sentences of twelve to fifteen years at the Massachusetts Correctional Institution at Cedar Junction to run concurrently with the sentence on the aggravated rape charge. The conviction for assault and battery was filed with Mr. LaGuer's consent. Mr. LaGuer convictions were affirmed by the Appeals Court; see Commonwealth v. LaGuer, 20 Mass.App.Ct. 965 (1985), and further appellate review was denied, see Commonwealth v. LaGuer 396 Mass. 1103 (1985). The effective date of sentence was July 16, 1983, making the initial parole eligibility date July 15, 1998. On June 29, 1998, Mr. LaGuer had his initial parole eligibility hearing, however, since the full complement of the Board was not present for that hearing, a rehearing was held on April 5, 2000, and on July 25, 2000, the Board voted to deny Mr. LaGuer's parole. The Board noted that Mr. LaGuer was a convicted sex offender not in treatment, and that his account of his involvement in the offense lacked credibility. The Board further set a review of five years. On June 19, 2003, the Board voted to deny Mr. LaGuer's parole with a five year review date. The Board noted that despite Mr. LaGuer's achievements relative to institutional programming, Mr. LaGuer takes no responsibility for a rape which he was convicted for. The Board further noted that Mr. LaGuer has not attended programming to address the nature of this offense. Given the fact that this crime was an extremely violent and vicious rape of a victim over an eight hour period of time the Board was of the opinion that he was a risk to the community. Mr. LaGuer is schedule to have his review hearing in June 2008.

¹ This case based in Texas, involved a habeas corpus petition seeking immediate release based upon a claim that the petitioner was innocent. As a side note, the court mentioned that under the Texas guidelines for clemency, there were specific guidelines for granting clemency on the grounds of innocence. The current guidelines of Governor Patrick do not contain specific guidelines for claims of innocence. The guidelines do not however preclude the granting of clemency to individuals who claim innocence as did the guidelines written by Governor Romney. The grant of a commutation, however, would not "vacate" the sentence as argued in the petition.

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According to a Department of Correction Classification Report dated November 7, 2007, Mr. LaGuer is a 44-year-old man incarcerated at North Correctional Center Institute who receives regular visits from his sister and friends. This report stated that Mr. LaGuer has a total of 28 disciplinary reports with the most recent on October 25, 2006, for possession of pornographic material. This report also states that Mr. LaGuer is currently not program compliant and spends the majority of his time in the dayroom doing legal work. This report further states that Mr. LaGuer's prior programming included Spanish Narcotics Anonymous, college courses and one on one counseling. According to this report, Mr. LaGuer's work assignment included being a clerk and volunteering at the law library.

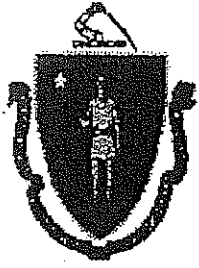
With respect to Mental and Medical Health Issues, Mr. LaGuer does not claim that he has any mental or medical issues.

With respect to Military service, according to the 1998 initial parole hearing summary, Mr. LaGuer stated that he was recruited by the Army in 1980 and that he was in the Army for two years. In the summary, Mr. LaGuer also stated that while in the Army he worked in the air conditioning and refrigeration field and received a general discharge under honorable conditions.²

Mr. LaGuer has not submitted any letters of support with his commutation petition. However, on November 26, 2007, this office received a letter from Kenneth C. Campbell dated November 5, 2007, regarding Mr. LaGuer. Mr. Campbell stated in his letter that he is writing to the Board concerning the case of Benjamin LaGuer, who has been in prison for 24 years for a crime he did not commit. This letter went on to say that Mr. LaGuer has been in prison for two decades longer than he would have been if he had been paroled, but being a Seventh Day Adventist, he cannot lie by falsely admitting guilt, which has always been one of the conditions for a parole. Mr. Campbell further stated in his letter that Mr. LaGuer has been held in prison for maintaining his innocence and it is now time for him to have a new trial in which all the facts that have come out since 1983 can be heard by an unprejudiced, racially and gender-balanced jury. He further stated that Mr. LaGuer would be found innocent, have his name cleared, and be a free man.

On December 11, 2007, this office received a letter from Assistant District Attorney Jane A. Sullivan, Chief of the Appeals Unit who stated that the Worcester County District Attorney's Office strongly opposes the Petition for Executive Clemency filed by Benjamin LaGuer. This letter states that Mr. LaGuer is serving a life sentence for Aggravated Rape, and presently has a parole hearing

² Due to a lack of information provided by the petitioner at the time, this information was never confirmed. The petitioner does not mention this service in his current petition.



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Mark A. Conrad
Chairman

Donald V. Giancioppo
Executive Director

RECORD OF DECISION

In The Matter of

BENJAMIN LAGUER
W-40280

TYPE OF HEARING: Review Hearing

DATE OF HEARING: April 22, 2010

DATE OF DECISION: May 20, 2010

PARTICIPATING BOARD MEMBERS: Mark Conrad, Candace Kochin, Pamela Lombardini, Thomas F. Merigan, Jr., Leticia Muñoz, Roger Michel, Cesar Archilla

DECISION OF THE BOARD: Denied. 5 y[ea]r Review.

Benjamin Laguer appeared before the Massachusetts Parole Board for a review hearing on April 22, 2010. This was Mr. Laguer's fourth appearance before the Board.

On February 17, 1984, Mr. Laguer was sentenced to life in prison with the possibility of parole for aggravated rape, G.L. c.265, section 22. At the same time, he received concurrent sentences (now expired) of twelve to fifteen years for breaking and entering with the intent to commit a felony, G.L. c.266, section 16 and unarmed robbery, G.L. c.266, section 19. Mr. Laguer timely filed a direct appeal which was later consolidated with a motion for new trial. Both were resolved in *Commonwealth v. Laguer*, 20 Mass. App. Ct. 965 (1985). Thereafter, Mr. Laguer filed seven additional motions for new trial and a federal habeas corpus petition. All were either denied or dismissed (citations omitted). At his hearing before the Board, Mr. Laguer stated his intention to file a ninth motion for new trial. He is currently incarcerated at MCI Gardner (NCCI).

The facts underlying Mr. Laguer's convictions are as follows: On the evening of July 12, 1983, the defendant entered the apartment of his neighbor, 59 year-old Lennice Plante, and beat, robbed and brutally raped her – vaginally, anally and orally – over a period of several hours. He then threatened to kill her if she told anyone about the attack, tied her up and left.

Eventually, Ms. Plante was able to summon assistance. Ms. Plante was taken to the hospital for treatment. A physical examination revealed numerous injuries consistent with the type of violent rapes described by Ms. Plante. During the examination semen was recovered from both her throat and vagina. Subsequently, Ms. Plante identified Mr. Laguer as her assailant, and he was taken into custody on July 15, 1983.

Significant evidence linked Mr. Laguer to the attack, including: (1) Ms. Plante's eyewitness identification (which must be accorded significant weight in view of her ample opportunity to observe her attacker and her prior familiarity with Mr. Laguer); (2) DNA evidence linking Mr. Laguer to biological material recovered from the crime scene; (3) testimony regarding scratches on the defendant's back at the time of his arrest; (4) the fact that the clothing worn by Mr. Laguer at the time of his arrest matched Ms. Plante's description of the clothing worn by her attacker; and (5) consciousness of guilt evidence in the form of Mr. Laguer's admission that he had submitted the saliva of another man when asked to provide a saliva sample for laboratory testing. Notwithstanding the foregoing, Mr. Laguer has always maintained that he did not attack Ms. Plante, blaming his conviction on a combination of poor police investigative work, trial errors, and a racially biased jury. However, all of these claims were reviewed in the aforementioned appeal and motions for new trial and rejected.

Unfortunately, in large part due to Mr. Laguer's insistence that he is innocent, he has not engaged in any significant sex offender treatment. Indeed, since his last parole hearing in 2003, Mr. Laguer admittedly has not been involved in any significant rehabilitative programming of any kind; rather, he has focused all of his energy on his appellate efforts. While this may be a reasonable strategy in view of Mr. Laguer's manifest strong belief in his innocence, it also precludes the Parole Board from undertaking any meaningful inquiry into the question of Mr. Laguer's suitability for community supervision.


Another impediment to parole is Mr. Laguer's troubling disciplinary history, including four serious disciplinary reports in the past fifteen months, six since his last hearing before the Board, and approximately thirty during his time in prison. Many of these are for serious offenses such as fighting or possession of contraband. Especially troubling is his most recent disciplinary report, less than a year ago, for possession of a large number of pornographic images. This is the second time since his last hearing that Mr. Laguer has been charged with possession of pornography. In view of his governing offense, such violations are especially concerning for the Board.

Finally, the Board was troubled by Mr. Laguer's conduct during the hearing. In the Board's opinion he was both combative and evasive during his appearance, particularly when he was subjected to questioning. The Board also observed that, in a number of instances, Mr. Laguer was manifestly deceptive in his responses. In the Board's view, these negative personality traits would make community supervision of Mr. Laguer difficult if not impossible.

After careful consideration and following an exhaustive review of the large body of documentary evidence supplied by all interested parties in this case, the Board has determined that, at this time, Mr. Laguer's release on parole is not consistent with the demands of public safety. His failure to take responsibility for his actions in spite of significant inculpatory evidence was but one factor informing our decision. As important were Mr. Laguer's willful failure to make productive use of the wide range of rehabilitative programming opportunities available to him in prison, his overall poor disciplinary record, the combative demeanor and dishonesty he evinced at his hearing, and his prior record, including his military record. Parole is denied.

- Board Member 1: Concur.
- Board Member 2: Concur with final vote.
- Board Member 3: Concur with final vote.
- Board Member 4: Concur with above vote.
- Board Member 5: Concur.
- Board Member 6: Concur.
- Board Member 7: Concur.

I certify that this is the decision and reasons of the Massachusetts Parole Board regarding the above referenced hearing.



Executive Director

6/11/10

Date