COMMONWEALTH OF MASSACHUSETTS

WORCESTER, *ss*.	SUPERIOR COURT DEPARTMENT OF THE TRIAL COURT INDICTMENT NOS. 83-103391 to -94
COMMONWEALTH OF MASSACHUSETTS v. BENJAMIN LAGUER, DEFENDANT	)) **COMMONWEALTH'S**) **MOTION FOR RELIEF**) **FROM FRIVOLOUS**) **FILINGS**)

To put an end to the deluge of frivolous, vexatious, and also fraudulent filings made in 2011 and 2012 by defendant Benjamin Laguer,[1] acting primarily through his privately-retained "counsel of record," Attorney Robert E. Terk, with little concern for the rules of procedure, for the prior judicial decisions in this case, or for the actual facts reflected in the record, **the Commonwealth respectfully moves this Court for a "gatekeeping" order to prohibit both defendant, when acting *pro se*, and Attorney Terk from filing any additional motions or papers in this case without first obtaining leave of court.**

Pursuant to "[t]he inherent powers of the judiciary . . . 'whose exercise is essential to the function of the judicial department, to the maintenance of its authority, or to its capacity to decide cases,'" *Querubin v. Commonwealth*, 440 Mass. 108, 114 (2003) (citations omitted), the Court may issue a "gatekeeping" order in response to "conduct which flouts the authority of the court or obstructs and impedes the orderly course of a legal proceeding." *Avelino-Wright v. Wright*, 51 Mass. App. Ct. 1, 5 (2001). *See, e.g., Watson v. Justice of Boston Housing Court Dep't*, 458 Mass. 1025, 1027 (2011) (court's "gatekeeping" order required plaintiff to file a "motion for leave to file" with any future filings "to prevent [him] from

[1] A court may take judicial notice of its own records in the same or a related case. *Camara v. Board of Appeals*, 40 Mass. App. Ct. 209, 211 (1996); *In re Welansky*, 319 Mass. 205, 210, (1946).

further abusing the system," because "repetitive filing of groundless petitions . . . unnecessarily consumes the court's limited resources"). A judge has the inherent authority to act as needed '"to achieve the orderly and expeditious disposition of cases,'" *State Realty Co. v. MacNeil Bros. Co.*, 358 Mass. 374, 379 (1970) (citation omitted), and to curb "'behavior that causes precious time to be wasted away . . . [by] the court, [other] parties, [and] court personnel.'" *Beit v. Probate and Family Court Dep't*, 385 Mass. 854, 860 (1982) (citations omitted). "[I]n these days of heavily burdened . . . dockets," the courts should "not be subjected to that type of abuse which is evident in this case." *Partlow v. Hertz Corp*., 370 Mass. 787, 790 (1976).

The record shows that the flood of needlessly-repetitive, factually-unsupported, procedurally-defective, and blatantly non-meritorious filings made by defendant through Attorney Terk over the last year "have become frivolous, an abuse of process, and a waste of the taxpayers' money." *Britt v. State*, 931 So. 2d 209, 210 (Fla. Dist. Ct. App. 1995). *See Demoulas v. Ryan*, 70 Mass. App. Ct. 259, 267 (2007) ("'frivolous' describes an absence of legal or factual basis for the claim"). Claims are frivolous if they "are unsupported by any evidence, . . . are incurably blemished by misrepresentation, distortion, or improper argument, . . . or . . . are so lacking in substance as to suggest an intent to harass." *Tamber v. Desrocher*, 45 Mass. App. Ct. 234, 239 (1998) (internal citations omitted). Defendant's recent filings made through Attorney Terk are stellar examples of "frivolousless." *Id.*

By having Attorney Terk appear in 2011 as "counsel of record" in this case (Docket No. 171) to sign and file defendant's frivolous filings -- **but not argue them in court** (Hrg. Tr. at 6-20, attached as EXH 2 to Docket No. 198) -- defendant has tried to wrap his own *pro se* writings

in the cloak of his lawyer's legitimacy, to distance himself from his handiwork while retaining control of his case. (*See generally* "Motion to Clarify Representation" (Docket No. 182)).

Three (3) e-mails sent out in 2011 -- by Attorney Terk, by "The Ben Laguer Defense Committee," and, somehow, by defendant himself -- demonstrate that it is defendant, not Attorney Terk, who is actually litigating this case. First, on June 27, 2011 -- just weeks after the **ninth** Motion for New Trial was filed on April 28, 2011 (Docket No. 168) -- Attorney Terk sent the following e-mail to Commonwealth's counsel and to Dennis P. McManus, Clerk of Courts for Worcester Superior Court: "Good Day Sandy and Dennis: Please know, Mr. Laguer intends to argue the instant Motion before the court and consequently, necessary [sic] that he attend all proceedings. Thank you. rt." ("Motion to Clarify Representation" (Docket No. 182, EXH 7). On August 12, 2011, "The Ben Laguer Defense Committee" sent out an e-mail announcing the hearing to be held on September 9, 2011 on defendant's new trial motion, stating in part: "Defense attorney Robert E. Terk . . . will be representing Ben, but we expect Ben will make a detailed statement in support of his life and defense." (*Id.*, EXH 11). Finally, on November 11, 2011, after the Court had allowed defendant to argue at the September 9th hearing when Attorney Terk immediately moved to withdraw as soon as he was asked to argue, defendant himself apparently sent the following e-mail from benlaguer@gmail.com directly to Commonwealth's counsel: "As the [sic] Judge Tucker has officially authorized me to represent myself in court, please email to this account a PDF file of your filings that are due at the end of today. Thank you. Sincerely, Ben LaGuer." (*Id.*, EXH 1). This last e-mail prompted the "Commonwealth's Motion to Clarify Representation." (Docket No. 182). On December 5, 2011, the Court ordered that all filings and communications with the District Attorney's Office must be made through "counsel of record," Attorney Terk. (Docket No. 182).

Starting in 1983, when defendant successfully tampered with his court-ordered saliva sample to avoid having blood-type evidence introduced against him at trial, *Commonwealth v. Laguer*, 448 Mass. 585, 590 n.15 (2007), "[d]efendant has continually attempted to dictate and control" the proceedings in this case. *Commonwealth v. McLaughlin*, 364 Mass. 211, 235 (1973). As this Court correctly noted, defendant is '"the boss"' in this matter ("Memorandum of Decision" (Docket No. 190) at 16, n.11), while Attorney Terk's "involvement seems little more than window dressing." ("Motion to Clarify Representation" (Docket No. 182) at 9). Compare *Britt v. Rosenberg*, 40 Mass. App. Ct. 552, 554 (1996), where plaintiff and his counsel "conspired to perpetrate a fraud on the court," by agreeing that "counsel would continue to draft and file pleadings but would sign the plaintiff's name as if he were proceeding pro se." *Id.* With Attorney Terk as his front man, defendant has been able to write his own motions and control his case from behind the scenes -- but "[j]udges do not like slick." *Commonwealth v. McMiller*, 29 Mass. App. Ct. 392, 410 (1990) (Brown, J., concurring).

Acting in his role as "counsel of record," Attorney Terk may have agreed to be a bit player in defendant's essentially solo show by allowing defendant to direct the proceedings and take center stage in the media spotlight -- but as a practicing lawyer with ethical obligations, Attorney Terk's "actions have consequences." *In re Olsen*, 358 B.R. 609, 627 (Bankr. S.D.N.Y. 2007). By signing his name to defendant's filings, Attorney Terk shares equal blame with defendant for needlessly harassing the Court, because no lawyer should "bring or defend a proceeding, or assert . . . an issue therein, **unless there is a basis for doing so that is not frivolous**." Mass. R. Prof. Conduct 3.1 (emphasis added). *See* Mass. R. Civ. P. 11 (an attorney's signature "constitutes a certificate by him that he has read the pleading . . . [and] that to the best of his knowledge, information, and belief there is good ground to support it"); *Van Christo*

Advertising, Inc. v. M/A-COM/LCD, 426 Mass. 410, 416-17 (1998) (Rule 11 "does not excuse an attorney's 'wilful ignorance' of facts and law which would have been known had the attorney simply not consciously disregarded them").

Despite the rules against frivolous filings, defendant's recent motions -- all filed and signed by Attorney Terk, and all firmly denied -- consistently have "set[] forth arguments on which . . . a reasonably competent attorney could not hope to prevail." *Callahan v. Board of Bar Overseers*, 417 Mass. 516, 520 (1994). '"[E]ven the presence of a few non-frivolous arguments does not prevent [a motion] as a whole from being deemed frivolous."' *Avery v. Steele*, 414 Mass. 450, 456 (1993) (citation omitted).

Attorney Terk's inexplicable lack of concern for the Rules of Professional Conduct is highlighted by the fact that he signed and filed defendant's 2012 "Defense Motion for Reconsideration." (Docket No. 194). This lengthy but utterly meritless motion included multiple paragraphs of defendant's **wholly-irrelevant personal data** -- e.g., the proclamation that defendant was "[b]orn May 1, 1963 at 4:06 PM in Saint Francis Hospital, Bronx New York, [and] delivered by Dr. Antonio Cavelli, M.D." ("Defense Motion for Reconsideration" (Docket No. 194) at 3); pages of **self-aggrandizing propaganda** -- e.g., "Ben LaGuer's carceral experiences are among the most thoroughly documented and reported events of any Massachusetts inmate in recent history. . . . Public testimonials of individuals acquainted with LaGuer or his case are posted on the website devoted to his quest for justice and freedom" (*id.* at 3); and numerous **glaring, baseless attacks** upon the integrity of: (1) police officers who investigated the crime; (2) judges who have ruled against defendant; (3) the prosecutor who convicted defendant, James R. Lemire, who, as defendant acknowledges, is now "an Associate Justice of the Massachusetts Trial Court" (*id.* at 7, n.23); (4) defendant's trial counsel, Peter

Ettenberg; (5) current prosecutors; and (6) the late victim and her daughter -- attacks that are littered throughout the motion. (*See* "Commonwealth's Opposition to Defense Motion for Reconsideration" (Docket No. 198) at 12-13). Almost everything Attorney Terk has signed and filed for defendant in recent months contains baseless innuendo and "exaggerated, inflammatory, and generally confusing accusations of [misconduct,] . . . conspiracy, fraud, [or] bad faith investigation" against an ever-increasing number of people who have either opposed defendant or failed to do what defendant wanted. *Callahan*, 417 Mass. at 516.

The following are from the "Defense Motion for Reconsideration" (Docket No. 194):

- "Judges Tucker and Lemire had a public lunch on September 9, 2011, immediately after a 90-minute courtroom session on issues of prosecutorial abuses directly affecting Judge Lemire's role as a prosecutor in LaGuer's trial. Their ex parte encounter was witnessed." ("Defense Motion for Reconsideration" at 3);

- "**Judicial Conflict of Interest** Judge Timothy S. Hillman, who had presided over the [DNA] legal proceedings and analysis, had previously been a lawyer to [the victim]'s family. Michael Hillman, Judge Hillman's younger brother, attended High School with [the victim's daughter]." (*Id.* at 18) (emphasis in original);

- "ADA Lemire was very precise in his assertions [at trial] that [the victim] was not psychotic or under antipsychotics for over two years [and] the prosecution could not possibly argue his ignorance over this affair. Lemire either had a very poor source of information or he lied to the court about [the victim]'s psychiatric history." (*Id.* at 11);

- "Lemire did not expect this case to go to trial, nor could he make head or tails of the state forensic report." (*Id.* at 19);

- "In the end, Lemire knew that all the twelve white jurymen needed in this case was a white woman identifying [sic] a black man of rape." (*Id.* at 19);

- "After meeting with [the victim's daughter] in private, Lemire substituted her [on his witness list] for a handyman who had merely called 911. One can only imagine what [the victim's daughter] had told Lemire to make him so quickly withdraw her from his witness list." (*Id.* at 7).

- "[The victim] had an infection so advanced that [she] was discharging a 'yellowish' pus." (*Id.* at 6).

- "Defense attorney Peter Ettenberg . . . had no ready defenses. He was only days in from Barbados. Perhaps Ettenberg had no realistic plans of ever taking the case to trial for the five thousand dollar retainer he had requested." (*Id.* at 22);

- "After LaGuer charged fraud with regard to the DNA, the District Attorney alleges that **a January 17, 1984 [plea offer] letter from then ADA James R. Lemire to defense counsel Peter L. Ettenberg is fraudulent**. In support of this claim, prosecutors had Ettenberg sign an affidavit that he first saw this letter in 2010. (A request of the District Attorney's server should reveal their draft e-mail to Ettenberg.)" (*Id.* at 23) (emphasis added);

- "The affidavit is incredulous [sic] because Ettenberg . . . does not preclude [sic] that he was in Barbados when his staff may have received the disputed [plea offer] letter. (Ettenberg's passport can be subpoena [sic])." (*Id.* at 23);

- "When **LaGuer discovered this disputed [plea offer] letter as a result of writing a bibliography of materials, he made public use of it.** . . . It was not until prosecutors felt a need to find an issue to deflect focus from prosecutorial malfeasance that they decided to allege fraud. . . . When their purpose is so clearly defined to have Laguer's Motion for a New Trial dismissed, this claim of fraud should be taken with a lot more skepticism than it was afforded. At a minimum, LaGuer should have been granted an evidentiary hearing and reasonable time to prepare, challenger [sic] the affiants Ettenberg and Lemire about matters that might expose their weaknesses of recollection, bias, and possible collusion with prosecutors." (*Id.* at 24-25) (emphasis added);

- "**Prosecutors Illegally Wired-tapped LaGuer's Lawyer Conversations** For a period ending in May 2008 all prison telephone calls between LaGuer and his lawyers were monitored until Department of Corrections Grievance Coordinator William P. Win put an end (Grievance Number 33698) to this violation of attorney/client privilege. No law enforcement agency other than District Attorney [sic] had any interest in these wiretaps. Prosecutors learnt that James C. Rehnquist would ignore the DNA in his legal strategy [for the **eighth** Motion for New Trial]. This insight led prosecutors to zealously argue the DNA, if only to poison appellate judges. . . ." (*Id.* at 17) (emphasis in original).

(*See* "Defense Motion for Reconsideration" (Docket No. 194) at pages cited). One "hardly can characterize this [string of spiteful innuendo and attacks] as anything but frivolous." *Callahan*, 417 at 521. Compare *In re Olsen*, 358 B.R. at 614 (in imposing sanctions on *pro se* litigant, judge doubted that "any lawyer would permit a client to routinely make the kind of irresponsible and reckless assertions" made in the *pro se* litigant's filings).

Attorneys must "maintain at all times the respect due to courts of justice and judicial officers." *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 355, 20 L. Ed. 646 (1871). *See* Mass. R. Prof. Conduct 8.2 ("A lawyer shall not make a statement . . . with reckless disregard as to its truth or falsity concerning the . . . integrity of a judge"); *Jaraki v. Quinlan*, No. 933406, 1995 WL 1312571, at *12 to *15 (Mass. Super. Ct. Sept. 28, 1995) (sanctioning lawyer who impugned the integrity of a federal judge). Such "disrespectful and irrelevant passages," particularly when mixed with "[i]nappropriate argument and unsubstantiated statements [as in the "Defense Motion for Reconsideration"] . . . may infect [even] an otherwise meritorious [motion] so pervasively as to make it frivolous." *Avery*, 414 Mass. at 451, 456.

'"An attorney who makes critical statements regarding judges and legal officers with reckless disregard as to their truth or falsity . . . exhibits a lack of judgment that conflicts with his or her own position as an officer of the legal system and a public citizen having special responsibility for the quality of justice."' *In re Curry*, 450 Mass. 503, 527 (2008) (citations omitted). "Lawyers . . . must never forget that . . . their oath and the canons of ethics are the paramount imperatives of the profession, not merely words mouthed perfunctorily at the time they are sworn in as members of the bar." *Petricca Const. Co. v. Commonwealth*, 37 Mass. App. Ct. 392, 402 (1994) (Brown, J., concurring). **When a lawyer faces a conflict between his duty as "an officer of the court" and a client's unreasonable demands for "zealous representation, the latter's interest must yield."** *In re Nietlich*, 413 Mass. 416, 423 (1992) (emphasis added). A lawyer's duty to zealously represent a client is circumscribed by an "equally solemn duty to comply with the law and standards of professional conduct . . . to prevent and disclose frauds on the court." *Nix v. Whiteside*, 475 U.S. 157, 168-69 (1986); Mass. R. Prof. Conduct 8.4 (c) & (d) ("It is professional misconduct for a lawyer to . . . engage in

conduct involving dishonesty, fraud, deceit, or misrepresentation" or "that is prejudicial to the administration of justice"). "A practicing attorney who includes [in his filings] 'disrespectful and irrelevant passages' and 'allegations . . . totally without record support' may be subject to sanctions," as may the "client [who] is responsible for inappropriate material being submitted to a court." *In re Application for Admission to the Bar*, 444 Mass. 393, 398 (2005) (citations omitted). Bringing claims before the Court '"is not a children's game, but a serious effort . . . to administer justice."' *Hennessey v. Stop & Shop Supermarket Co.*, 65 Mass. App. Ct. 88, 93 n.3 (2005) (citation omitted). Both defendant and Attorney Terk need to be reminded of this fact.[2]

In late April of 2011, defendant, through Attorney Terk, filed defendant's **ninth** Motion for New Trial (Docket No. 168), and set off an avalanche of subsequent filings:

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[2] Attorney Terk was defendant's *pro bono* "legal advisor" in the late 1980s when they fabricated an affidavit signed by an elderly juror and filed it in February, 1989 as "Exhibit A" in support of defendant's *pro se* "Petition for New Trial" (Docket No. 55). To get the juror to sign the affidavit, Attorney Terk repeatedly went to the juror's home, while defendant called the juror from prison. (*See* Docket 177, EXHS 10 & 11). On remand in 1991, the trial judge (Mulkern, J.) found that the juror was "baited and hooked" by defendant and Attorney Terk into signing "an affidavit containing wildly exaggerated and uncorroborated allegations" of anti-Hispanic jury bias that were "not essentially true." (*See* "Memorandum of Decision" (Mulkern, J.) (Docket Nos. 71 & 198, EXH 4). The Appeals Court affirmed these findings. *Commonwealth v. Laguer*, 36 Mass. App. Ct. 310 (1994). In February, 2012, this Court (Tucker, J.) cited defendant's and Attorney Terk's actions with the juror's affidavit, defendant's tampering with his saliva sample, and defendant's fabrication, and Attorney Terk's filing, of an "unauthentic" letter regarding a nonexistent "plea offer" as grounds for dismissing the **ninth** Motion for New Trial due to "**fraud on the court**." ("Memorandum of Decision" (Docket No. 190) at 12-17). Nonetheless, later in 2012, ignoring what now is clearly the "law of the case," **defendant, through Attorney Terk, once again raised the very same claim that the trial judge found in 1991 was "not essentially true" -- "Racial Bias in the Jury Deliberation."** (*See, e.g.*, "Defense Motion for Reconsideration" (Docket No. 194) at 21-22). After a court has decided an issue, that '"decision continue[s] to govern the same issue[] in subsequent stages in the same case.'" *United States v. Matthews*, 643 F. 3d 9, 13 (1st Cir. 2011) (citation omitted). **By trying to resurrect the long-rejected "jury bias" issue, defendant, through Attorney Terk, is simply asking for a "do-over" to erase a disappointing outcome, while thumbing his nose at the courts' authority.** "**Enough is enough**." *Isely v. State*, 653 So. 2d 409, 411 (Fla. Dist. Ct. App. 1995) (emphasis added).

- **Docket No. 168** (4/28/11) "Laguer's [**Ninth]** Motion for New Trial and Evidentiary Hearing," "Laguer's Memorandum in Support of Motion for New Trial," and an unsworn "Affidavit of Counsel in Support of Defendant's Motion for New Trial," listing 118 "Exhibits," but with **no exhibits attached**.

- **Docket No. 169** (5/12/11) "ORDERED: The defendant, Benjamin Laguer, has filed a motion for new trial pursuant to Mass. R. Crim. P. 30 and a request for an evidentiary hearing. The Office of the District Attorney is invited to respond on or before June 24, 2011. The matter is also assigned to Justice Richard Tucker for any action he may deem appropriate. (Agnes, J.)."

- **Docket No. 170** (6/1/11) "Defendant's List of **[27]** Prospective Witnesses," including: "Governor Deval L. Patrick"; Superior Court Associate Justice "James R. Lemire"; former District Attorney for the Middle District "John J. Conte"; then Superintendent of the Massachusetts State Police, "Colonel Maureen [sic] McGovern"; and expert witnesses from other states.

- **Docket No. 171** (6/7/11) Notice of Appearance of Attorney Robert E. Terk.

- **Docket No. 172** (6/15/11) "Commonwealth's Opposition to Laguer's **Ninth** Motion for New Trial and Evidentiary Hearing," citing defendant's failure to comply with procedural rules.

- **Docket No. 173** (6/21/11) "Defendant's [*pro se*] "Rebuttal to Commonwealth's Opposition To Laguer's Ninth Motion for a [New] Trial and Evidentiary Hearing," in which defendant argued in part: "**As the defendant in this case, I write . . . because attorney Terk is far more confident and far greater a gentleman to do so** [sic]. . . . **While we obviously cede [sic] that our Exhibit List ought to be signed, for [the prosecutor] to grab hold of this trifling wrinkle to demand dismissal is outrageous," and "[a]ny dismissal of this nature would only open up this court to public ridicule**." (emphasis added).

- **Docket No. 174** (6/22/11) "List of [118] Exhibits In Support of Defendant's Motion for a New Trial," signed under the pains and penalties of perjury by Attorney Terk -- but with **no exhibits attached**.

- **Five (5) bound volumes from Attorney Terk containing numerous unidentified, unorganized "EXHIBITS"** (7/5/11) -- documents that do not correspond either to Attorney Terk's sworn list of 118 "exhibits" or to the 138 footnotes in defendant's **ninth** Motion for New Trial -- **including in "Volume 1" an unsigned, "unauthentic" plea offer letter that defendant manufactured in 2010** in response to a sworn affidavit from the trial prosecutor, now a Superior Court judge, confirming that no plea offer was ever made to defendant. (*See* Docket Nos. 177 & 190).

- **Docket No. 175** (9/1/11) "Defendant's Request for Evidentiary Hearing to Establish the Following Testimony and Evidence from These [**27**] Listed Witnesses," with **no supporting affidavits**.

- **Docket No. 176** (9/8/11) "Commonwealth's Renewed Opposition and Motion to Reconsider Allowance of 'Live Testimony,'" citing the lack of sworn affidavits from any of defendant's proposed 27 witnesses.

- **Docket No. 177** (9/9/11) "**Commonwealth's Motion to Dismiss Laguer's Ninth Motion for New Trial due to 'Fraud on the Court'" with EXHIBITS 1-11**, citing defendant's intentional tampering in 1983 with his court-ordered saliva sample, which resulted in no blood-type evidence being offered against him at trial; defendant's and Attorney's Terk's joint creation of a false affidavit alleging "jury bias," which they filed in support of a *pro se* "Petition for New Trial" (Docket No. 55) in 1989; and defendant's creation in 2010, and Attorney Terk's filing in 2011, of an unsigned, "unauthentic" plea offer letter allegedly from the trial prosecutor, now a Superior Court judge, who had submitted a sworn affidavit to the Parole Board in early 2010 stating that no plea offer was ever made to defendant -- "ALLOWED" on 2/27/12 (*see* Judge Tucker's "Memorandum of Decision" (Docket No. 190)).

After a contentious, non-evidentiary hearing on defendant's **ninth** Motion for New Trial held on September 9, 2011 -- at which Attorney Terk immediately moved to withdraw upon being asked to argue defendant's claims after the Court had denied his request for defendant to argue the motion himself (Hearing Tr. at 7-20, filed as EXH 1, Docket No. 183) -- the Court (Tucker, J.) allowed both parties to submit "supplemental" filings on three issues: (1) defendant's DNA contamination claims; (2) whether defendant's unsworn evidence from Annie K. DeMartino could have been discovered sooner; and (3) and the Commonwealth's allegations of "fraud on the court." (HRG TR at 40-53, Docket No. 198, EXH 2). After the September 9th hearing, the parties filed:

- **Docket No. 178** (10/20/11) defendant's "Supplemental Memorandum in Support of Laguer's Motion for New Trial and Evidentiary Hearing," with **no supporting affidavits.**

- **Docket No. 179** (11/14/11) "Commonwealth's Motion for Enlargement of Time [until Nov. 21, 2011] to Respond to Defendant's Supplemental Memorandum" -- "ALLOWED" on 11/14/11.

- **Docket No. 180** (11/21/11) "Commonwealth's Motion for Enlargement of Time [until November 23, 2011] to Respond" -- "ALLOWED" on 11/21/11.

- **Docket No. 181** (11/21/11) "Defendant's Motion For Sanctions Against Commonwealth For Failure To Respond To Defendant's Supplemental Memorandum On Or Before November 21, 2011" -- endorsed by the Court (Tucker, J.) on 12/5/11: "DENIED. "Commonwealth, on motion filed, was granted a two-day enlargement of time on 11/21/11, which was complied with."

- **Docket No. 182** (11/23/11) "**Commonwealth's Motion to Clarify Representation**," **with EXHIBITS 1-16** -- endorsed by the Court (Tucker, J.) on 12/5/12: "At present, Attorney Robert E. Terk is counsel of record for the defendant. Therefore, all filings with the court and communications with the DA's office shall be through Attorney Terk. If this representation is to change it shall be accomplished only after court order upon a properly filed motion. **Direct communication by defendant with the DA handling this case or with the DA's office shall cease immediately.**" (emphasis added).

The Commonwealth filed its "Motion to Clarify Representation" (Docket No. 182) in response to a series of taunting and self-promoting letters and e-mails that defendant, acting *pro se* while represented by Attorney Terk, had been sending directly to Commonwealth's counsel (*see* "Motion to Clarify Representation" (Docket No. 182) EXHS 1, 3, 5, 8-14) until the Court ordered defendant to stop.

- **Docket No. 183** (11/23/11) "**Commonwealth's Response to Supplemental Memorandum in Support of Laguer's Ninth Motion for New Trial**" **with EXHIBITS 1-28,** submitting documentary evidence that disproved defendant's unsupported and factually-inaccurate claims of DNA contamination and "newly discovered evidence."

- **Docket No. 184** (12/5/11) "Laguer's Brief Rebuttal to the Commonwealth's November 23, 2011 Response."

- **Docket No. 185** (12/16/11) "Laguer's Brief ***AMENDED*** Rebuttal to the Commonwealth's November 23, 2011 Response."

- **Docket No. 186** (1/6/12) "Notice Of Compliance" filed by Attorney Terk with a two-page, *pro se* letter from defendant dated Dec. 24, 2011, complaining about Judge Tucker's Order of Dec. 3, 2011 (Docket No. 182) that required "all filings with the court and communications with the DA's office by defendant [to be made] through Attorney Terk."

- **Docket No. 187** (1/9/12) "ORDER OF COURT: Correspondence from defendant dated December 24, 2011 not read and hereby returned to defendant. The Court does not receive correspondence directly from either party. Said practice by either party or attorneys shall cease immediately. The notice of compliance has been received and filed."

- **Docket No. 188** (1/11/12) "Defense Motion to Stay Execution of Sentence Pending Final Judicial Adjudication" -- endorsed by the Court (Tucker, J.) on 1/18/12: "DENIED without hearing. **Although the court denies the motion upon its merits, it notes that Rule 31(a) Mass R Crim P permits a stay of sentence 'pending the determination of the appeal' only**. 'The rule does not authorize a judge to stay execution of a penal sentence when an appeal is not pending.' Commonwealth v. McLaughlin, 413 Mass. 506, 518 (2000)" (emphasis added).

- **Docket No. 189** (1/12/12) "Commonwealth's Opposition to Defense Motion to Stay Execution of Sentence," with attached copy of the Parole Board's 2010 decision stating that **"Mr. Laguer's release . . . is not consistent with the demands of public safety."**

On February 27, 2012, this Court (Tucker, J.) issued a comprehensive, sixteen-page "**Memorandum of Decision on Defendant's Motion for New Trial and Evidentiary Hearing and the Commonwealth's Motion to Dismiss for Fraud on the Court**" (**Docket No. 190**). In this "Memorandum of Decision," the Court DENIED defendant's **ninth** Motion for New Trial (Docket No. 168) and ALLOWED the "Commonwealth's Motion to Dismiss due to 'Fraud on the Court'" (Docket No. 177) -- but the avalanche of filings soon continued:

- **Docket No. 191** (3/19/12) "Motion For Leave To File Motion For Reconsideration Of Denied Motion For New Trial On March 25, 2012" -- endorsed by the Court (Tucker, J.) on 3/25/12: "The defendant may file a memorandum in support of a motion for reconsideration on or before 4-6-12. If the Commonwealth desires to oppose the motion for reconsideration and/or the newly filed motion for discovery and tangible evidence, such response shall be filed on or before 4-30-12."

- **Docket No. 192** (3/19/12) "Motion for Discovery and Production of Tangible Evidence" -- endorsed by the Court (Tucker, J.) on 5/17/11: "DENIED. **Rule 14, Mass. R. Crim. P., governing 'Pretrial Discovery' is not applicable. Post Conviction discovery under Rule 30 (c) (4) Mass. R. Crim. P. requires a**

pending motion for new a trial supported by affidavit establishing 'a prima facie case for relief.' Here, there is no such motion supported by affidavit." (emphasis added).

- **Docket No. 193** (3/19/12) defendant's "Notice of Appeal," from the Court's denial of defendant's **ninth** Motion for New Trial ("Memorandum of Decision" issued on 2/27/12 (Docket No. 190)).

- **Docket No. 194** (4/9/12) "Defense Motion For Reconsideration Of Denial Of Motion For New Trial," twenty-five pages long with 133 footnotes, but with **no supporting documents** -- summarily "DENIED" on 5/17/12.

- **Docket No. 195** (4/30/12) "Commonwealth's Opposition to Laguer's **Post-Conviction** 'Motion for Discovery and Production of Tangible Evidence," describing defendant's motion as "**not only duplicative and wholly unnecessary," but also "frivolous, vexatious, and border[ing] on harassment**." (emphasis added).

- **Docket No. 196** (4/30/12) "Commonwealth's Motion for Enlargement of Time to Respond to 'Defense Motion for Reconsideration'" -- "ALLOWED" on 5/3/12.

- **Docket No. 197** (5/9/12) "Commonwealth's Motion to File Forthwith."

- **Docket No. 198** (5/9/12) "Commonwealth's Opposition to Laguer's 'Defense Motion for Reconsideration of Denial of [**Ninth**] Motion for New Trial'" with EXHIBITS 1-5, arguing that **the defense motion was frivolous, vexatious, and inappropriate, being "primarily a rehash of defendant's previously-rejected and factually-unsupported claims"** (emphasis added).

EARLIER PROCEDURAL HISTORY

Soon after he was convicted of Assault and Battery, Breaking and Entering in the Nighttime with Intent to Commit a Felony, Unarmed Robbery, and Aggravated Rape in Worcester Superior Court in January, 1984, and was sentenced to life in prison with the possibility of parole on the Aggravated Rape conviction (Trial Tr. at 596-97, 617-18), defendant, acting both *pro se* and at times with or through Attorney Terk or another lawyer, began filing a parade of unsuccessful motions and "petitions" to challenge his convictions and his life sentence (*see* Docket Nos. 26-36, 39, 40, 45-48, 50, 54-56, 61, 74, 76-83) -- a parade

that has marched into 2012. (*See* attached **EXHIBIT A**, "Affidavit of Sandra L. Hautanen," and Affidavit **EXHIBIT 1**, Docket Sheets for Indictment Nos. 83-103391 and 83-103394).

In the mid-1980s, defendant filed a series of new trial motions, acting either *pro se* or assisted in some way by counsel. For example, in December, 1986, both defendant and Attorney Michael V. Caplette signed defendant's "Verified Motion for New Trial under Mass. R. Crim. P. 30 (a) (b) (c)" (Docket No. 48), claiming that defendant's trial counsel was ineffective in failing to introduce a State Police Laboratory showing **blood-type evidence**; failing to introduce evidence of **the victim's "Schizophrenia**"; failing to introduce evidence from three known "**alibi witnesses**"; and failing to procure three more "**alibi witnesses**." ("Verified Motion" (Docket No. 48) at 1-3). According to the media, **defendant intended to "argue [the Verified Motion] on his own behalf, with his criminal and civil lawyers in attendance . . . ."** (*See* attached **EXHIBIT 2,** Allen W. Fletcher, *Inmate Learns About Law from Inside Out*, Sunday Telegram, Jan. 18, 1987, at 37A) (emphasis added). In January, 1987, Attorney Caplette was quoted as saying that ""**[d]efending himself is a decision that Ben made** . . . [H]e just feels the stakes are so high **he wants to have input**. **He feels that it's his life and it's his case and he wants to have control.**"" (**EXH** 2) (emphasis added). *See Wisdom v. State*, 708 S.W.2d 840, 844 (Tex. Crim. App. 1986) ('"**Rape** . . . **is concerned much more with status, hostility, control and dominance** than with sensual pleasure or sexual gratification"') (quoting A. Groth, *Men Who Rape* 13 (1979)) (emphasis added).

In January, 1987, just three years after defendant's 1984 trial, a journalist noted that "[t]he sheer volume of [defendant]'s legal production has been impressive" (**EXH** 2) -- so impressive that Attorney "Caplette finally felt obliged to chastise [defendant] in a letter for **harassing the court with so many motions and appeals** and pleaded with him to be more

restrained." (**EXH** 2) (emphasis added). Current counsel of record, Attorney Terk, also has admitted that "Benji gets a little excited" and "gets a little carried away." (**EXH** 2). In October, 1987, Attorney Caplette filed a "Motion for Leave to File Disappearance" in defendant's case. (Docket No. 52).

In January of 1987, Attorney Terk was described as "a lawyer whom [defendant] ha[d] retained as a consultant and to protect possible financial interest related to his story," i.e., book rights and movie deals. (**EXH 2**). "[I]n May of 1987, **Attorney Terk mailed out a press release 'constructed' by Laguer**, stating that: '**Historically many minorities are the victims of race and class discrimination**, **which ultimately has resulted in unwarranted convictions**. **We feel** that this too **might** have been a motivating factor in Mr. Laguer's arrest and subsequent prosecution.'" ("Commonwealth's Motion to Clarify Representation" (Docket No. 182) EXH 15 at 3; "Commonwealth's Motion to Dismiss" (Docket No. 177) EXH 10 at 3) (emphasis added). (*See* attached **EXHIBIT 3**, copies of **(1)** the "Press Release" and a cover letter from Attorney Terk dated May 8, 1987, and **(2)** a summary of how defendant and Attorney Terk acted together to create false evidence of "jury bias" set forth in the "Commonwealth's Opposition to Application for Further Appellate Review," No. FAR-07222, dated May 2, 1994. (*See* "Commonwealth's Motion to Clarify Representation" (Docket No. 182) EXH 15; "Commonwealth's Motion to Dismiss" (Docket No. 177) EXH 10). By crafting and sending out this "Press Release" in May, 1987, defendant and Attorney Terk began a still-ongoing campaign of claiming **"Racial Bias in the Jury Deliberation,"** which they jointly nurtured into fullness by badgering an elderly juror into signing a false affidavit filed as "Exhibit A" in support of defendant's *pro se* 1989 "Petition for New Trial" (Docket No. 55). (*See* **EXH 3** & **EXHIBIT 4**, copies of **(1)** a cover letter from Attorney Terk dated Feb. 23, 1989; **(2)** pages from defendant's

pro se "Petition for New Trial" (Docket No. 55); and **(3)** "Exhibit 'A,'" the "Affidavit of William P. Nowick"). (*See also* "Memorandum of Decision" (Mulkern, J.) (Docket No. 71), filed as EXH 4, Docket No. 198). *See generally Commonwealth v. Laguer*, 36 Mass. App. Ct. 310 (1994).

In September, 1987 -- before Attorney Caplette moved to disappear from the case in October (Docket No. 52) -- Attorney Terk assented on behalf of defendant to a "Joint Motion for Blood Test" (Docket No. 51) and in November, 1987, he signed and filed a "Motion for Blood Test" for defendant. (Docket No. 53). In December, 1987, Attorney Terk signed and filed for defendant both a "Petition for Release from Confinement Mass. Rule Crim. P. 30 (a)" and a "Memorandum in Support" (Docket No. 54), which stated on the last page that "**Mr. Laguer shall be making his own oral presentation and arguments to this Honorable Court**." ("Memorandum in Support of Petition for Release" (Docket No. 54) at 19) (emphasis added).

In his 1987 "Petition for Release," defendant, through Attorney Terk, claimed that **his trial counsel's failure to "request an independent examination of Defendant's blood type" deprived him of "a substantial defense."** ("Petition for Release" (Docket No. 54) at 2-3) (emphasis added). Defendant made this "blood-type" argument -- and also asked for blood tests through Attorney Terk (Docket Nos. 51 & 53) -- knowing that, before his 1984 trial, he had intentionally tampered with a court-ordered saliva sample that was intended to obtain his blood-type by mixing another inmate's saliva with his own, which resulted in an "inconclusive" test result and no blood-type evidence being introduced at trial. (*See* "Memorandum of Decision" (Docket No. 190) at 14-15). *Commonwealth v. Laguer*, 448 Mass. 585, 590 n.15 (2007).

In his 1987 "Petition for Release" (Docket No. 54), defendant, through Attorney Terk, also argued, *inter alia*, that his trial counsel was ineffective in failing to obtain the victim's

mental health records and to introduce evidence of her **"Schizophrenia,**" failing to procure three "**alibi witnesses**," and failing "to request the inspection of and examination of **the perpetrator's underwear which [allegedly] was found at the crime scene by the police**." ("Petition for Release" (Docket No. 54) at 3-4) (emphasis added). Defendant, through Attorney Terk, also argued that defendant "**poses absolutely no threat to the community and is not a danger to any person**"; that "the Commonwealth's psychiatrist, **Daniel W. Weiss, M.D.**, states in his [1984] psychiatric examination" that "'it seems totally out of character that this man should have done it'"; that **"[r]ecent revelations contend that the [all-white] jury was biased with racial overtones**"; and that **defendant "holds great compassion and sympathy for [the victim].**" ("Petition for Release" (Docket No. 54) at 2-4) (emphasis added).

In his 1987 Petition for Release, defendant, through Attorney Terk, also quoted an elderly juror, "William Novick of Worcester," as stating: "With the things I have learned since [the trial], there is no way I would have voted guilty. We didn't have much evidence then." ("Petition for Release" (Docket No. 54) at 4). Defendant failed to mention that the reason there was not "much evidence" at trial was that defendant had intentionally tampered with his court-ordered saliva sample, which resulted in an "inconclusive" blood-type result and no blood-type evidence introduced at trial. ("Memorandum of Decision" (Docket No. 190) at 14-15). *Laguer*, 448 Mass. at 590 n.15.

Defendant's tampering with his court-ordered saliva sample first came to light in a *Esquire Magazine* article about defendant published in May, 1994 -- a factually-inaccurate article that defendant filed, along with several other stories and glowing quotations about himself, in support of a *pro se* "Petition for Revision of Sentence" (Docket No. 74) in July, 1994 -- many years after the three-year statute of limitations had run on any possible criminal charges

of obstruction of justice or contempt of court arising from defendant's bad acts committed before his 1984 trial. Although defendant now freely admits that he tampered with his saliva sample (*see* "Laguer's Memorandum" (Docket No. 168) at 32 and "Defense Motion for Reconsideration" (Docket No. 194) at 18-19), he is still trying to benefit from his intentional bad act by claiming that he deserves a new trial because "the case against [him] was devoid of physical evidence" ("Laguer's Memorandum" (Docket No. 168) at 21, 32) -- but "'[n]either in criminal nor in civil cases will the law allow a person to take advantage of his own wrong.'" *Commonwealth v. Edwards*, 444 Mass. 526, 549 (2005) (explaining the doctrine of "forfeiture by wrongdoing") (citation omitted).

In early 1989, defendant -- with Attorney Terk acting as his deliveryman and "*pro bono* legal advisor" -- signed and filed a *pro se* "Petition for New Trial" (Docket No. 55) supported in part by "Exhibit 'A,'" the false affidavit signed by the elderly juror. (**EXH 4**). *Laguer*, 36 Mass. App. Ct. at 311-15. Attorney Terk drafted and signed a cover letter and then hand-delivered defendant's *pro se* 1989 "Petition for New Trial" to the Worcester Superior Court for filing on February 23, 1989. (**EXH 4**). Later, in April, 1989, defendant also filed a *pro se* "Amendment of Motion for New Trial." (Docket No. 56).

In his *pro se* 1989 "Petition for New Trial" (Docket No. 55), defendant, with Attorney Terk acting as his "*pro bono* legal advisor," raised essentially the **same claims** -- except for the newly-expanded "jury bias" claim supported by the elderly juror's false affidavit (**EXH 4**) -- that he raised in his 1986 "Verified Motion for New Trial" (Docket No. 48), which was signed and filed by defendant and Attorney Caplette, and also raised again in his 1987 "Petition for Release" (Docket No. 54), which was signed and filed by Attorney Terk. In July, 1989, defendant raised

these same claims yet again in a *pro se* "Petition and Memorandum for Reconsideration of Denied Motion for New Trial." (Docket No. 61).

After extensive appellate and trial court proceedings (*see, e.g.,* Docket Nos. 56-58, 60, 61, 63, 64-70) -- which included evidentiary hearings held before the trial judge (Mulkern. J.) on remand from the SJC in August, 1991, at which both defendant and Attorney Terk testified and tried to downplay their direct involvement in creating the elderly juror's false "jury bias" affidavit (*see* "Commonwealth's Motion to Dismiss due to 'Fraud on the Court'" (Docket No. 177) EXHS 10 & 11) -- all of the claims raised in defendant's new trial motions filed in the late 1980s were denied (*see* Docket Nos. 59 & 71), and eventually affirmed on appeal. *Commonwealth v. Laguer*, 410 Mass. 89, 92 (1991); *Commonwealth v. Laguer*, 36 Mass. App. Ct. 310, 315 (1994). As the Appeals Court found in 1994, in affirming the trial judge's factual findings on the "juror bias" claim ("Memorandum of Decision" (Mulkern, J.) (Docket No. 71); Docket No. 198, EXH 4)) -- a claim that defendant and Attorney Terk dreamed up and sent out into the world for the first time in a "Press Release" in May, 1987 (**EXH 3**) -- Judge Mulkern properly had found that **the racially-offensive "statements** alleged in the [elderly juror's] affidavit [jointly created by defendant and Attorney Terk] . . . **were the product of suggestion and involvement by the juror . . . in the defendant's cause,"** and that **"neither of the offending statements had been made.**" *Laguer*, 36 Mass. App. Ct. at 313 (emphasis added).

Nonetheless, defendant, through Attorney Terk, has brought **this same, long-rejected "jury bias" claim** -- "**Racial Bias in the Jury Deliberation" by "twelve white jurymen**" -- before the Court in **2012** ("Defense Motion for Reconsideration" (Docket No. 194) at 2, 19, 21-22), along with the **same claims** that defendant first raised in **1986** in his "Verified Motion for New Trial" (Docket No. 48) signed by both defendant and Attorney Caplette ("Verified Motion"

(Docket No. 48) at 1-3); raised again in **December, 1987** in his "Petition for Release from Confinement" (Docket No. 54) signed by Attorney Terk; again in February, **1989** in his *pro se* "Petition for New Trial" (Docket No. 55) -- the motion filed with the false affidavit from the elderly juror, with Attorney Terk acting as defendant's deliveryman and "*pro bono* legal adviser" (**EXH 4**); again in **April, 1989** in defendant's *pro se* "Amendment of Motion for New Trial" (Docket No. 56); and yet again in **July, 1989** in his *pro se* "Petition and Memorandum for Reconsideration." (Docket No. 61). These oft-repeated claims include the **victim's "psychotic break" and "psychiatry history"** ("Defense Motion for Reconsideration" (Docket No. 194) at 2, 8, 10-12); **missing "alibi witnesses**" (*id.* at 22-23); **"saliva" and "blood type evidence"** (*id.* at 2, 18-21); **missing "underclothes from suspect**" (*id.* at 13-14); and **Dr. Weiss's 1984 psychiatric report** (*Id.* at 4).

During the late 1980s, defendant also filed a federal habeas petition in the U.S. District Court for Massachusetts, once again claiming "that the trial judge improperly denied petitioner and his counsel certain **medical records pertaining to the victim-witness.**" (*See* attached **EXHIBIT 5**, *Laguer v. Bender*, No. 86-1237-WF, "Report and Recommendation," slip op. at 2 (D. Mass. Dec. 11, 1987)). After a federal magistrate recommended in 1987 that defendant's habeas petition be dismissed for failure "to exhaust his available state remedies" (**EXH 5**, *id.* at 2 & 4), the District Court (Wolf, J.) agreed and dismissed the petition in 1988. (**EXH 5**, *Laguer v. Bender*, No. 86-1237-WF, "Memorandum and Order," slip op. at 2, 4 (D. Mass. Nov. 8, 1988)).

Ten years later, in May, 1997, defendant filed yet another *pro se* "Petition for a New Trial under Rule 30 (A) (B)" -- his **seventh** new trial motion -- with a *pro se* "Memorandum of Law" and a one-sentence, *pro se* "Affidavit" that stated in full: "I am innocent." (Docket No. 79). In his 1997 *pro se* "Petition," defendant claimed that his trial counsel had "impermissibly

eliminated every single woman on the jury venue" in choosing jurors for defendant's 1984 trial (Docket No. 79), which included a charge of Aggravated Rape. At sentencing, after the jury convicted defendant of Aggravated Rape in 1984, the trial judge (Mulkern, J.) imposed a life sentence with the possibility of parole, saying "[T]his is one of the most vicious sexual assaults on a particularly fragile person that I have ever seen." (Trial Tr. 617-18).

On September 17, 1997, the Court (Travers, J.), by endorsement, "refuse[d] to act" upon defendant's 1997 *pro se* "Petition," "[b]ecause **this motion raised no issue that could not have been raised previously, including the direct appeal and [earlier] motions for new trial**." (Docket No. 79) (emphasis added).

In quick response, on September 22, 1997, defendant, acting *pro se*, filed a "Motion for this Court to Reconsider its 'Refusal to Act upon the Motion' for New Trial," with a three-page, self-serving, *pro se* "Affidavit" (Docket No. 80); a "Motion for Findings of Facts and Conclusions of Law" (Docket No. 81); a "Motion for Assignment of Counsel" (Docket No. 82); and a "Notice of Appeal" from the denial of his **seventh** new trial motion. (Docket No. 83). On October 23, 1997, the Court (Travers, J.), endorsed defendant's *pro se* motion to reconsider (Docket No. 80) as follows:

> Denied without a hearing. The defendant, who is pro se, is informed that "a refusal to act" endorsement is an action of the court which means that **because the defendant could have raised an issue at trial, or upon appeal, or in prior post-conviction proceedings and did not do so (or did so and they were rejected) they are treated as waived and cannot be raised**.

(*See* Judge Travers's endorsement on Docket No. 80) (emphasis added). Defendant also filed a *pro se* "Notice of Appeal" from this denial on October 28, 1997. (Docket No. 84). On October 30th, the Court (Travers, J.), by endorsement, refused to act upon defendant's *pro se* "Motion for Assignment of Counsel" (Docket No. 82), but added that "the defendant should feel free to apply

to the Office of Public Counsel Services pro se." (Docket No. 82). Defendant handled the appeal from the denial of his **seventh** new trial motion *pro se*.

On January 19, 1999, the Massachusetts Appeals Court, in an unpublished Rule 1:28 decision (Docket No. 85), affirmed Judge Travers's denial of defendant's *pro se* 1997 "Petition for New Trial," on the grounds that defendant's no-women-on-the-jury claim "could have been raised in any of defendant's prior appeals" and thus was barred by waiver, and that the claim also lacked substantive merit. (*See* attached **EXHIBIT 6**, the Rule 1:28 decision issued by the Massachusetts Appeals Court in *Commonwealth v. Laguer*, No. 98-P-0063, slip op. at 2-5 (Mass. App. Ct. Jan. 19, 1999)).

After this Court (Tucker, J.) denied defendant's **ninth** Motion for New Trial (Docket No. 190) in February, 2012, this Court also denied the multi-issue "Defense Motion for Reconsideration" (Docket No. 194) filed in April, 2012, consistent with the rule of waiver as described by both Judge Travers (Docket Nos. 79 & 80) and the Appeals Court (**EXH 6**), and with the doctrine of the "law of the case," which "bars a party from resurrecting issues that either were, or could have been, decided on an earlier appeal." *United States v. Matthews*, 643 F. 3d 9, 12-13 (1st Cir. 2011). "[A] motion for a new trial [or a motion to reconsider] may not be used as a vehicle to compel a . . . judge to review and reconsider questions of law' on which a defendant [already] has had his day in appellate court. . . ." *Fogarty v. Commonwealth*, 406 Mass. 103, 107 (1989) (quoting from *Commonwealth v. McLaughlin*, 364 Mass. 211, 229 (1973)). "This salutary approach safeguards 'the finality and efficiency of the judicial process by protecting against the agitation of settled issues."' *Matthews*, 643 F. 3d at 13.

"Finality in the criminal law is an end which must always be kept in plain view." *Commonwealth v. Pisa*, 384 Mass. 362, 367 (1981). "'There must be a reasonable moment for a

judgment to become final and a time beyond which further [repetitive] challenges must be barred.'" *Id.* (quoting *Reddick v. Commonwealth*, 381 Mass. 398, 403 (1980)). In defendant's case, the time for finality is now.

In January, 1987, just after defendant and Attorney Caplette had filed the "Verified Motion for New Trial" in December, 1986 (Docket No. 48), a journalist described defendant as "eager for another day in court," and quoted him as saying: "It's just such an accomplishment when you can stand up in court and argue something in a professional manner. . . . **I like to follow procedure, and I have integrity.** I will not make statements out of context. I would not insult a courtroom . . . ." (**EXH 2**) (emphasis added).

In their recent court filings, however, both defendant and Attorney Terk have demonstrated their continuing lack of "integrity" by engaging in "fraud on the court" ("Memorandum of Decision" (Docket No. 190) at 12-17) and by consistently refusing "to follow procedure." (**EXH 2**). (*See, e.g.*, Docket Nos. 172, 176, 182, 187, 189, 195 & 198). For example, in April, 2011, in filing defendant's **ninth** Motion for New Trial (Docket No. 168) defendant, through Attorney Terk, failed to comply with the requirements of Mass. R. Crim. P. 30 (c) (3), Superior Court Rule 9, and Superior Court Rule 61A (C) (*see* Docket No. 172), filed no exhibits with his 118-item list of exhibits, and filed no supporting affidavits from any of his 27 listed witnesses. (*See* Docket Nos. 170, 175 & 176). In January, 2012, in moving to "stay" his life sentence (while citing the wrong procedural rule, Mass. R. Crim. P. 31 (a), which governs stays only after appeal) defendant, through Attorney Terk, claimed that defendant would not "present a danger to the community if released" (Docket No. 188), but somehow failed to mention that "the Parole Board [had] found in a unanimous decision after a lengthy hearing in 2010 . . . [that] **Mr. Laguer's release [would] not [be] consistent with the demands of public safety**."

("Commonwealth's Opposition" (Docket No. 189) at 2). And more recently, in March, 2012, twenty-eight years after his 1984 trial, defendant, through Attorney Terk, filed an abundantly frivolous "Motion for Discovery and Production for Tangible Evidence" (Docket No. 192) (again citing the wrong procedural rule, Mass. R. Crim. P. 14, which governs only **pre-trial** discovery) but filed no supporting affidavits to establish a "prima facie case for relief" as required by the rule governing **post-conviction** discovery, Mass. R. Crim. P. 30. In addition to making ridiculously-broad discovery requests in his 2012 motion for discovery, defendant, through Attorney Terk, also failed to mention that the Commonwealth had agreed to conduct extensive post-conviction discovery during defendant's DNA proceedings in 2001 -- a search that unearthed a previously-undiscovered "fingerprint" report (*see* "Commonwealth's Opposition" (Docket No. 195) at 8-9), and led to the filing of defendant's **eighth** Motion for New Trial and two subsequent appeals. *Commonwealth v. Laguer*, 65 Mass. App. Ct. 612 (2006) and *Commonwealth v. Laguer*, 448 Mass. 585 (2007).

"Rules of procedure are not just guidelines." *USTrust Co. v. Kennedy*, 17 Mass. App. Ct. 131, 135 (1983). "They have the force and effect of law." Mass. R. Crim. P. Rule 2, Reporter's Notes. The law "does not permit a [defendant] to disregard . . . established postconviction procedures," even when "a claim of actual innocence is made." *Bates v. Commonwealth*, 434 Mass. 1019, 1021 (2001). As shown in all their recent filings, defendant and Attorney Terk refuse to follow the rules.

2012 "REQUEST FOR EXECUTIVE CLEMENCY"

This Court has denied every post-conviction motion that defendant has filed through Attorney Terk over the past year. To avoid what defendant describes as "more pointless legal machinations" in Superior Court (**EXH 7**, Supp. at 4), defendant recently reshaped his personal

narrative into a "Request for Executive Clemency" aimed at a new audience, the Advisory Board of Pardons. (*See* attached **EXHIBIT 7**, copies of **(1)** defendant's one-page "Commutation Petition" and other required forms; **(2)** an e-mail from Attorney Terk; and **(3)** defendant's **second,** revised clemency petition captioned **"{SUPPLEMENTAL} In the Matter of Ben Laguer's Request for Executive Clemency**" with a Certificate of Service, both dated June 11, 2012 and both signed by Attorney Terk). Like his recent motions filed in Superior Court, defendant's 2012 clemency petition is a frivolous filing littered with meritless conjecture and vitriolic rhetoric. *See Tamber*, 45 Mass. App. Ct. at 239. In addition, in writing and submitting both the incomplete and "supplemental" versions of his 2012 clemency petition, defendant once again has failed to follow the rules.

In late May, 2012, defendant, through Attorney Terk, announced to the media that defendant was submitting a second clemency petition to the Governor and Advisory Board of Pardons (the first was in 2007) -- but defendant submitted his May, 2012 clemency petition without the required forms. (*See* Affidavit attached as **EXH A**, ¶ 10). In early **June, 2012**, defendant, through Attorney Terk, finally submitted to the "Executive Clemency Unit–Advisory Board of Pardons" a one-page "Commutation Petition" and other required forms, along with a revised, "Supplemental" twenty-five-page clemency petition. (**EXH 7**). But defendant still has not followed the applicable rules.

By submitting a "Commutation Petition" form, defendant has asked for "a commutation of [his life] sentence." (**EXH 7**). The current "Executive Clemency Guidelines" (*see* attached **EXHIBIT 8**, "Executive Clemency Guidelines" issued by Gov. Patrick on May 21, 2007 (hereafter "Guidelines")) set forth "threshold requirements" for requesting both "Pardons" and

"Commutations" (*see* **EXH 8** at 1, 2 & 7), and warn petitioners that "[e]xecutive clemency . . . is warranted only in rare and exceptional circumstances." (**EXH 8** at 1).

Under the Guidelines, a petitioner requesting a commutation of sentence "bears the responsibility of demonstrating, by clear and convincing evidence, that . . . [he] has made exceptional strides in self-development and self-improvement and would be **a law-abiding citizen**" if his sentenced were commuted. (**EXH 8** at 7) (emphasis added). As to this requirement, in his 2012 clemency petition, defendant admits that he has "accrued 30 disciplinary reports in his 29 . . . years" in prison. (**EXH 7** at 7). As described by defendant, "[s]ome [of his disciplinary] infractions are minor, [such as being] found in the shower while [sic] a major headcount[,] or not returning library books on time, [but] others include participating in a live radio broadcast, and a couple of inmate-on-inmate physical altercations." (*Id.* at 7). Despite the large number of disciplinary reports defendant has accrued, and the seriousness of having engaged in more than one "inmate-on-inmate physical altercation[]," defendant dismisses the significance of his lengthy and at times violent disciplinary history, claiming that "[t]his record of behavior, read fairly in the context of his unique predicament, reflects nothing beyond the abnormal episodes of an abnormal existence in prison." (*Id.* at 7). Where defendant freely admits that, for 29 years, he repeatedly has refused to follow the rules in prison, there is little chance he "would be a law-abiding citizen" outside of prison. (**EXH 8** at 7).

The Guidelines also state that "[t]he Governor will very rarely, if ever, grant commutation relief where . . . **a.** there is an adequate administrative or judicial remedy available," or "**e.** the petitioner has been convicted of a sex crime and has not participated in sex offender treatment." (**EXH 8** at 8) (emphasis added). As to an available "judicial remedy," in his 2012 clemency petition, defendant, through Attorney Terk, claims that he "has no other available

options open to him" except commutation of his sentence (**EXH 7** at 4), but this is not true, because Attorney Terk already has filed a "Notice of Appeal" from this Court's denial of defendant's **ninth** Motion for New Trial. (Docket No. 193).

As to participating in sex offender treatment, defendant, through Attorney Terk, admits in his clemency petition that "[i]n 2000 [defendant] was denied parole" for the following reason: '"**Convicted sex offender not in treatment**"'; that in 2003 he was denied parole because he "takes no responsibility for rape for which he was convicted"; and that in 2010 he was denied parole because, "since his last parole hearing in 2003, **[defendant] admittedly has not been involved in any significant rehabilitative programming of any kind**; rather, he has focused all of his energy on his appellate effort." (**EXH 7** at 6) (emphasis added). Defendant, through Attorney Terk, also admits that **he "attended the pre-treatment phase of the sex offender program**," but "**was asked to leave,"** allegedly due to "his inability to sign an admission of guilt." (*Id.* at 6) (emphasis added). By filing a clemency petition without even coming close to meeting the Guidelines' threshold requirements, defendant once again failed to follow the rules.

In addition, the Guidelines state that "[a] commutation of sentence reduces the period of incarceration; it does not imply forgiveness of the underlying offense . . . [and] **has no effect on the underlying conviction** . . . ." (**EXH 8** at 7) (emphasis added). Nonetheless, in his 2012 clemency petition, defendant, through Attorney Terk, once again has attacked the validity of his "underlying conviction" by including his now-tired claims of "Racial Bias in the Jury Deliberation" (**EXH 7** at 21-22); the victim's "psychotic break" and "psychiatry history" (**EXH 7** at 1, 3, 4, 10-12); missing "alibi witnesses" (**EXH 7** at 22-23); "saliva" and "blood type evidence"(**EXH 7** at 19-21); missing "underclothes from suspect" (**EXH 7** at 13-15); and Dr. Weiss's 1984 psychiatric report. (**EXH 7** at 5).

Defendant also has included the same **wholly-irrelevant personal data** (**EXH 7** at 5), **self-aggrandizing propaganda** (**EXH 7** at 2, 5-7), and **baseless innuendo and retaliatory attacks on his adversaries** (**EXH 7** at 8, 10, 12, 17, 18, 23) that appeared, but did not belong, in his "Defense Motion for Reconsideration." (Docket No. 194). *See infra* at 6-7. Moreover, in his 2012 clemency petition, defendant, through Attorney Terk, has expanded his hit list to include the former District Attorney for the Middle District, John J. Conte (**EXH 7** at 3, 4, 25); the late Superior Court Judge William C. O'Neil, Jr., who denied defendant's pre-trial request for the victim's mental health records in January, 1984, after reviewing those records *in camera* (**EXH 7** at 4, 12); Superior Court Judge Richard T. Tucker, who denied all of defendant's recent motions filed through Attorney Terk (**EXH 7** at 1, 4, 12, 17, 22), and the entire "Worcester clique of legal personalities" (EXH 7 at 4), as shown by the following excerpts:

> Beginning with trial prosecutor James R. Lemire, a succession of prosecutors have defended this **racially stained** LaGuer verdict, before a clique of judges who owed their fortunes to the legendary **district attorney, John J. Conte**, with who [sic] most of these men started out as young assistant district attorneys. Conte became became obsessed by LaGuer's public challenges. . . .
>
> . . . .
>
> Prosecutors misled courts, [and] withheld evidence on every pertinent topic and physical form, because they could do so with impunity. Few could ever conceive of [sic] Conte, an appointee of the great Massachusetts liberal Governor Michael S. Dukakis, would sanction these actions against LaGuer.

(**EXH 7** at 3) (emphasis added).

> It raises the question whether **superior court judge William C. O'Neil, Jr**., whom [sic] denied the defense access to any part of [the victim's] psychiatric records . . . actually read the record or merely accepted Lemire's version. O'Neil had long been partner with the John J. Conte political machine. . . . Lemire committed serious ethical and **likely criminal offenses** in LaGuer's prosecution.
>
> . . . This homogeneity of white police, prosecutors, clerks, jurors and judges routinely afforded white suspects greater respect for the rule of law. . . . A clique of white judges and prosecutors were simply not inclined to let an accused black rapist besmirch a white woman. This background context fully lays out why

> **superior court Judge Richard T. Tucker** . . . granted LaGuer only 3 days' notice to present 118 material exhibits and 27 witnesses. . . .
>
> . . . .
>
> Since **the Worcester clique of legal personalities** is unlike [sic] to afford a fair and impartial assessment of the physical evidence and historical documentary record, the matter becomes all of [sic] urgent for His Excellency to order the Board of Pardons and Commutations to undertake a public hearing. . . .

(**EXH 7** at 4) (emphasis added). *See Gordon v. United States*, 558 F.2d 618, 618-19 (1st Cir. 1977) (affirming federal injunction against litigant who "filed a series of complaints made up of vituperative attacks" upon numerous judges in retaliation "for ruling against him").

In each new iteration of his ever-expanding personal narrative, defendant ramps up the negative tone and abusive language and "reargues [his own] version of the 'facts' which . . . [previous judges and parole boards] all have rejected." *Callahan*, 417 Mass. at 520. In his 2012 clemency petition, defendant also "repeats [his baseless] accusations of ethical violations and criminal and professional misconduct" by the judges, prosecutors, defense attorneys, and police officers involved in his case, even though "[t]he only substantiation of this alleged misconduct" exists solely in defendant's imagination. *Id.* No attorney should have signed or filed a clemency petition containing such frivolous claims. *See* Mass. R. Prof. Conduct 3.1.

Moreover, as the record shows, in February, 2012, this Court (Tucker, J.) found that **an unsigned, plea offer letter that defendant himself "manufactured"** (Hrg. Tr. at 51; (Docket No. 198) EXH 2; (Docket No. 183) EXH 2) -- and Attorney Terk filed with defendant's unorganized "exhibits" -- was "**unauthentic**," which led the Court to dismiss the **ninth** Motion for New Trial due to defendant's and Attorney Terk's continuing pattern or practice of committing "fraud on the court." ("Memorandum of Decision" (Tucker, J.) (Docket No. 190) at 12-14, 17). Incredibly, despite Judge Tucker's specific finding that the plea offer letter was "unauthentic" (Docket No. 190 at 12-14, 17), defendant, through Attorney Terk, has claimed in

both his "Defense Motion for Reconsideration" filed with this Court in April, 2012 (Docket No. 194), and his 2012 clemency petition filed with the Advisory Board of Pardons in June, 2012 (**EXH 7),** that **"[i]n January of 1984, Laguer rejected a plea**" -- and to support this false claim, defendant **quotes lines from his manufactured, "unauthentic" plea offer letter**. (*See* 2012 clemency petition (**EXH 7)** at 7 & n.8, 23-25; "Defense Motion for Reconsideration" (Docket No. 194) at 5 & n.10. Such behavior by defendant and by Attorney Terk, a practicing lawyer, both defies explanation and exhibits a stunning lack of respect for both this Court and for the Advisory Board of Pardons.

Most disturbing, however, is that, in his 2012 clemency petition, defendant, through Attorney Terk, has expanded his remorseless attempts to impugn the integrity of the victim and her family, by not only asserting new claims against the victim's late daughter (*see, e.g.*, **EXH 7** at 9 & 13), but also, for the first time, attacking by name the victim's granddaughter and son-in-law, apparently in retaliation for their compelling testimony against him before the Parole Board and their repeated appearances at defendant's court hearings to show their support for the victim and her daughter. (**EXH 7** at 13). By directing personal attacks against the victim's remaining family members, defendant and Attorney Terk have gone too far.

"GATEKEEPING" ORDER

An appropriate "gatekeeping" order mandating that **defendant, acting either (1) *pro se,* or (2) through Attorney Terk,** first obtain leave of Court and comply with reasonable conditions set by the Court before filing any future motions or papers in this case, would put a stop to defendant's and Attorney Terk's repeated filing of frivolous motions and papers in his criminal case that continue to '"squander[] limited judicial [and taxpayers'] resources."' *Beit*, 385 Mass. at 860 (citations omitted). As a practicing lawyer, Attorney Terk "has the professional

responsibility not to advance groundless contentions," *Commonwealth v. Moffet*, 383 Mass. 201, 207 (1981), and therefore has no excuse for failing to "'comply with relevant rules of procedural and substantive law.'" *International Fid. Ins. Co. v. Wilson*, 387 Mass. 841, 847 (1983) (citation omitted). Because even "[p]ro se litigants are generally required to comply with the same rules as represented parties and their attorneys . . . there is no reason to immunize [defendant or Attorney Terk] from the consequences of the most egregious forms of misconduct." *Mt. Ivy Press, LP v. Defonseca*, 78 Mass. App. Ct. 340, 350 (2010). Compare G.L. c. 231, § 6F (if the court finds that an inmate "has repeatedly abused the integrity of the judicial system through frivolous [civil] filings, **the court may order that the inmate be barred from filing future [civil] actions without leave of court**") (emphasis added).

Defendant's and Attorney Terk's continuing egregious conduct constitutes "both an affront to the court's dignity and a perversion of the court's purposes as an institution for just resolution of legitimate disputes." *Miaskiewicz v. Commonwealth*, 380 Mass. 153, 158 (1980). '"Not to condemn this sort of conduct . . . does a disservice to the bench, the bar, and the public."' *Britt*, 40 Mass. App. Ct. at 555 (citations omitted).

Any "gatekeeping" order "should be tailored to [limit] the resources wasted or unnecessarily expended as a result of . . . misconduct," *Avelino-Wright*, 51 Mass. App. Ct. at 5, and to deter any future misconduct. *See Sommer v. Maharaj*, 451 Mass. 615, 622 (2009). Superior Court judges throughout the Commonwealth have issued a variety of "gatekeeping" orders to curtail vexatious filings while still allowing parties access to the courts, should they have meritorious claims.[3] "Access to the courts is a fundamental tenet of our judicial system;

[3] *See, e.g.*, *Benyamin v. Land Court Dep't of the Trial Court*, No. 2008-1687-E, 2010 WL 1076628, at *9 (Mass. Super. Ct. Jan. 28, 2010) ("gatekeeping" order by McDonald, J., prohibiting plaintiff from filing complaint against named defendants unless Court first authorized

legitimate claims should receive a full and fair hearing no matter how litigious the plaintiff may be." *In re Oliver*, 682 F.2d 443, 446 (3rd Cir. 1982) (emphasis added). But "there is no constitutional right of access to the courts to prosecute [a claim] that is frivolous or malicious." *Tripati v. Beaman*, 878 F.2d 351, 353 (10th Cir. 1989).

Since his 1984 trial, defendant -- whether acting *pro se*, through Attorney Terk, or while represented by **at least ten (10) other lawyers** -- has left no "stone unturned which he could possibly move." *Commonwealth v. Edgerly*, 6 Mass. App. Ct. 241, 266 (1978). "An examination of the history of this litigation as disclosed in the [**now almost 200] pleadings and docket entries** . . . shows an undue multiplicity of [filings] pursued to unreasonable lengths," *Boyagian v. Hart*, 312 Mass. 264, 266 (1942) (emphasis added), an achievement in which defendant, unfortunately, takes great pride. After defendant, through Attorney Terk, filed the **ninth "**Motion for New Trial" (Docket No. 168) in November, 2011, defendant, through his supporters, sent out a mass e-mail proclaiming that defendant now "**stands unique as the only person in the history of the Commonwealth to have done so**." (*See* attached as **EXHIBIT 9**, a printout of an e-mail dated November 14, 2011, from "Ben LaGuer [benlaguer@gmail.com]," attached to the "Commonwealth's Motion to Clarify Representation" (Docket No. 182) as EXH

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the filing in response to a letter from plaintiff, which had to "include a copy of the Memorandum of Decision and Order issued this date"); *Evicci v. Souza Baranowski Correctional Center*, No. 031897, 2004 WL 297280 (Mass. Super. Ct. Nov. 3, 2004) ("gatekeeping" order by McCann, J., enjoining inmate from filing any future civil action without first submitting it to the Court "for review" and approval); *Pandey v. Two Associate Justices of the Superior Court*, Nos. 03-P-277 & 03-P-379, 2004 WL 1872471, at *2 & *3 (Mass. App. Ct. Aug. 20, 2004) (Rule 1:28 decision quoting several Superior Court "gatekeeping" orders); *Dowd v. Palandgian*, No. 01-P-190, 2002 WL 31424323, at *1 (Mass. App. Ct. Oct. 29, 2002) (discussing orders that restricted a "vexatious litigant" from filing frivolous actions in Suffolk, Norfolk and Middlesex counties); *Camoscio v. Hanley*, No. 956472E, 1996 WL 1353296, at *4 n.10 (Mass. Super. Ct. Apr. 3, 1996) (noting in part that "**due to the multitude of motions filed by the plaintiff in his criminal case . . . [he] was forbidden from filing further papers without prior leave of the court**") (emphasis added).

14) (emphasis added). Repeatedly filing frivolous post-conviction motions, however, is not something to celebrate. In this case, it constitutes harassment.

In a 1982 Worcester County rape case with umpteen post-conviction motions and **over 440 entries on the docket** -- proceedings aptly described as "the antithesis of finality" -- the Court (McHugh, J.) found that "the extensive record [in that case] . . . ma[de] appropriate an assumption that **all meritorious issues . . . have surfaced and been reviewed**." (*See* attached **EXHIBIT 10**, "Memorandum and Order on Outstanding Motions" (McHugh, J.) at 16, issued Dec. 9, 1996, in *Commonwealth v. Sumner*, Worcester Superior Court Indictment Nos. 82-98448 & 82-98449) (emphasis added)). The same is true here.

In the 1982 rape case, Judge McHugh also found that, "[i]n addition to **frequently repeating matters previously decided**, the [inmate's] motions **frequently ma[de] ludicrous assertions with absolutely no basis in fact**" (**EXH 10** at 14) (emphasis added) -- precisely what defendant has been doing through Attorney Terk. (*See, e.g.*, "Commonwealth's Response to Supplemental Memorandum" (Docket No. 183) and "Commonwealth's Opposition to 'Defense Motion for Reconsideration'" (Docket No. 198) at 10-13). Compare *Simmons v. State*, 61 So. 3d 1175, 1177 (Fla. Dist Ct. App. 2011) (affirming sanctions where defendant had "engaged in the filing of meritless, frivolous and successive claims, and continue[d] to seek relief . . . notwithstanding the repeated adverse determination of the claim on its merits").

In 1996, in response to the Commonwealth's motion to enjoin the inmate in the 1982 rape case from filing even more frivolous motions (*see* **EXHIBIT 11,** "Commonwealth's Motion for Injunction Barring Defendant's Repetitive and Vexatious Post-Conviction *Pro Se* Motions" (exhibits omitted), referenced in **EXH 10** at 14), Judge McHugh ruled that "no further [*pro se*] motions . . . should be entitled to consideration on the merits **unless the Court affirmatively**

decides that they contain a novel issue of arguable merit." (**EXH 10** at 16) (emphasis added). As stated by Judge McHugh, "the record [in the 1982 rape case] . . . ma[de] a 'gatekeeping' order essential," because "[t]he Court's severely taxed resources as well as those of the District Attorney, both resources of the public, should not be squandered on repetitive frivolity." (**EXH 10** at 15). The same is true here.

To address "[t]he problem of separating the occasional grain of wheat [in the inmate's filings] from bushel upon bushel of chaff," Judge McHugh carefully crafted a "gatekeeping" order intended to curtail any frivolous *pro se* filings yet ensure that the inmate still had access to the courts to "file and obtain a hearing on any motion that in fact ha[d] arguable merit." (**EXH 10** at 14). According to Judge McHugh, "[t]o insure that justice is done, . . . any order constricting the flow of [the inmate]'s motions should have three primary characteristics: (1) the Order should provide for creation of a record of what [the inmate] has filed and thus should allow [the inmate] to file any papers he chooses, (2) the Order should provide for notice of [the inmate's] filings [and] papers to be brought to the attention of a judge in a regular and systematic fashion, and (3) the Order should provide a mechanism for prompt resolution of the [papers and] motions [the inmate] has filed." (**EXH 10** at 15-16). The Order also should offer clear guidelines as to what a litigant must do to obtain leave of court. *Tripati*, 878 F.2d at 354.

Judge McHugh issued the following "gatekeeping" order in the 1982 rape case:

> With the foregoing considerations in mind, it is hereby ORDERED as follows with respect to all motions filed in [the inmate's criminal cases] after the date of this Order:
>
> 1. Any Motion signed by an attorney who has filed an appearance for Defendant in these cases, see Superior Court Rule 2, shall be exempt from the provisions of this order and shall be processed in the customary fashion.

> 2. Defendant shall file all future *pro se* motions directly with the Clerk in Worcester County. Any motion filed with or sent by any other person may be ignored and destroyed.
>
> 3. Each *pro se* motion filed by Defendant shall be accompanied by (A) **a motion for leave to file the motion** and (B) **an affidavit signed by a person competent to offer evidence on the factual matters on which the substantive motion is based.** Any [pro se] motion not accompanied by a motion for leave to file shall be docketed and shall be deemed denied on the date of docketing.
>
> 4. The clerk shall docket each motion for leave to file a motion and each substantive motion to which the motion for leave to file relates. The Commonwealth shall not file a response to any substantive motion or to any motion for leave to file a substantive motion unless and until requested by the Court to do so. No summons or writ of *habeas corpus* shall be issued in connection with any motion Defendant files except upon express order of the Court.
>
> 5. On the second Monday of every month, the Clerk shall present the Justice sitting in the First Criminal Session, or any Justice sitting in said session [that] the Regional Administrative Justice may designate, with a copy of that portion of the Docket in these cases showing all motions Docketed within the proceeding 31 days **plus a copy of this Order**. Said Justice may thereafter take such action with respect to said motions, if any, as he or she deems appropriate.
>
> 6. Unless a Justice of this Court enters an affirmative Order allowing a motion for leave to file a substantive motion, each motion for leave to file a motion shall be deemed to have been denied on the 42nd day after that motion is Docketed and Defendant's objection to said denial shall be deemed recorded.

(**EXH 10** at 16-17) (emphasis added). The inmate in the 1982 rape case filed a *pro se* notice of appeal from Judge McHugh's "gatekeeping" order, but failed to pursue it.

State and federal courts around the country have issued "gatekeeping" orders with varying provisions in both civil and criminal cases. *See, e.g.*, *Watson*, 458 Mass. at 1027; *Cook v. Carlson*, 440 Mass. 1025, 1025-26 (2003); *Goldgar v. Office of Administration*, 26 F.3d 32, 36 & n.3 (5th Cir. 1994); *Green v. White*, 616 F.2d 1054, 1056 (8th Cir. 1980); *Hofland v. LaHaye*, No. 1:09-cv-00172-JAW, 2012 WL 140216, at *6 (D. Me. Jan. 18, 2012) (requiring "motion for leave to file for [each] specific pleading"); *Sumbry v. Indiana*, 2006 WL 3420206, at *2 n.2

(citing federal cases); *Crittenden v. State*, 67 So.3d 1184, 1186 (Fla. Dist. Ct. App. 2011) (citing Florida criminal cases).

In considering a "gatekeeping" order in defendant's case, the Commonwealth respectfully suggests that: (1) the order should encompass motions filed both **by Defendant acting *pro se*** and **by Attorney Terk;** (2) a copy of the Court's "gatekeeping" order should be filed along with the motion for leave to file and the substantive motion; and (3) the designated Justice should review any motions docketed in defendant's case as they are filed, instead of through monthly reviews. *See Sumbry v. Indiana*, No. 4:06 CV 1322, 2006 WL 3420206, at *2 (N.D. Ohio Nov. 27, 2006) (court issued a permanent injunction against litigant who had "established a pattern of filing complaints across this country which [were] patently frivolous and vexatious," an injunction that required, in part, that "[h]e must file a 'Motion Pursuant to Court Order Seeking Leave to File' with any document he wishes to file and **he must attach a copy of this Order to it**") (emphasis added).

Finally, "[d]ue process requires . . . that a sanction [such as a "gatekeeping" order] be imposed only on fair notice and a reasonable opportunity to be heard." *Commonwealth v. Matranga*, 455 Mass. 45, 49 (2009); *Beit*, 385 Mass. at 860-61. *See, e.g., In re Oliver*, 682 F.2d at 446 (remanding case for a hearing "out of an abundance of caution," to allow vexatious litigant to be heard on proposed "gatekeeping" order); *Holt v. State*, 232 P.3d 848, 853-56 (Kan. 2010) (remanding case because inmate who filed "cumulative, spurious" motions did not have "notice and an opportunity to be heard" before court restricted his future filings); *State v. Spencer*, 751 So. 2d 47, 48 (Fla. 1999) ("it is important . . . to first provide notice and an opportunity to respond before preventing [a] litigant from bringing further attacks on his or her conviction or sentence"). Therefore, **the Commonwealth requests a hearing on this motion**.

CONCLUSION

"A part of the Court's responsibility is to see that resources are allocated in a way that promotes the interests of justice. The continual processing of frivolous [filings made by defendant and Attorney Terk] does not promote that end." *In re McDonald*, 489 U.S. 180, 184 (1989). For this reason, and for all of the reasons stated above, the Commonwealth respectfully requests that: (1) the Court enter an appropriate "gatekeeping" order with appropriate conditions to prohibit both **defendant, when acting *pro se***, and **Attorney Terk** from filing any additional motions or papers in this case without first obtaining leave of court; and (2) the Court schedule a hearing on this motion.

Respectfully submitted,

COMMONWEALTH OF MASSACHUSETTS

_____

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Dated: _____

CERTIFICATE OF SERVICE

I, Sandra L. Hautanen, Assistant District Attorney, do hereby certify that on June _____, 2012, I caused to be served via First Class mail a copy of the "**Commonwealth's Motion for Relief from Frivolous Filing"** with **EXHIBITS 1-11**, along with this Certificate of Service, to the following counsel of record for defendant Benjamin Laguer:

Robert E. Terk, Esq.
5 Almount Terrace
Fitchburg, MA 01420

_____

Sandra L. Hautanen