Office of the Attorney General and
Division of Immigration Services,
Commonwealth of the Northern
Mariana Islands,
Petitioners,
v.
Superior Court of the Commonwealth
of the Northern Mariana Islands,
Respondent,
Alicia U. Fabricante and Chi, Min Yu,
Real Parties in Interest
Original Action No. 99-001
Civil Actions Nos. 98-1147 & 98-1248
June 28, 1999

Argued and Submitted February 10, 1999

Counsel for Petitioners: Robert Goldberg, Assistant Attorney General, Saipan.

Counsel for Real Parties in Interest: Joe Hill (Hill Law Offices), Saipan.

BEFORE: CASTRO, Acting Chief Justice, DEMAPAN, Acting Chief Justice, and TAYLOR, Justice *Pro Tem*.

CASTRO, Acting Chief Justice:

¶1 **[1]** This matter is before us on a Petition for Writ of Mandamus brought by the Office of the Attorney General and the Division of Immigration Services of the Commonwealth of the Northern Mariana Islands ("Government") following the Superior Court's issuance of an interim order which stated that two immigration cases would remain under submission pending the outcome of another case currently on appeal in this Court. We have jurisdiction to issue extraordinary writs pursuant to our general supervisory powers. *See* N.M.I. Const. art. IV, § 3; 1 CMC § 3102(b). For the reasons set forth below, we decline to issue a writ of mandamus against the Superior Court.

ISSUE PRESENTED AND STANDARD OF REVIEW

¶2 **[2]** We must determine whether this Court should issue a writ of mandamus where the Superior Court issued an interim order retaining Fabricante and Chi's immigration cases under advisement pending

the outcome of another immigration case involving similar issues now on appeal to this Court.[1] The issuance of a writ requires the balancing of the five factors enunciated in *Tenorio v. Superior Court*, 1 N.M.I. 1, 9 (1989). *See infra*.

FACTUAL AND PROCEDURAL BACKGROUND

¶3 Fabricante is a citizen of the Republic of the Philippines who entered the Commonwealth under a non-resident worker entry permit sometime in 1991. Chi is a citizen of the People's Republic of China who entered the Commonwealth under a short term business entry permit sometime in 1995. It is undisputed that Fabricante has overstayed the period of her entry permit by at least six years and Chi has overstayed by at least three years.

¶4 On October 15, 1998, the Government filed a Petition for Order to Show Cause and supporting documents in Fabricante's case, alleging that her entry permit expired on September 11, 1992. Excerpts of Record ("E.R.") at 1-7.

¶5 On November 11, 1998, the Government filed a Petition for Order to Show Cause and supporting documents in Chi's case, alleging that her business entry permit expired on November 23, 1995. E.R. at 10-21.

¶6 On December 17, 1998, the Presiding Judge entered an order consolidating Chi's case with Fabricante's. *Office of the Attorney General v. Chi, Min Yue*, Civ. No. 98-1248 and *Office of the Attorney General v. Alicia Fabricante*, Civ. No. 98-1147 (N.M.I. Super. Ct. Dec. 17, 1998) ([Unpublished] Order Consolidating Cases For Briefing and Hearing). The order stated that the cases were being consolidated "for judicial economy because the issues presented regarding a grant of voluntary departure to an alien parent with a United States citizen child presents similar facts and legal issues." *Id.*

¶7 A hearing was held on January 5, 1999, during which the trial court granted counsel for Respondents' motion to strike certain scandalous and impertinent statements from the Government's brief. The court then stated that it would try to issue a decision within two weeks and took the matter under advisement. On January 15, 1999, the trial court entered an order which stated:

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[1] In *Office of the Attorney General v. Sagun*, Civ. No. 98-1022 (N.M.I. Super. Ct. Oct. 26, 1998) ([Unpublished] Order) the trial court entered a judgment granting voluntary departure relief. The Government, represented by the same counsel as in the present deportation cases, appealed the *Sagun* decision by filing a notice of appeal on November 5, 1998.

> The Court issues this interim order based on its earlier statement that it would try to issue its decision in this matter by today's date. It appears, however, that due to the appeal filed in Civil Action Case No. 98-1022B, *Office of the Attorney General and the Division of Immigration Services v. Gemma S. Sagun*, Appeal No. 98-041, the consideration of this matter pending a decision by the Supreme Court would be imprudent. Since the Petitioners, in that appeal, have challenged the Court's authority and jurisdiction to grant the relief that is being requested in these cases, the Court must await the outcome of that appeal before it can issue a ruling.
>
> Now therefore, this matter will remain under submission until the Supreme Court rules on the above specified appeal.

Office of the Attorney General v. Chi, Min Yue, Civ. No. 98-1248 and *Office of the Attorney General v. Alicia Fabricante*, Civ. No. 98-1147 (N.M.I. Super. Ct. Jan. 15, 1999) ([Unpublished] Order). The Government timely filed this Petition for Writ of Mandamus.

ANALYSIS AND DISCUSSION

¶8 **[3,4]** When a party is aggrieved by an action of the trial court, there are two paths to seeking appellate review – appeals and extraordinary writs. Under a normal appeal, the appellate court is asked to evaluate the actions of a particular judge after a final judgment has been entered. The appellate court therefore receives the case after the trial court has resolved all claims presented, after the parties have had the chance to raise every argument, and after the facts have been fully developed. *Calderon v. United States Dist. Court*, 163 F.3d 530 (9th Cir. 1998).[2]

¶9 **[5,6]** A petition for a writ of mandamus, on the other hand, is an original proceeding and differs from the normal appellate process in all of the foregoing respects. *Id.* Moreover, the relief requested under a writ is an order against the trial court as an entity, even though only one judge's ruling is being challenged. Hence, this Court's exercise of its supervisory jurisdiction to issue a writ is reserved for extraordinary situations. *Mundo v. Superior Court*, 4 N.M.I. 392, 393 (1996).

¶10 > There are dangers to an unprincipled use of peremptory writs, as for example, the possibility that its use would be an impermissible alternative to the normal appellate process. Its abuse could operate to undermine the mutual respect generally existing between trial and appellate courts.

Tenorio, 1 N.M.I. at 8. We must, therefore, carefully look to the five factors delineated by the Ninth Circuit Court of Appeals in *Bauman v. United States Dist. Court*, 557 F.2d 650 (9th Cir. 1977) before

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[2] Stated differently, cases are tried in the lower court and judges are tried in the appellate court.

granting a writ of mandamus:

> (1) The party seeking the writ has no other adequate means, such as a direct appeal, to attain the relief desired.
>
> (2) The petitioner will be damaged or prejudiced in a way not correctable on appeal.
>
> (3) The lower court's order is clearly erroneous as a matter of law.
>
> (4) The lower court's order is an oft-repeated error, or manifests a persistent disregard of applicable rules.
>
> (5) The lower court's order raises new and important problems, or issues of law of first impression.

Tenorio, 1 N.M.I. at 9-10 (citations omitted).

¶11 **[7]** "In applying these guidelines to a particular case there will not always be a bright-line distinction; the guidelines themselves often raise questions of degree; the considerations are cumulative; and proper disposition will require a balancing of conflicting indicators." *Mafnas v. Superior Court*, 1 N.M.I. 74, 78 (1990).

¶12 Before we examine these guidelines, it is imperative that we address four very serious and important matters that have arisen in this case.

1. Improper Remarks in Appellant's Brief

¶13 At the January 5, 1999 hearing before the trial court, counsel for Fabricante and Chi moved to strike certain language included in the Government's brief entitled, "Memorandum Re: Children as Deportation Shields," which was offensive to both women and persons of Asian descent. The language objected to included the following:

> *Respondents (like so many alien parents) pretend to believe that dropping babies on CNMI soil somehow immunizes them from our immigration laws.*

Supplemental Excerpts of Record ("S.E.R.") at 20 (emphasis added).

> *An alien's uterus is not a license to violate our immigration laws with impunity.*

Id. (emphasis added).

> *If the shield argument were given any credence, thousands and thousands of alien women would drop babies here in order to avoid returning home to China, the Philippines and other less prosperous countries.*

S.E.R. at 21 (emphasis added).

[L]est the CNMI become an Asian baby factory.

Id. (emphasis added).

¶14 The Superior Court granted the motion to strike these statements from the bench. *See* Respondent Superior Court's Answer to Petition for Writ of Mandamus at 11; Appellant's Petition for Writ of Mandamus ("Petition") at 5 n.3. Yet despite the language being stricken below, the Government has incredibly included the exact same language in the instant Petition. *See* Petition at 8, 11-12. We can think of no justification for or relevance of the inclusion of the stricken language.

¶15 Counsel for the Government is hereby warned never to use such offensive language again in a brief, motion or other court document. This Court will not hesitate to suspend or even terminate an attorney from practicing law before the courts of this Commonwealth for engaging in such unnecessary pleading tactics.

2. Unprofessional Criticism of a Trial Court Judge

¶16 Throughout its Petition, the Government repeatedly criticizes the trial court judge by name and includes statements such as the judge "refuses to follow the law," "refuses to deport overstays," and "clearly violated the law." Petition at 1, 16. These statements were reported in the local media. We acknowledge that criticism is common to all public officials. We further concede that criticism against judges and their decisions are inevitable. After all, in every case there will be at least one disappointed party. However, it is one thing to allege that a judge has made an error in judgment but quite another to accuse a judge of intentionally violating the law which he or she has been sworn to uphold.

¶17 **[8]** The importance of maintaining and protecting the integrity of the judiciary is reflected by the rule that prohibits lawyers from making "a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge . . . ." MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.2(a) (1998). This rule helps to ensure that such false statements by a lawyer will not unfairly undermine public trust and confidence in the administration of justice. *Id.* Rule 8.2 cmt. [1]. This rule becomes even more important in our island community because a criticism of one judge is automatically reflected on all the other judges of this Commonwealth. Because judges are restrained by tradition and the judicial canons from responding to criticisms leveled against them or their decisions, sustained and inaccurate criticism would not only erode public trust and confidence in the judges but also

in the Commonwealth Judiciary itself.

3. Judicial Integrity

¶18 Although we disapprove of the Government's reckless criticism of the trial court judge, we cannot help but note that the judge's response to such criticism in this matter fell short of the normal judicial restraint expected of a judge.

¶19 **[9]** In explaining to this Court how counsel for the Government has been actively providing scandalous material to the media, the trial judge revealed his own dealings with the media. On January 20, 1999, reporters from the local newspapers and television station visited the trial judge in his chambers for comment on a story. *See* Declaration of Timothy H. Bellas, Exhibit A to Respondent Superior Court's Answer to Petition for Writ of Mandamus. Upon learning that the story was about the deportation cases in this matter, the trial judge correctly informed the reporters that he could not comment about a pending case. *Id.* However, the trial judge then proceeded to accept a reporter's offer to fax to him a copy of the Government's Petition for Writ of Mandamus which was not yet filed with this Court. *Id.* The trial judge's motive for obtaining this information is unclear from the record before us. If the judge intended to seek the discipline of counsel, the proper method would have been to file a complaint with the Disciplinary Committee of the N.M.I. Bar Association. *See* Com. Disc. R. 4. Once a complaint is filed, it is up to the Disciplinary Committee to investigate and gather evidence that may be relevant. By inquiring into how the Petition was provided to the media in this case, the trial judge himself acted as an investigator and contributed fuel to the fire of which he now complains.

¶20 **[10]** As judges in this Commonwealth, we must observe "high standards of conduct so that the integrity and independence of the judiciary may be preserved." Canon 1, Com. C. Judic. Cond. We must also have high tolerance of criticism, even when unfairly received.[3]

4. Relief requested vs. the Applicable law

¶21 **[11]** In its petition, the Government appears to be asking this Court to either order the deportations of Respondents Fabricante and Chi or direct the Superior Court to order their deportations. Neither

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[3] The trial judge should seriously consider whether a personal bias or "the appearance of impartiality" will prevent him from sitting on cases involving the same counsel for the Government, and in particular on those immigration cases currently pending before him.

request for relief is appropriate under this Court's supervisory jurisdiction. The remedy of mandamus is a drastic one, and should only be granted to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so. *Tenorio*, 1 N.M.I. at 9. Under no circumstances can this Court, however, order a lower court to decide a case in a certain way before the lower court has entered a final decision.[4]

The Writ of Mandamus

¶22 **[12]** Let us now examine the five factors delineated by the Ninth Circuit Court of Appeals in *Bauman v. United States Dist. Court*, 557 F.2d 650 (9th Cir. 1977), to wit:

> (1) The party seeking the writ has no other adequate means, such as a direct appeal, to attain the relief desired.
>
> (2) The petitioner will be damaged or prejudiced in a way not correctable on appeal.
>
> (3) The lower court's order is clearly erroneous as a matter of law.
>
> (4) The lower court's order is an oft-repeated error, or manifests a persistent disregard of applicable rules.
>
> (5) The lower court's order raises new and important problems, or issues of law of first impression.

Tenorio, 1 N.M.I. at 9-10 (citations omitted).

A. No adequate means to attain the relief desired and prejudice not correctable on appeal.

¶23 Greater weight is placed on these first two factors in determining whether a writ of mandamus should issue. *Mafnas*, 1 N.M.I. at 79. Moreover, the first two factors are similar and may be considered together. *Calderon*, 163 F.3d at 534.

¶24 **[13]** When it is said that a litigant has no other adequate means for relief, or that he or she will be prejudiced in a way not correctable on appeal, it does not mean that the litigant has been made to suffer unnecessary cost and delay by a trial court's erroneous ruling. *Id.* at 534-35 (*citing Mortgages, Inc. v. United States Dist. Court*, 934 F.2d 209, 211 (9th Cir. 1991); *In re Sugar Antitrust Litig.*, 559 F.2d

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[4] The Government has confused the issues by misrepresenting to this Court that a decision on the merits of the deportation cases was entered by the trial court. Had counsel seriously analyzed the five factors governing issuance of writs from *Tenorio v. Superior Court*, 1 N.M.I. 1, 9-10 (1989), rather than arguing the merits of the cases, we do not think this Petition would be before this Court today.

481, 484 & n.1 (9th Cir. 1977)).

> That happens every single time a litigant loses a summary judgment motion that he or she should have won, every time a district court mistakenly thinks federal jurisdiction exists when it does not, and every time a meritorious motion for judgment as a matter of law is denied. Undoubtedly, the cost and delay occasioned by such erroneous rulings, in the aggregate, are quite significant and can be quite burdensome to the individual litigant. If such harm could support mandamus, however, then mandamus would no longer be an extraordinary remedy and we will have effectively abandoned our tradition against piecemeal appeals.

Id. at 535. Rather, the petitioner must demonstrate some burden imposed by a clearly erroneous order of the trial court, other than mere cost and delay. *Id.*

¶25 **[14]** The Government contends that there is no other adequate means, such as a direct appeal, to obtain review of an "indefinite stay," and that the instant petition for a writ is the only means available of obtaining the relief requested, i.e., the immediate deportation of Fabricante and Chi. Even if the trial court's interim Order retaining Fabricante and Chi's cases under advisement had the effect of a stay, we do not agree with the Government's characterization of the stay as indefinite. Decisions of the Superior Court, as well as the Supreme Court, must be rendered within one year from the time the case is taken under submission. 1 CMC § 3404.[5] Thus, by law the trial court may only retain a case under advisement up to a maximum period of one year. No showing has been made by the Government that the trial court will not issue a final decision within the one year period prescribed by statute.[6] Once the trial court renders a final

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[5] We note that the one year rule was enacted prior to the passage of House Legislative Initiative 10-3 (ratified by the voters on November 1, 1997 and certified by the Board of Elections on December 13, 1997) which amended Article IV of the Commonwealth Constitution to recognize that the judicial branch of the government is co-equal with and independent of the executive and legislative branches. The U.S. Constitution has always recognized the judiciary as a co-equal branch of government, and the modern trend in the United States is that the monitoring of cases under advisement is left to the internal operations of the courts.

[6] The Government contends that the general one year period provided in 1 CMC § 3404 is superseded by the deportation statute, which mandates immediate deportation. We do not agree with the Government's interpretation. The deportation statute states: "*[i]f* the trial court makes a determination of deportability, an order of deportation shall be entered and the respondent shall forthwith be deported." 3 CMC § 4341(f) (emphasis added). Section 4341(f) specifies a time frame for deportation **only after** the trial court makes a finding of deportability. The statute, however, does not specify any time period in which the trial court must make that determination of deportability.

In contrast, a good example of a statute which does contain specific time limitations is 6 CMC § 5321 *et seq.*, governing the procedures for the protection of abused or neglected children. For instance, if a child is taken into protective custody, the statute sets forth the following court procedures:

> [t]he child shall be released within 48 hours unless during that period the Attorney General files a petition in the Commonwealth Trial Court to have the child declared a ward of the court. *The hearing*

decision, the Government is free to challenge such decision through the normal appellate process. Clearly, the Government has the adequate remedy of an appeal if the writ is not granted. Similarly, the Government has not demonstrated prejudice or injury that cannot be corrected on appeal. The alleged damage to the integrity of Commonwealth immigration laws and the credibility of the Commonwealth's enforcement efforts is not the type of non-correctable injury warranting issuance of a writ.

B. Clear error as a matter of law

¶26 **[15]** The third *Tenorio* factor is that the petitioner must show that the lower court order is clearly erroneous as a matter of law. If a rational and substantial legal argument can be made to support the questioned ruling, the case is not appropriate for mandamus relief, even though a reviewing court may find reversible error on normal appeal. *Sablan v. Superior Court*, 2 N.M.I. 166, 168 (1991) (*citing Tenorio*, 1 N.M.I. at 5).

¶27 **[16]** The ruling in question here is the trial court's Order retaining two deportation cases under submission pending the outcome of the *Sagun* appeal.[7] Although we do not condone the trial court's postponement of its decision, the trial court may take up to one year to issue its opinion, as explained above. This is not to say that the trial court should wait until the eleventh hour to decide a case. The purpose behind the one year rule is to allow sufficient time for research and writing, for example, if the case involves complex issues or if the court's docket is overburdened. The one year period was not intended to allow judges to delay issuing decisions arbitrarily.[8]

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shall be conducted before the close of the following judicial day and in no event more than 48 hours after the petition is filed.

6 CMC § 5323(a) (emphasis added). *See also* 6 CMC § 5324(a) ("Within 30 days of a temporary wardship finding, the court shall determine whether the wardship should be continued.").

[7] The Government misstates the questioned ruling by alleging that the trial court's refusal to deport Fabricante and Chi is clear error. This presumes that the trial court has decided the merits of their cases. As already mentioned, the only ruling made by the trial court is the order stating that the cases would remain under advisement. The merits of the deportation cases are not properly before this Court on this petition for a writ of mandamus.

[8] Immigration cases, in general, are not especially complex that they would require months or weeks for a trial judge to issue a written decision. The same trial judge had rendered his prompt decision in the *Sagun* case now pending before this Court. There is no legal reason why this same trial judge should delay making a final ruling in the Chi and Fabricante cases so that the parties could decide their next litigation forum. It is for these reasons that the trial judge is now urged to issue a prompt decision in these matters taken under advisement. The entire public has a vested interest in seeing that immigration cases are disposed of in a timely manner without resorting to the one year written opinion rule or waiting for what the Supreme court might do in the pending *Sagun* appeal.

¶28 **[17]** In the present matter, we find no direct or circumstantial evidence that the trial court purposefully delayed its decision to frustrate the Government. We note, however, the danger that due to the close proximity in time between the filing of the appeal in *Sagun*, *supra* and the issuance of the challenged Order, the trial court's action may give the appearance of retaliation against Government counsel for appealing the *Sagun* decision. The wiser course, therefore, may have been for the trial court to enter a decision, notwithstanding the pending appeal on the same issue. Despite our disagreement with the trial court on this point, however, we do not find that the trial court interim order in question was clearly erroneous. To the contrary, 1 CMC § 3404 explicitly grants the court up to one year to issue its decision. The Government's attempt to challenge the trial court's Order by way of this writ is therefore premature.

C. Oft-repeated error or persistent disregard of applicable rules

¶29 **[18]** The fourth factor that may support issuance of a writ of mandamus is if the trial court order is an oft-repeated error or manifests a persistent disregard of applicable rules. In an attempt to demonstrate the presence of this factor, the Government cites twenty five cases as evidence that the trial court's ruling is part of a recurring, widespread pattern of abusive and arbitrary immigration decisions. Appellant's Opening Brief at 16-18. Yet, except for *Office of the Attorney General v. Sagun*, *supra*, none of the cases cited by the Government are before this Court, on regular appeal or otherwise. At oral argument, counsel for the Government stated that many of the cited cases are not final appealable orders and that limited resources prevent the Government from appealing or seeking a writ in as many cases as it would like.

¶30 While this Court is not unsympathetic to the Government's predicament, it does not change the fact that the Government's cited cases are not properly before this Court. Thus, we cannot determine whether any of the cases are pertinent to the issue of whether the trial court's order in the instant deportation cases was erroneous. As such, we will not rely upon the Government's examples as evidence of persistent disregard of applicable law.

¶31 **[19]** In addition, we note that the trial judge in this case has not received any prior warnings that the type of order objected to here is erroneous. The absence of any such prior warnings is an indication that no showing of persistent disregard of applicable rules has been made. *See Bauman*, 557 F.2d at 661.

To our knowledge, this Court has not previously held that an order of the type challenged here is erroneous. *See id.* (where neither the Ninth Circuit Court of Appeals nor United States Supreme Court had previously held that type of order being reviewed is erroneous, "persistent disregard" concept was simply not applicable to case at bar). Accordingly, we find that the Government has not demonstrated an oft-repeated error or persistent disregard of the law.

D. Issue of First Impression or New Question of Law

¶32 The fifth factor is the opposite side of the same coin as the fourth factor. *Calderon*, 163 F.3d at 536 (*citing Admiral Ins. Co. v. United States Dist. Court*, 881 F.2d 1486, 1491 (9th Cir. 1989)). Thus, the fourth and fifth factors are rarely ever present at the same time. *Id.* at 534.

¶33 **[20]** At first glance, the Superior Court's Interim Order seems to suggest or raise an issue of first impression or new question of law in the sense that the question of whether the trial court may grant voluntary departure after deportation proceedings have commenced is not settled in the Commonwealth. Indeed, the practice over the years has been that the trial court has permitted voluntary departure relief pursuant to stipulations by the Office of the Attorney General. *See, e.g., Office of the Attorney General v. Tobias*, Civ. No. 97-1144 (N.M.I. Super. Ct. Dec. 1997) ([Unpublished] Stipulated Motion for Stay/Dismissal and Relief from Order of Deportation/Order); *Office of the Attorney General v. Cabusao*, Civ. No. 96-0366 (N.M.I. Super. Ct. June 17, 1997) ([Unpublished] Stipulation Re Motion for Stay/Dismissal and Relief from Order of Deportation/Order); *Office of the Attorney General v. Mendoza*, Civ. No. 96-0659 (N.M.I. Super. Ct. Sept. 13, 1996) ([Unpublished] Stipulated Motion to Dismiss with Prejudice Pursuant to 3 CMC Section 4343 – Voluntary Departure and Order).

¶34 **[21]** In any event, we note that the Order in question here did not grant voluntary departure. At most, the Order may indicate an intention by the trial judge to grant voluntary departure if the Supreme Court decides that such authority exists. If the trial court actually enters an order granting voluntary departure, review would then be appropriate. *See Bauman*, 557 F.2d at 661 (where class certification order objected to only revealed trial judge's *intention* to permit class members to opt out of class, review would be more appropriate of order actually excluding opting-out members if such order is ever made). The risk of unnecessarily and prematurely reviewing an issue of first impression is avoided by proceeding

in this way. *Id.* (citation omitted).

¶35 Thus, even assuming that the trial court Order at issue here raises a new question of law or issue of first impression, review would be premature at this point.

CONCLUSION

¶36 For the foregoing reasons, we find that the Government failed to demonstrate that it is entitled to the extraordinary relief of mandamus as enunciated in *Tenorio v. Superior Court*, *supra*. The petition for a Writ of Mandamus against the Commonwealth Superior Court is, therefore, **DENIED.**
