

No. 12-10014

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In The  
**Supreme Court of the United States**

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GABRIEL RIVERA,

*Petitioner,*

vs.

MICHAEL VENDITTO, JR.,

*Respondent.*

—◆—  
**On Petition For A Writ Of Certiorari  
To The Massachusetts Appeals Court**

—◆—  
**PETITION FOR WRIT OF CERTIORARI**

—◆—  
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## **QUESTION PRESENTED**

The question presented is whether the Due Process Clause of the Fourteenth Amendment denies Massachusetts courts jurisdiction over a defendant who did not waive in personam jurisdiction and who was not served with process in conformity with common law, statutory law or controlling precedent.

**LIST OF PARTIES**

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## PETITION FOR WRIT OF CERTIORARI

Petitioner Gabriel Rivera respectfully petitions for Writ of Certiorari to the Appeals Court of Massachusetts in *Gabriel Rivera v. Michael Venditto, Jr.*, No. 2012-P-0797.



## OPINION BELOW

The memorandum and order of the Appeals Court of Massachusetts (Pet. App. 1-2) is reported in an unpublished decision at 83 Mass. App. Ct. 1103, 979 N.E.2d 239. The order of the Massachusetts Supreme Judicial Court denying review (Pet. App. 13) is reported at 464 Mass. 1105, 982 N.E.2d 1189. The relevant trial court proceedings and order are unpublished.



## JURISDICTION

The Massachusetts Supreme Judicial Court denied review of this case on February 4, 2013. Pet. App. 13. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).



## RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment to the United States Constitution. provides in relevant part: “No person

shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.”

The Fourteenth Amendment to the United States Constitution provides in relevant part: “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law. . . .”;

Mass. R. Civ. P. 4 provides in relevant part:

“(c) By Whom Served. . . . service of all process shall be made by a sheriff, by his deputy, or by a special sheriff; by any other person duly authorized by law; by some person specially appointed by the court for that purpose;. . .

(d) Summons: Personal Service Within the Commonwealth. The summons and a copy of the complaint shall be served together. The plaintiff shall furnish the person making service with such copies as are necessary. Service shall be made as follows:

(1) Upon an individual by delivering a copy of the summons and of the complaint to him personally; or by leaving copies thereof at his last and usual place of abode;. . .



## INTRODUCTION

This case presents a pressing issue concerning the administration of justice and the safeguards of the Due Process Clause of the Fourteenth Amendment. The question presented is: Whether the Fourteenth Amendment to the United States Constitution denies Massachusetts Courts jurisdiction over a defendant who did not waive in personam jurisdiction and who was not served with process in conformity with Massachusetts law (Mass. R. Civ. P. 4) or statutory precedent. The Appeals Court, following a decision from the Massachusetts Supreme Judicial Court, held that it does not.

The classic expression of the criterion that personal jurisdiction must be consistent with due process appeared in *International Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S. Ct. 154, 158, 90 L. Ed. 95 (1945), which held that a state court's assertion of personal jurisdiction must not violate "traditional notions of fair play and substantial justice." Pp. 608-610.

The limits of the authority of Massachusetts Courts for asserting jurisdiction over a defendant are set out in substantive compliance with Mass. R. Civ. P. 4. In this case, Respondent failed to comply with statutory law or with precedent. Hence, due process wanting, the judgment is void for want of personal jurisdiction.

## A. Definition of Jurisdiction

“Jurisdiction” means the power of a court to hear and determine a cause, which power is conferred by a constitution or a statute, or both. *Penn v. Com.*, 32 Va. App. 422, 528 S.E.2d 179 (2000). “A universal principle as old as the law is that proceedings of a court without jurisdiction are a nullity and its judgment therein without effect either on person or property.” *Norwood v. Kenfield*, 34 Cal. 329 (1867); *Ex parte Giambonini*, 49 P. 732 (1897). “A judgment rendered by a court without personal jurisdiction over the defendant is void. It is a nullity.” *Sramek v. Sramek*, 17 Kan. App. 2d 573, 576-77, 840 P.2d 553 (1992), rev. denied, 252 Kan. 1093 (1993). “[A]nd it is void ab initio.” *In re Application of Wyatt*, 114 Cal. App. 557, 300 P. 132 (1931); *Ex parte Cavitt*, 118 P.2d 846 (1941). “A court cannot confer jurisdiction where none existed and cannot make a void proceeding valid. A void order can be challenged in any court.” *Old Wayne Mut. Life Ass’n v. McDonough*, 204 U.S. 8, 27 S. Ct. 236 (1907). “There is no discretion to ignore lack of jurisdiction.” *Joyce v. U.S.*, 474 F.2d 215 (3d Cir. 1973). “Court must prove on the record, all jurisdiction facts related to the jurisdiction asserted.” *Town of Lantana, Fla. v. Hopper*, 102 F.2d 118 (5th Cir. 1939). In 1980 this Court affirmed that “[t]he law provides that once State and Federal jurisdiction has been challenged, it must be proven.” *Main v. Thiboutot*, 100 S. Ct. 2502 (1980). See *Basso v. Utah Power and Light Co.*, 495 F.2d 906, 910 (10th Cir. 1974). *Stuck v. Medical Examiners*, 94 Cal.2d 751,

211 P.2d 389 (1949). The burden shifts to the court to prove jurisdiction. *Rosemound Sand & Gravel Co. v. Lambert Sand & Gravel Co.*, 469 F.2d 416 (5th Cir. 1972). “There is no discretion to ignore lack of jurisdiction.” *Joyce v. U.S.*, 474 F.2d 215 (3d Cir. 1973). “A departure by a court from those recognized and established requirements of law, however close apparent adherence to mere form in method of procedure, which has the effect of depriving one of a constitutional right, is an excess of jurisdiction.” *Wuest v. Wuest*, 53 Cal. App. 2d 339, 127 P.2d 934, 937 (1942). “Where a court failed to observe safeguards, it amounts to denial of due process of law, court is deprived of juris.” *Merritt v. Hunter*, 170 F.2d 739 (10th Cir. 1948).

## **B. Recognized Principles of Due Process**

“The fundamental requirement of due process is an opportunity to be heard and it is an opportunity which must be granted at a meaningful time and in a meaningful manner.” *Parratt v. Taylor*, 451 U.S. 527, 537, 540, 101 S. Ct. 1908, 68 L. Ed. 420 (1981) (“internal quotations omitted); see also *id.* (noting that some kind of hearing is required at some time before a State finally deprives a person of his property interests”). In 1982 in *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428, 436-437, 102 S. Ct. 1148, 71 L. Ed. 2d 265 (1982) this Court expanded the definition of due process and expressed that “[w]hat the Fourteenth Amendment does require, however, is an opportunity . . . granted at a meaningful time and in

a meaningful manner for [a] hearing appropriate to the nature of the case” (alterations in original) (internal citations omitted).

### **C. Controlling Precedent on Void Judgments**

The proposition that the judgment of a court lacking jurisdiction is void traces back to the English Year Books, see *Bowser v. Collins*, Y.B. Mich. 22 Edw. 4, f-30, pl. 11, 145 Eng. Rep. 97 (1482), and was made settled law by Lord Coke in *The Case of the Marshalsea*, 10 Co. Rep. 68b, 77 Eng. Rep. 1027, 1041 (K.B. 1612). Traditionally that proposition was embodied in the phrase *coram non iudice*. *Burnham v. Superior Court*, 495 U.S. 604, 609 (1990).

American courts invalidated, or denied recognition to, judgments that violated this common law principle long before the Fourteenth Amendment was adopted. See, e.g., *Grumon v. Raymond*, 1 Conn. 40 (1814); *Picquet v. Swan*, 19 F.Cas. 609 (No. 11, 134) (CC Mass. 1828); *Dunn v. Dunn*, 4 Paige 425 (N.Y. 1834); *Evans v. Instine*, 7 Ohio 273 (1835); *Steel v. Smith*, 7 Watts & Serg. 447 (Pa. 1844); *Boswell’s Lessee v. Otis*, 50 U.S. 336, 51 U.S. 350 (1850).

In *Pennoyer v. Neff*, 95 U.S. 714 (1878), it was announced that the judgment of a court lacking personal jurisdiction violated the Due Process Clause of the Fourteenth Amendment as well. The court stated that due process “mean[s] a course of legal proceedings according to those rules and principles which have

been established in our systems of jurisprudence for the protection and enforcement of private rights.”

*International Shoe Co. v. Washington*, 326 U.S. 310 (1945), remains unturned in so far as it was determined that a State court’s assertion of personal jurisdiction satisfies the Due Process Clause if it does not violate “*traditional notions of fair play and substantial justice*.” *Id.* 326 U.S. at 316, quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940). See also *Insurance Corp. of Ireland Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 703 (1982).

“[W]ell established principles of public law.” *Pennoyer*, 95 U.S. at 722. Those principles, embodied in the Due Process Clause, required that when proceedings “involv[e] merely a determination of the personal liability of the defendant, he must be brought within [the court’s] jurisdiction by service of process within the State, or his voluntary appearance.” *Pennoyer v. Neff*, 95 U.S. at 733. We invoked that rule in a series of subsequent cases, as either a matter of due process or a “fundamental principl[e] of jurisprudence,” *Wilson v. Seligman*, 144 U.S. 41, 46 (1892). See, e.g., *New York Life Ins. Co. v. Dunlevy*, 241 U.S. 518, 522-523 (1916); *Goldey v. Morning News*, 156 U.S. 518, 521 (1895). The Due Process Clause requires analysis to determine whether “traditional notions of fair play and substantial justice” have been offended. *International Shoe*, 326 U.S. 310, 316 (1945).



#### **D. Petitioner Presents a Prima Facie Case**

Establishing a prima facie case of the magnitude of violation of due process, requires of the deprivation of a constitutional or federal statutory right, a causal connection between the actor and the deprivation, and state action. *Sanchez v. Pereira-Castillo*, 590 F.3d 31, 41 (1st Cir. 2009).



#### **STATEMENT OF THE CASE**

1. Massachusetts law establishes that all individuals and residents of the Commonwealth must be served with process in conformity with Mass. R. Civ. P. 4. In the case of an individual such as Petitioner, service of process is required by a previously duly authorized officer to conduct service; It must be done in personam or by leaving copy of summons and complaint at the defendant's last and usual place of abode with additional service by regular first class mailing to the defendant's last and usual place of abode.
2. On October 30, 2008, Respondent filed complaint No. 2008-04045 against Petitioner alleging breach of the terms of a commercial lease commencing. Pet. App. 14.
3. On October 30, 2008, Respondent, in conformity with Mass. R. Civ. P. 4(c) was allowed a court motion for appointment

of special process server, to wit: Constable Paul Minsky. Pet. App. 15-16.

4. On December 19, 2008, Respondent returned a substitute and defective return of service to the Court certifying compliance with the court order of October 30, 2008. Pet. App. 17-19.
5. The substituted and defective service depicts that Respondent engaged Donna Callandrillo to serve process on Petitioner. Donna Callandrillo is neither an individual qualified by law to serve process nor an individual authorized or appointed by the Court to conduct said service. Pet. App. 20-21. Donna Callandrillo is not an employee or agent of Constable Minsky.
6. Donna Callandrillo served process on Petitioner at 11 Lambert Avenue, Chelsea, Suffolk County, Massachusetts 02150. Pet. App. 17-19. Which address is not Petitioner's place of abode.
7. At all relevant times Petitioner's place of abode was established to be at 339 Atlantic Avenue, Marblehead, Essex County, Massachusetts 01945.
8. Donna Callandrillo did not personally serve Petitioner, nor did she serve copy of the summons and complaint at Petitioner's place of abode by leaving it there or by first class mailing to Petitioner's

place of abode as required under Mass. R. Civ. P. 4.

9. Petitioner did not evade service of process. Petitioner did not become aware of the default judgment entered until after a year following entry of the default when Respondent attached Petitioner's residence at 339 Atlantic Avenue, Marblehead, Essex County, Massachusetts 01945 for public sale in satisfaction of the judgment.
10. The trial court file reflects that mailings addressed by the court to Petitioner to 11 Lambert Avenue, Chelsea, Massachusetts 02150 were returned to the court by the U.S. Postal Service as "not deliverable." Pet. App. 22.
11. Petitioner never received service of process.
12. Petitioner was not aware of the pendency of the proceeding.
13. Petitioner never appeared in court to answer the complaint or otherwise appear in Court to conduct any business in relation to the action.
14. Petitioner did not waive personal jurisdiction.
15. On April 27, 2009, Petitioner was defaulted and judgment entered against him in the sum of \$275,756.88 plus interest in the sum of \$15,684.28. Pet. App. 23.

16. On February 06, 2012, Petitioner filed the instant action, 2012cv000447, to set aside the judgment for want of personal jurisdiction in conformity with Mass. R. Civ. P. 60(b)(4), cognate with federal rules of civil procedure.
17. The trial court denied relief for Petitioner. The Appeals Court affirmed. Pet. App. 1-2. The Supreme Judicial Court of Massachusetts denied Further Appellate Review. Pet. App. 13. thus, Massachusetts Court rejected Petitioner's argument of lack of personal jurisdiction.
18. The decision of all Massachusetts courts is silent as to resolving the issue raised by Petitioner regarding jurisdiction.
19. Petitioner submitted a prima facie case establishing that the court lack personal jurisdiction over him.
20. Petitioner's instant complaint is verified and accompanied all relevant documents in support thereof.
21. Although the Appeals Court of Massachusetts acknowledged the concurrent pendency of appeal court case No.: 2011-P-1092 between Petitioner and Respondent, the Appeals Court, upon deciding that case it did not address the issue of jurisdiction, and thus, assumed it in all cases.



## **REASONS FOR GRANTING THE WRIT**

This Court has repeatedly held that a judgment which lacks personal jurisdiction over the defendant is void. Massachusetts courts are divided from the Federal courts of appeals and state courts of last resort; Massachusetts judgment departs from common law, constitutional and statutory safeguards, and precedent.

This Court should use this case to resolve this conflict. Service of process and returns of service are an integral part of civil proceedings. Exempting and disregarding its importance from the adversarial civil process poses a significant threat and miscarriage of justice. What is more pressing is that the holding below is incorrect.

### **I. The Decision Below Implicates an Irreconcilable Conflict Between Massachusetts Courts, and Federal and State Courts.**

This Court should not allow this conflict over whether Massachusetts court lacks jurisdiction over Petitioner for the following reasons:

1. Only service of process in conformity with the law guarantees due process.
2. The question presented implicates practices across the Commonwealth that impact on the U.S. Constitutional rights of its citizens, and particularly on the rights of Petitioner.

3. The unchecked use of the law, Mass. R. Civ. P. 4(c), 4(d), and 4(d)(1) undermines the integrity of our justice system. The impact in our society of the misuse, tainted or fraudulent compliance with the law is of immense caliber because its ramifications pierce the heart of innocent, and unsuspecting individuals and families as a direct attack to their liberty.

## **II. This Case is an Excellent Vehicle for Considering the Question Presented.**

This case presents an excellent vehicle for resolving the split in authority over the question presented free of any waiver or collateral review. The case comes to this Court on direct review, and Petitioner unambiguously asserted his rights through Mass. R. Civ. P. 60(b)(4), an independent complaint and acceptable mechanism intended to remediate this precise issue of law designated for setting aside void judgments. Petitioner never surrendered to jurisdiction. Petitioner did not evade service of process. Petitioner was not aware of the pendency of the proceedings. The Court's reliance on substitute return of service violates Petitioner's rights safeguarded by the Fifth and the Fourteenth U.S. Constitutional Amendments.

Petitioner rightfully filed this Rule 60(b)(4) complaint asserting that the judgment is void because "The concept of void judgments is narrowly construed. *Lubben v. Selective Serv. Sys.*, 435 F.2d

645, 649 (1st Cir. 1972) 7 Moore & Lucas, Moore's Federal Practice Section 60.25(2), at 60-225 (2d ed. 1990)," quoting *O'Dea v. J.A.L. Inc.*, 30 Mass. App. Ct. 449 (1991). This Court ruled in *Old Wayne Mut. Life Ass'n*, supra, that "it is clear and well established law that a void order can be challenged at any court." And in *Vallely v. Northern Fire & Marine Ins. Co.*, 254 U.S. 348, 41 S. Ct. 116, 116, 65 L. Ed. 297 (1920), this Court held that "A void judgment, order or decree may be attacked at any time or in any court, either directly or collaterally" because a judgement is "void because of lack of jurisdiction." *Hagans v. Lavine*, 415 U.S. 528 (1974). "[I]t may be raised at any time, even on appeal." *Hilltop Developers v. Holiday Pines Service Corp.*, 478 So.2d 368 (Fla. 2nd DCA 1985). See *Basso v. Utah Power and Light Co.*, 495 F.2d 906 (10th Cir. 1974), supra.

The Fourteenth Amendment issue here turns exclusively on whether the judgment is void for want of jurisdiction in the absence of due process as contemplated under the scrutiny of substitute and inadequate service of process.

Where the return of service filed by Respondent with the court indicated that Petitioner had been served at 11 Lambert Avenue, Chelsea, Suffolk County, Massachusetts, Petitioner submitted, for the Court's consideration, in the instant action, sufficient information in the nature of voting records, tax receipts, insurance information, contractor's license address, state driving record information, utility bills, a 1996 publicly recorded Declaration of Homestead at

the properly designated registry of deeds declaring 339 Atlantic Avenue, Marblehead, Essex County, Massachusetts 01945, but the Respondent did not present any evidence to contradict the Petitioner's claim that at all relevant times he was domiciled at 339 Atlantic Avenue, Marblehead, Essex County, Ma., and not at 11 Lambert Avenue, Chelsea, Suffolk County, Massachusetts where he was served by Donna Callandrillo, the courts are bound to address the issue of jurisdiction in favor of Petitioner before addressing any other question of law or fact because a court can not assume jurisdiction.

Petitioner's claim falls squarely within the definition of what constitutes a void judgment, and has established an un rebutted prima facie case of violation of due process. Notwithstanding, Massachusetts court assumed jurisdiction, failed to decide on it, and decided the case in favor of Respondent.

### **III. The Decision Below Misconstrues the Due Process Clause of the Fourteenth Amendment.**

Although it appears that this Court has never ruled on this precise issue, this Court's precedent dictate in favor of Petitioner because a process of law which is not otherwise forbidden must be taken to be due process of law if it can show the sanction of settled usage both in England and in this country. . . . [That which], in substance, has been immemorially the actual law of the land. . . . therefor[e] is due



process of law. *Burnham v. Superior Court*, 495 U.S. 604 (1990), quoting *Hurtado v. California*, 110 U.S. 516, 528-529 (1884). Thus, the personal jurisdiction of the Court over Petitioner is limited by the strictures of constitutional due process. Respondent did not comply with the law but engaged in forbidden behavior, the judgment is void due to violations of due process.

Compare one California case which set out, in conclusion that where “they [the Court] did not authorize service of the complaint in the cross-action upon the plaintiffs attorney of record; No jurisdiction could be acquired over [a corporation] by the substituted service, and the California judgment was consequently without due process and a nullity . . . ” quoting *Adam v. Saenger*, 303 U.S. 59 (1938). In absence of compliance with the rules of service, the court must authorize substitute or alternate service. In 1987 it was held that “[A]bsent consent, there must be authorization for service of summons on the defendant. *Omni Capital v. Rudolf Wolff & Co.*, 484 U.S. 97, 104 (1987).

The United States Court of Appeals, Fifth Circuit decided “Defective Service of Process can cause a court to lack personal jurisdiction over a defendant.” *Harper Macleod Solicitors v. Keaty & Keaty*, 260 F.3d 389 (5th Cir. 2001). *Bludworth Bond Shipyard, Inc. v. M/V Caribbean Wind*, 841 F.2d 646, 10 Fed. R. Serv.3d 1147 (5th Cir. 1988).

“The requirement that a court have personal jurisdiction flows. . . . from the Due Process Clause. . . . It represents a restriction on judicial power, not as a matter of sovereignty, but as a matter of individual liberty.” *Insurance Corp. of Ireland Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982), quoting *Omni Capital v. Rudolf Wolff & Co.*, 484 U.S. 97, 104 (1987). In *Omni*, the Court further held that “[B]efore a federal court may exercise personal jurisdiction over a defendant, the procedural requirement of service of process must be satisfied.” “Absent consent, this means there must be authorization for service of summons on the defendant.” See other cases cited at 109. Hence, defective or substituted service is justifiable cause for a court to lack personal jurisdiction over a defendant.

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## CONCLUSION

Review of Respondent’s departure from traditional practice raises a serious question of constitutional magnitude. The constitutionality of Respondent’s submission of a substituted or defective service, without proper authorization, has become imminent in the light of our jurisprudence. Respondent’s proposition is unfaithful to both elementary logic and the foundations of common law and our due process jurisprudence.

Based on the foregoing, Petitioner has stated a due process violation of such a significant magnitude

that the judgment is void. Respondent has not stated a shred of evidence that there has been compliance with due process. Thus, Petitioner has alleged a reviewable constitutional case that is “plausible on its face.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

GABRIEL RIVERA,

By his Attorney

ALBA C. CORONA-PEREZ, ESQ.

P.O. Box 3

Swampscott, Massachusetts 01907

83 Mass.App.Ct. 1103

NOTICE: THIS IS AN UNPUBLISHED OPINION.

Appeals Court of Massachusetts.

Gabriel RIVERA

v.

Michael VENDITTO, Jr., & another.<sup>1</sup>

No. 12-P-797.

Dec. 19, 2012.

By the Court (KANTROWITZ, BERRY &  
GRAINGER, JJ.).

*MEMORANDUM AND ORDER  
PURSUANT TO RULE 1:28*

On February 6, 2012, lessee Gabriel Rivera commenced the present action against lessor Michael Venditto, Jr. (and the special process server in the underlying litigation), under Mass.R.Civ.P. 60(b)(4) and (6), 365 Mass. 828 (1974), alleging that the complaint underlying the appeal in a related case<sup>2</sup> is void for lack of service-grounds identical to those asserted, and found wanting, in his rule 60(b)(4) and (6) motion in the underlying litigation.

It appears that this is a collateral attack on the orders denying the latter motion and the motion for relief from the default judgment in the related case, as the Superior Court judge recognized in allowing

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<sup>1</sup> Donna Callandrillo

<sup>2</sup> See *Venditto vs. Rivera*, Mass.App.Ct., No. 11-P-1092, released this day.

Venditto's motion to dismiss on grounds of res judicata. Her order states:

“After hearing and review, the motion to dismiss is ALLOWED. The matter of service of process on plaintiff in MICV 2008-4045 has been litigated and resolved and said issue is currently on appeal in the Appeals Court in Docket No. 2011-P-1092.”

Judgment properly was entered dismissing the complaint as to both defendants.

No more need be said other than, as in *Cary Place Condominium Assn. vs. Rivera*, Mass.App.Ct., No. 12-P-94, also released this day, the state of the law is clear. As such, and due to the conduct of the plaintiff, appellate attorney's fees and costs for the defendants are appropriate and so ordered.<sup>3</sup> Contrast *Pierce v. Clark*, 66 Mass.App.Ct. 912, 915 (2006). The defendants are to submit, within fourteen days of the date of the rescript, the specific amount requested, along with a breakdown of all fees and costs and supporting documentation. See *Fabre v. Walton*, 441 Mass. 9, 10-11 (2004). The plaintiff may then, within seven days thereafter, submit a response challenging the requested amounts. See *ibid*.

*Judgment affirmed.*

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<sup>3</sup> We deny the plaintiffs request for attorney's fees and costs.

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COMMONWEALTH OF MASSACHUSETTS  
MIDDLESEX, ss. SUPERIOR COURT  
OF THE TRIAL COURT  
Docket No. 12-447

GABRIEL RIVERA,  
Plaintiff,

v.

MICHAEL VENDITTO, JR.  
Defendants,

**DEFENDANT, MICHAEL VENDITTO'S,  
MOTION TO DISMISS FOR RES JUDICATA**

(2012 February 8 Filed in Court (Haggerty, J.)  
Attest: Mary E. Rasa Deputy Assistant Clerk)

NOW COMES the Defendant, Michael Venditto, in the above matter and hereby files this request for dismissal pursuant to the well recognized legal concept of *res judicata*. Based upon the enormous amount of wasted time and energy that has been expended in responding the numerous pleadings filed by Rivera's counsel, in this court, the Appeals Court and the Northeast Housing Court, Counsel for the Defendant was hesitant to even respond to the Complaint filed by Attorney Corona-Perez. However, at the risk of further unfair delay, the Defendant seeks a dismissal or a refusal to accept for filing and docketing, this action and any further action, pleading, motion or claim filed by the Plaintiff, or his attorney

Alba Corona-Perez, if it pertains to Michael Venditto or the premises at 339 Atlantic Avenue, Marblehead, Massachusetts.

Attorney Corona-Perez is the ex-wife of Gabriel Rivera, and current occupant of the Premises located at 339 Atlantic Avenue, Marblehead, Massachusetts. The objective or independent judgment of counsel for the Plaintiff may be clouded due to her personal and financial interest in the outcome of any litigation involving Mr. Rivera or concerning the premises at 339 Atlantic Avenue, Marblehead, Massachusetts. Notwithstanding the foregoing, the Defendant responds with the undisputed facts as either evidenced in the Plaintiff's Complaint or available to the Court by an examination of the record of the case of *Venditto v. Rivera*, Docket No. MICV2008-04045, as follows:

1. The Defendant obtained a default judgment against the Plaintiff, Gabriel Rivera, in the amount of \$275,756.88 plus interest on April 21, 2009.
2. Beginning in February of 2011, Alba Corona-Perez, as counsel from Gabriel Rivera, filed in excess of six (6) various motions seeking to remove the default or enjoin the Defendant from exercising its rights in the execution on the judgment, alleging various claims of improper service and lack of knowledge.
3. After reviewing the papers, which included a detailed opposition and affidavits of persons attesting to the certain

facts relating to the actual knowledge of the Plaintiff (Gabriel Rivera), Judge Kern DENIED the Plaintiff's request to remove the default on April 6, 2011.

4. The parties were present on April 11, 2011 and conducted a further hearing where additional arguments were presented, affidavits were filed and the matter was taken under advisement.
5. On April 13, 2011, Judge Kern DENIED the Plaintiff's request for injunctive relief and the denial was entered on the docket sheet on April 20, 2011.
6. The Plaintiff, through counsel, filed a Notice of Appeal of the April 6, 2011 decision on May 5, 2011.
7. On August 8, 2011, an entry indicates Judge Leibensperger, in addressing one of the various Rule 60 motions of the Plaintiff, wrote "[t]his motion and all other motions under Rule 60 and otherwise described in Rule 9A Compliance affidavit are DENIED as untimely and unsupported. Dated August 15, 2011."
8. After additional Rule 60 Motions were filed, on August 17, 2011, an entry of an order by Judge Leibensperger states "[u]pon review of all materials, this motion is DENIED. Defendant fails to support any ground for Rule 60(b)(6) relief from judgment. Specifically, there was no fraud on the court in connection with



the 2009 judgment arising from the plaintiff entering into a lease of the subject premises in 2010. Dated: August 16, 2011.”

9. Despite the entry date of June 22, 2011, with the Appeals Court in Docket No. 2011-P-1092, and seven (7) months having passed, the Plaintiff has still not filed a proper record appendix or taken the proper steps of filing her appellate brief.
10. The Plaintiff’s counsel, Alba Corona-Perez, has sought six (6) extensions with the Appeals Court and has not complied with the final order deadline of January 27, 2012.
11. On January 24, 2012, presumably realizing she would not be able to comply with the Court’s deadline, Attorney Corona-Perez, filed a Motion to Dismiss her appeal in 2011-P-1092. This request for dismissal has not yet been acted upon.
12. On a related matter, the Defendant has also obtained a final judgment for possession following a motion for summary judgment of the Premises occupied by Attorney Corona-Perez, from the Northeast Housing Court on January 3, 2012.

### **Argument**

The doctrine of res judicata is a rule of public policy founded on the established principle that it is in the interest of the parties and for the public welfare that litigation once decided on its merits should end. *Biggio v. Magee*, 272 Mass, 185, 188, 172 N.E. 336, 337 (1933); *Browne v. Moran*, 300 Mass. 107, 111, 14 N.E.2d 119 (1938). The parties in this matter have had an extensive amount of litigation between them. Without exaggeration, it is estimated that the Plaintiff's counsel, has filed in excess of two thousand pages of documents, pleadings, and information with the various courts. The filings almost never had cover letters, rarely were properly indexed with referenced exhibits and almost never contained correct citations. In many instances, the pleadings or documents were of very little assistance to the Court in deciphering the issues, but suffice it to say, that the Plaintiff (Gabriel Rivera) has had more than ample opportunity to present his arguments and defenses. Nonetheless, there has been no relief afforded. The Defendant, with the assistance of the Essex County Sheriff's Office, has conducted a sheriff's sale, purchased the property, invested funds in making certain repairs, and obtained a judgment for possession. The issues between the parties have now been litigated in various forms in three (3) separate courts, the Superior Court, the Housing Court and the Appeals Court. The merits of Rivera and Corona's claims have been examined and decided on multiple occasions. Specifically, *Venditto v. Rivera*, Docket No. MICV2008-04045, has had multiple decisions (DENIALS) that

were made after review of evidence or after hearings and therefore, qualify as a decision on the merits.

Res judicata makes a final valid judgment in a prior action conclusive, and bars “*further litigation of all matters* that were or should have been adjudicated in the prior action.” *TLT Constr. Corp. v. A. Anthony Tappe & Assocs., Inc.*, 48 Mass.App.Ct. 1, 716 N.E.2d 1044 (1999), emphasis added; see also *Boyd v. Jamaica Plain Co-Operative Bank*, 7 Mass.App.Ct. 153, 163, 386 N.E.2d 775 (1979) (entry of valid final judgment extinguishes all rights and remedies arising from the transaction and precludes subsequent claims even if based on new evidence, ground or case theory). Attorney Corona-Perez repeatedly attempts to raise new issues and arguments. She will undoubtedly attempt to now claim she has newly discovered evidence which was not know, but the case law make clear, that she will still not be able to avoid the bar of res judicata. Her actions of knowingly filing repetitive claims, dilatory motions or baseless claims are improper in that she rarely has complied with the applicable court rules but the Defendant is nonetheless forced to respond. This current 2012 action is a perfect example of an action that an attorney who has been practicing for many years would know is not appropriate. This action contains all the same arguments, claims and allegations which have been raised again and again. This action is merely designed to harass the Defendant and cause him to unnecessarily spend his limited funds. This type of activity should not be tolerated by the Court. It is an abuse of process

and a violation of Rule 11 and Mass. Gen. L. c. 231, § 6F.

While the Defendant fully acknowledges the burden is on the party claiming res judicata by reason of a prior adjudication, we maintain that we have easily satisfied the criteria. The moving party must allege enough facts in his plea or motion to establish that the cause of action was (1) between the same parties; (2) concerned the same subject matter; and (3) was decided adversely to the party seeking to litigate the subject matter again. See *New England Home for Deaf Mutes v. Leader Filling Stations Corp.*, 276 Mass. 153, 157, 177 N.E. 97 (1931). A party relying on res judicata must establish it from the record of the former action or from extrinsic evidence the subject matter decided in the earlier judgment. *Daggett v. Daggett*, 143 Mass. 516, 521, 10 N.E. 311 (1887). *Cote v. New England Navigation Co.*, 213 Mass. 177, 182, 99 N.E. 972 (1912). *Boston & Maine R.R. v. T. Stuart & Son Co.*, 236 Mass. 98, 102, 127 N.E. 532 (1920). The Plaintiff has attached the docket sheet to the Complaint in the former action and the Court can also examine a docket sheet in its own Court. The docket sheet is replete with various motions which have been filed and denied.

### **Conclusion**

The evidence and information presented at prior hearings seemingly established that the Defendant was aware of the litigation and chose to ignore it. In a case with very similar facts after there was a default

and substantial time had passed, the Appeals Court refused to vacate a default and ruled there was no error or unfairness to the Defendant and ruled “the default judgment, produced by the defendants’ own wilful conduct, must stand.” See *Jones v. Boykan*, 74 Mass.App.Ct. 213, 905 N.E.2d 132, Mass.App.Ct. (2009). In the present case, the Defendant obtained a Judgment against the Gabriel Rivera in 2009. Gabriel Rivera and his counsel were afforded years of opportunities to seek to resolve and the dispute and done nothing other than attempt to avoid payment by hiding, transferring assets, attempting to avoid service and causing the Plaintiff to continually incur time, energy and money in attempting to collect on the Judgment. Rivera and Attorney Corona-Perez have seemingly exhausted all delay tactics and the only pending appeal is likely to be dismissed at any moment, and they now seek to merely relitigate the matter in an effort to restart the clock. This cannot be allowed. The Plaintiff has failed to properly preserve certain appellate issues, failed to comply with the Appeals Court order, and failed to comply with various other court orders, and they should not be rewarded for their intentional actions and refusal to comply with the applicable rules and standards. For the foregoing reasons, the Plaintiff’s Complaint should not be accepted by the Court or in the alternative, it would be dismissed under the principles of res judicata. Furthermore, Gabriel Rivera and Alba Corona-Perez should be prevented from filing any further documents, pleadings, motions or claims with this Court with respect to Michael Venditto or the

premises at 339 Atlantic Avenue, Marblehead, unless specifically reviewed and approved by appropriate court personnel familiar with any decision on this request.

Respectfully submitted,  
Defendant,  
By their attorney,

/s/ [Illegible]  
\_\_\_\_\_  
David A. Marsocci  
BBO #629429  
Dolan Connly, P.C.  
50 Redfield Street, Suite 202  
Boston, MA 02122  
(617) 265-3100  
dmarsocci@dolanconnly.com

Dated: February 7, 2012

**Certificate of Service**

I, David A. Marsocci, Esq., hereby certify that a true copy of the above document was served upon the following parties by in hand service on this the 8th day of February, 2012.

Alba C. Corona-Perez  
Attorney At Law  
339 Atlantic Avenue  
Marblehead, MA 01945

/s/ [Illegible]  
\_\_\_\_\_  
David A. Marsocci

\_\_\_\_\_

[3/14/12 After hearing and review, the motion to dismiss is ALLOWED. The matter of service of process on plaintiff is MICV 2008-4045 has been litigated and resolved and said issue is currently on appeal in the Appeals Court in Docket # 2011-P-1092. S. Jane Haggerty]

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Pet. App. 13

Supreme Judicial Court of Massachusetts.

Gabriel Rivera

v.

Michael Venditto, Jr.

February 04, 2013

Appeal From: 83 Mass.App.Ct. 1103, 979 N.E.2d  
239.

DENIED.

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Case Summary  
Civil Docket

**MICV2008-04045**  
**Venditto, Jr. v Rivera**

<b>File Date</b>	10/30/2008	<b>Status</b>	Disposed: Entered in Appeals Court (dapenter)	
<b>Status Date</b>	06/27/2011	<b>Session</b>	C – Civil C CtRm 610 (Woburn)	
<b>Origin</b>	1 – Complaint	<b>Case Type</b>	A08 – Sale/lease real estate	
<b>Track</b>	F – Fast track	<b>Lead Case</b>		<b>Jury Trial Yes</b>

**DEADLINES**

	Service	Answer	Rule 12/19/20	Rule 15	Discovery	Rule 56	Final PTC	Judgment
<b>Served By</b>			02/27/2009	02/27/2009	08/26/2009	09/25/2009		
<b>Filed By</b>	01/28/2009	02/27/2009	03/29/2009	03/29/2009		10/25/2009		08/21/2010
<b>Heard By</b>			04/28/2009	04/28/2009			02/22/2010	

Pet. App. 14

**PARTIES**

**Plaintiff**

Michael Venditto, Jr.  
Boston, MA  
Active 10/30/2008

**Private Counsel 647631**

Christopher F. Hemsey  
Hemsey Law Office (Christopher F)  
47 Federal Street  
Salem, MA 01970  
Phone: 978-745-2611  
Fax: 978-744-9809  
Active 10/30/2008 Notify

**Private Counsel 629429**

David A Marsocci  
Dolan & Connly  
50 Redfield Street  
Suite 202  
Boston, MA 02122  
Phone: 617-265-3100  
Fax: 617-265-3101  
Active 03/02/2011 Notify

**Defendant**

Gabriel Rivera  
11 Lambert Avenue  
Chelsea, MA 02150  
Served: 11/26/2008  
Defaulted under time standards 03/19/2009

**Private Counsel 545514**

Alba C Corona-Perez  
339 Atlantic Ave  
Marblehead, MA 01945  
Phone: 407-452-8870  
Fax:  
Active 02/25/2011 Notify

**ENTRIES**

Date	Paper	Text
10/30/2008	1.0	Complaint & civil action cover sheet filed
10/30/2008		Origin 1, Type A08, Track F.
10/30/2008	2.0	Plaintiff's Motion To Appoint Paul Minsky As Special Process Server Motion Allowed. (Curran, J.)
12/19/2008	3.0	SERVICE RETURNED: Gabriel Rivera (Defendant) 11/26/08 L&U and By 1st Class Mail 11 Lambert Ave, Chelsea, Ma
2/20/2009		Case status changed to 'Needs review for answers' at service deadline review

**COMMONWEALTH OF MASSACHUSETTS**

MIDDLESEX, ss.

MIDDLESEX SUPERIOR  
COURT

C.A. NO. 08-4045

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MICHAEL VENDITTO, JR., )  
Plaintiff )  
v. )  
GABRIEL RIVERA )  
Defendant )

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**MOTION FOR APPOINTMENT OF  
SPECIAL PROCESS SERVER**

(Filed Oct. 30, 2008)

Pursuant to Mass. R. Civ. P. 4(c), the plaintiff hereby moves for an order appointing Constable Paul Minsky, or his employee or agents, as special process server in the above-captioned matter.

The person to be appointed special process server is experienced in the service of process, is 18 years of age or older, and is not a party to this action.

Pet. App. 16

The plaintiffs,  
Through their Attorneys,

/s/ [Illegible]  
\_\_\_\_\_  
Christopher F. Hemsey, Esquire  
The Law Office of  
Christopher F. Hemsey, P.C.  
47 Federal Street  
Salem, MA 01970  
(978) 745-2611  
BBO#647631

Dated: September 21 2008

10/30/08 Motion Allowed

Attest: /s/ Ellen M. DiPace  
Deputy Assistant Clerk

Conran J.[Illegible]

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TORT – MOTOR VEHICLE TORT – CONTRACT –  
EQUITABLE RELIEF – OTHER

**COMMONWEALTH OF MASSACHUSETTS**

MIDDLESEX , ss.

SUPERIOR COURT  
DEPARTMENT OF THE  
TRIAL COURT  
CIVIL ACTION  
No. 08-04045-C

[SEAL]

Michael Venditto, Jr. , Plaintiff(s)

v.

Gabriel Rivera , Defendant(s)

**SUMMONS**

(Filed Dec. 19, 2008)

To the above-named Defendant:

You are hereby summoned and required to serve upon Christopher Hemsey plaintiff's attorney, whose address is 47 Federal St. Salem MA 01970, an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint. You are also required to file your answer to the complaint in the office of the Clerk of this court at Middlesex Superior Court, 200 Trade Center, Woburn MA either before service upon plaintiff's attorney or within a reasonable time thereafter.

Unless otherwise provided by Rule 13(a), your answer must state as a counterclaim any claim which you may have against the plaintiff which arises out of the transaction or occurrence that is the subject matter of the plaintiff's claim or you will thereafter be barred from making such claim in any other action.

Witness, Barbara J. Rouse, Esquire, at .....  
the 11 day of November, in the  
year of our Lord 2008.

/s/ Michael A. Sullivan  
Clerk

NOTES.

1. This summons is issued pursuant to Rule 4 of the Massachusetts Rules of Civil Procedure.
2. When more than one defendant is involved, the names of all such defendants should appear in the caption. If a separate summons is used for each defendant, each should be addressed to the particular defendant.

---

**PROOF OF SERVICE OF PROCESS**

I hereby certify and return that on November 26, 2008, I served a copy of the within summons, together with a copy of the complaint in this action, upon the within-named defendant, in the following manner (See Mass. R. Civ. P. 4(d)(1-5)):

leaving it Last & Usual to Gabriel Rivera @ 11 Lambert Ave. Chelsea, MA. Later this same [Illegible] mailed 1st class a second copy of the within summons & complaint to Gabriel Rivera

Donna Callandrello

Dated: November 26, 2008

**N.B. TO PROCESS SERVER:**

**PLEASE PLACE DATE YOU MAKE SERVICE ON DEFENDANT IN THIS BOX ON THE ORIGINAL AND ON COPY SERVED ON DEFENDANT.**

(Donna Callandrello )

(November 26, 2008 )

(Process Server Disinterested Person )

MIDDLESEX, ss.

SUPERIOR COURT  
DEPARTMENT OF THE  
TRIAL COURT  
CIVIL ACTION  
No. 08-04045

Michael Venditto, Jr., Plff.

v.

Gabriel Rivera, Deft.

SUMMONS  
(Mass. R. Civ. P. 4)

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Pet. App. 20

Donna Collandrillo  
Dona Collandrillo

Alleges to be a constable in and for the City of Chelsea since 2007. Please verify this and provide us with copy of all her appointments to date from the City.

Please email me your name and information or I can have your email to have someone email you this request.

Ramfro57@yahoo.com

RECEIVED  
CITY CLERK'S OFFICE  
CHELSEA, MA

2011 OCT 18 A 11:42

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**Clayman, Debbie**

---

**From:** Clayman, Debbie

**Sent:** Tuesday, November 08, 2011 1:35 PM

**To:** 'Ramfro57@yahoo.com'

**Subject:** Donna Collandrillo

In response to your recent communication, please be informed that this office has no record of Donna Collandrillo being licensed by the City of Chelsea as a Constable. Thank you.

Deborah A. Clayman, City Clerk  
City Hall, 500 Broadway  
Chelsea, MA 02150  
617-466-4160 (telephone)  
617-466-4059 (fax)  
Dclayman@chelseama.gov

CHELSEA, SUFFOLK, MA

NOV – 8 2011

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A TRUE COPY ATTEST:

/s/ Deborah A. Clayman

CITY CLERK

VALID ONLY IF STAMPED WITH CITY SEAL

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AFTER FIVE DAYS RETURN TO  
MICHAEL A. SULLIVAN, ESQ.  
CLERK OF THE COURTS  
MIDDLESEX SUPERIOR COURT  
200 TRADE CENTER – 2ND FLOOR  
WOBURN, MA 01801

UNITED STATES POSTAGE

\$ 00.44<sup>0</sup>

FEB 22 2012

MAILED FROM ZIP CODE 01801

(Filed Feb. 28, 2011)  
[08-4045]

TO: Gabriel Rivera  
11 Lambert Avenue  
Chelsea, MA 02150

Pet. App. 22

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RETURN TO SENDER  
NOT DELIVERABLE AS ADDRESSED  
UNABLE TO FORWARD

Commonwealth of Massachusetts  
County of Middlesex  
The Superior Court

CIVIL DOCKET#: MICV2008-040[Illegible]

RE: Venditto, Jr. v Rivera

TO: Gabriel Rivera  
11 Lambert Avenue  
Chelsea, MA 02150

**NOTICE OF DOCKET ENTRY**

(Filed Apr. 27, 2009)

You are hereby notified that on **04/21/2009** the following entry was made on the above referenced docket:

**Default judgment (55b1) by clerk v defendant Gabriel Rivera in amount \$275,756.88 plus interest from 10/30/2008 to date in the sum of \$15,684.28 and costs of action. Copies mailed 4/21/2009**

Dated at Woburn, Massachusetts this 21st day of April, 2009.

Michael A. Sullivan  
Clerk of the Court  
/s/ Arthur DeGuglielmo  
BY: Arthur DeGuglielmo  
Assistant Clerk

Telephone: 781-939-2757

Disabled individuals who need handicap accommodations should contact the Administrative [Illegible] of the Superior Court at (617) 788-8130

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