UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

In re JOSEPH HUNT _____ JOSEPH HUNT, Petitioner; U.S. DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, Respondent; SCOTT KERNAN, WARDEN, Real Party in Interest.	Case No. D.C. Case No. CV 98-5280 AHS (AN)

PETITION FOR WRIT OF MANDAMUS AND STAY OF PROCEEDINGS

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Petitioner Joseph Hunt respectfully petitions, pursuant to FRAP 21(a), for a writ of mandamus directed to the U.S. District Court for the Central District of California to remedy that court's failure, after some *14 years* (and 25 years after conviction in state court), to decide his *first* habeas petition under 28 U.S.C. § 2254. He also seeks revocation of the reference of the matter to the currently assigned Magistrate Judge (hereinafter "MJ") and an immediate stay of proceedings below until revocation is ordered. He seeks revocation and a stay because the MJ has a demonstrated history of punishing him for resisting the MJ's torpid, and at times puzzlingly illogical, management of the case, as detailed *infra*.

Issuance of the requested writ is sought not only to remedy the stark and ongoing violation of petitioner's right to a speedy resolution of his habeas petition, but to remedy the irreparable harm of extending an incarceration that, beyond all reasonable dispute, was unconstitutionally obtained. This Court would have to search long, far, and wide to find a habeas petition grounded on a more glaring (and sickening)[1] compendium of structural and trial errors than those in Hunt's

[1] To cite but two examples, and to give this Court just the flavor of the trial afforded petitioner, he notes two comments by the trial judge in the course of the prosecutor's cross-examination of an important female witness for the defense. That judge, who had long since egregiously abandoned his role as a neutral arbiter (as well as all bounds of propriety), thrust himself into that examination to leeringly comment, as the witness was attempting to complete an answer, "Have you ever tried to shut up a woman when she's in the mood?" At another point, the judge inexplicably and spontaneously denounced the witness as "a hatchet woman."

case. Copies of the habeas petition (district court doc. 190; Ex. 1) and reply to respondent's answer (doc. 248; Ex. 2) are submitted herewith per FRAP 21(a)(2)(C) as essential background to show that the harm done here is not just to institutional goals of regularity and expedition, but also to a litigant who will inevitably be granted relief.

This case did not require 14 years to adjudicate. Although certainly extraordinary*, it is a simple case*, "simple" because it is not close. There is no need for an evidentiary hearing – respondent has not disputed any of the presented extra-record facts. There is no need for further briefing. AEDPA deference does not even apply to key claims due to various and sundry defects in the related state orders and processes. Each day Hunt spends in custody premised on his unlawful conviction compounds the prejudice he suffers. *Cf. Harvest v. Castro*, 531 F.3d 737, 747 (9th Cir. 2008) ("Certainly, staying in prison when one might have been released constitutes prejudice."). This Court should intervene forthwith.

THE RELIEF SOUGHT

Hunt seeks an Order directing the district judge to (1) revoke the reference of this case to the MJ; and (2) rule, without any input from or further involvement of the MJ, on his habeas petition within six months of the date of that revocation. He also requests an Order immediately staying the proceedings to prevent retribution taken against him for the filing of the instant petition.

THE ISSUES PRESENTED

1. Whether a habeas petitioner is entitled to a ruling on his petition within 14 years of its filing.

2. Whether the MJ who has not issued an R&R in a habeas case pending for over 14 years should be excluded from further involvement in the case.

THE FACTS NECESSARY TO UNDERSTAND THE ISSUES PRESENTED

On June 30, 1998, Hunt timely filed his first § 2254 petition (doc. 1/Ex.5). Promptly, on July 2, 1998, MJ Robbins ordered, *inter alia*, the filing of an answer (doc. 13). Respondent did so. (Doc. 15.) So far, so good. On July 22, however, MJ Robbins recused himself (doc. 17), and the case was reassigned to MJ Nakazato (*id.*), the MJ whose failure to issue an R&R in the 14 years since is at issue herein.

The first action taken by MJ Nakazato was to vacate MJ Robbins' previous order and to strike Hunt's petition and its supporting memorandum. (Doc. 20, filed Aug. 10, 1998.) The MJ permitted Hunt to file a first amended petition, but placed a 25-page limit on it and a 50-page limit on any supporting memorandum. (*Id.*)

Three weeks later, on August 31, 1998, Hunt filed a fully compliant first amended petition and memorandum. (Docs. 24, 25.) Some four and one-half months later, on January 13, 1999, the MJ ordered respondent to file a return

within two months and permitted Hunt to file a reply. (Doc. 47.)[2] After respondent was granted (doc. 57) another month, on the date the return was due, respondent was granted leave to file a motion to dismiss in lieu of that return (doc. 61). The motion was filed on April 15, 1999 (doc. 98), nine and one-half months after the filing of the initial petition. Respondent argued that certain claims were unexhausted. (*Id.*)

Eleven days later, distressed with the passage of time and cognizant of how delay served respondent's interests but not his own (though having no inkling, even in his worst nightmares, of how much time was yet to pass), petitioner filed a motion seeking to have the MJ resolve all putative procedural defenses simultaneously rather than piecemeal. (Doc. 65.)[3] The MJ denied that motion on June 2, 1999. (Doc. 81.) He also denied petitioner's motion (doc. 72) to order respondent to file portions of the state record relevant to the motion to dismiss (doc. 81). After an opposition (doc. 79) and reply (doc. 84) were filed regarding

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[2] In the period between the filing of the first amended petition and the order to file an answer, Hunt filed several motions, including motions to expand the record (doc. 40), for leave to propound requests for admission (doc. 34), for production of the state record (doc. 36), for an "intrinsic review" of the 1996 state evidentiary-hearing process on grounds that he was unlawfully denied his right of self-representation (doc. 42), and for resolving other preliminary questions (doc. 43), all of which were summarily denied by the MJ (doc. 68).

[3] This was one of several attempts by petitioner through the years to move his case along. (*See also* docs. 210, 228, 251.) All these efforts, obviously, were rejected, often censoriously (*see* docs. 68, 81).

the motion to dismiss, the MJ issued a "Memorandum and Order" on November 22, 1999 (doc. 106) (seven months after the motion had been filed), finding that numerous claims were fully or partially unexhausted. Then ensued a "torturous procedural hejira," *Hunt v. Pliler*, 384 F.3d 1118, 1120 (9th Cir. 2004), leading to the entry of judgment dismissing Hunt's habeas petition with prejudice on August 27, 2001. (Doc. 170.)

That "hejira," detailed in this Court's decision vacating that judgment (*Hunt*, 384 F.3d at 1120-23), was triggered by a series of procedural and substantive errors committed by the Magistrate, approximately 15 in number. (*See* Ex. 3 at 3-5 (listing them).) This Court held that the MJ's issuance of his "Memorandum and Order" "exceeded his statutory authority" and that the MJ poorly advised the district court in recommending that the case be dismissed with prejudice for Hunt's failure to prosecute and obey the MJ's orders (doc. 160). *See Hunt*, 384 F.3d at 1125. This Court's mandate issued on September 28, 2004 (doc. 185). Over six years had then elapsed since the filing of Hunt's petition.

On March 24, 2004, pursuant to an order of the district court (doc. 188, filed on Jan. 26, 2005, some four months after the filing of this Court's mandate), Hunt filed a fourth amended petition (doc. 190), repeating every one of the claims in the previous versions of his petition, but tagging them as directed by the court's order with citations to the related state pleadings. Respondent, also given 60 days,

applied for (doc. 195) and was given (doc. 196) two more months to respond to the petition. Once again, rather than filing a return, respondent moved to dismiss (doc. 202) raising procedural defenses other than exhaustion, which the MJ recommended granting in part and denying in part (doc. 207). The stunning aspect of these filings is that, though respondent and the MJ had cost Hunt almost five years[4] with respondent's argument, and the MJ's finding, that *dozens* of claims were unexhausted, now the state conceded, and the MJ found, that *all* of Hunt's claims were exhausted after all.[5] (*See* doc. 207 at 24 (R&R).)[6]

When Hunt applied for leave to file a 58-page objection to the MJ's recommendation to dismiss some of his claims, the MJ ordered the court clerk not to file the proposed objections, but, instead, to return them to Hunt (doc. 209), even

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[4] After this Court first vacated the judgment dismissing Hunt's petition with prejudice, *Hunt v. Pliler*, 336 F.3d 839 (9th Cir. 2003), respondent filed a petition for writ of certiorari that was granted. The Supreme Court vacated this Court's judgment, *Pliler v. Hunt*, 542 U.S. 933 (2004), and remanded to this Court for reconsideration in light of a then-recently issued Supreme Court decision. Upon such reconsideration, this Court affirmed its earlier decision. Hence the five years lost just to vindicate petitioner's original position on exhaustion.

[5] This outcome was particularly "stunning" coming as it did after the MJ had repeatedly castigated Hunt, who was then proceeding *in propria persona*, for his intransigence in maintaining the correctness of his position re exhaustion. (*See, e.g.,* docs. 106, 160.)

[6] In its *Hunt* decisions, this Court did not review the MJ's finding that some 36 sub-claims were unexhausted and 5 were partially exhausted. Had it done so, it would have added those errors to the other 15 it identified.

though Hunt had properly submitted his objections with a separate application for leave to file them (doc. 208). The MJ gave Hunt 10 days to shorten his objections to 25 pages and re-file them. (Doc. 209.) Hunt responded by filing two documents, the 25-page "Part One" Objections (doc. 214), and a separate "Part Two" Objections, which was 14 pages (*see* Ex. 3 at Ex. A). In the application for leave to file Part Two, Hunt explained the series of factors which necessitated the filing of objections collectively longer than 25 pages. (Docs. 212, 213.) The MJ denied the application and ordered the clerk to purge Part Two from the files. (Doc. 217.)

Fearing that the MJ's order would deprive him of the possibility of appellate review, and viewing the recent actions as a continuation of the MJ's practice of intercepting objections for which this Court had already admonished the MJ (*see Hunt*, 384 F.3d at 1124), Hunt moved to disqualify him, appending the Part Two Objections. (Doc. 219; Ex. 3 at Ex. A.) While that motion was pending, the case was reassigned first to one district judge (doc. 224), and then another (doc. 225). The latterly assigned judge, the Hon. Alicemarie H. Stotler, then denied petitioner's motion to disqualify the MJ. (Doc. 227.)[7] That order issued on December 27, 2006.

[7] The judge wrote, "Nothing suggests that Judge Nakazato is unable or unwilling to apply the standards governing petitioner's section 2254 motion." (Doc. 227 at 4 n.1.) Petitioner contends herein that the passage of the case's 14th anniversary without the issuance of an R&R, standing alone, compels such an inference.

When over five more months went by without further action from the court, on June 1, 2007, Hunt applied for a ruling on his pending objections to the R&R and for expedited processing of the case in light of its advanced age. (Doc. 228.) Petitioner had previously filed a motion to accelerate processing on May 3, 2006 (doc. 210), but that was denied by the MJ (doc. 211). The court took no action on the June 2007 application, waited *over one year*, then adopted the R&R in its entirety on June 17, 2008. (Doc. 230.) The day after that decision, the *MJ* denied the June 2007 application to accelerate the proceedings. (Doc. 231.)

On June 18, 2008, then almost a decade since the case was initiated, the MJ ordered respondent to file a return and permitted Hunt to reply. (Doc. 233.) The MJ limited the reply to 25 pages (*id.*) and denied Hunt's request to file a longer brief (doc. 235).

Undersigned counsel entered his appearance (doc. 236), and respondent filed a 50-page return on August 1, 2008 (doc. 237). After the MJ denied another request to permit a reply exceeding 25 pages (doc. 247), it was filed on September 25, 2008 (doc. 248). The MJ had (grudgingly)[8] granted an extra 10 *days* to file, a delay sought due to the press of business in his attorney's office (*see* doc. 244), but

[8] "[E]ven though the application does not show good cause, the Court exercises its discretion to grant the application…." (Doc. 247 at 7.)

ruled out further extensions and warned that a late reply would be disregarded (doc. 247 at 7).

One might have reasonably believed, in light of the expedition that the MJ insisted upon for the filing of the reply, that an R&R would at long last be forthcoming. One would have been wrong, however. Another two years and seven months went by without any R&R. On April 28, 2011, now nearly 13 years after the case was filed, Hunt moved to revoke the reference to the MJ and for a speedy resolution of the case. (Doc. 251.) On May 25, 2011, the district judge denied the motion, finding the issues were complex and the factual support voluminous, necessitating "a great deal of time" in order to issue a "considered ruling"; that revoking the reference to the MJ would only create additional delay; and that the MJ was "making progress in this matter." (Doc. 255; Ex. 4.)

No R&R has issued in the 13-plus months since that ruling.[9] It is almost 4 years since petitioner's reply was filed (*i.e.,* 4 years since the MJ took great umbrage at petitioner's request for an additional 10 days to file it).[10]

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[9] Petitioner must ask – if this case was simple enough to the MJ to justify his limiting Hunt's reply to 25 pages, why is it not simple enough to allow an R&R in the 4 years since?

[10] "The Court is not aware of any federal or state laws that require Hunt's counsel to represent Hunt in this matter. Nor is the Court aware of any laws that require members of the California Bar to forego vacations and holidays or take on new cases even though counsel does not have time to work on new matters. Further, if counsel did not have the time to work on this case due to the press of other client

BACKGROUND LEGAL PRINCIPLES RE MANDAMUS RELIEF

This Court has the authority to issue a writ of mandamus under the "All Writs Act," 28 U.S.C. § 1651. *Hernandez v. Tanninen*, 604 F.3d 1095, 1099 (9th Cir. 2010). Issuance of the writ is appropriate "to compel [a lower court] to exercise its authority when it is its duty to do so." *Kerr v. United States Dist. Ct.,* 426 U.S. 394, 402 (1976). This Court has specified five guidelines to be considered in determining whether to issue the writ:

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

Bauman v. United States District Court, 557 F.2d 650, 654-55 (9th Cir. 1977).

The *Bauman* guidelines "serve only as a useful starting point" and "are not meant to supplant reasoned and independent analysis by appellate courts." *In re Cement Antitrust Litigation*, 688 F.2d 1297, 1301 (9th Cir. 1982); *see also Cole v. U.S. Dist. Ct. for District of Idaho*, 366 F.3d 813, 817 (9th Cir. 2004) ("The

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matters, then he should not have accepted the representation and entered an appearance in this case." (Doc. 247 at 6.) All that for a 10-*day* extension-of-time request in a case that had already passed its 10th-*year* anniversary(!) *Cf. Liteky v. United States*, 510 U.S. 540, 550 (1994) (defining prejudice as an "unfavorable disposition or opinion that is *wrongful or inappropriate*, either because it is undeserved, … or because it is excessive in degree…") (emphasis in original).

Bauman factors should not be mechanically applied."). The *Bauman* court itself recognized that the guidelines "are cumulative" and "often raise questions of degree." 557 F.2d at 655. The proper disposition "will often require a balancing of conflicting indicators," *id.*; "a showing of less than all, indeed, of only one, [does not] necessarily mandate denial," *Cole,* 366 F.3d at 817. *See also Pit River Tribe v. U.S. Forest Service*, 615 F.3d 1069, 1079 (9th Cir. 2010) ("[N]ot all factors need be met."). "In the final analysis, the decision of whether to issue the writ lies within [this Court's] discretion," *In re Van Dusen*, 654 F.3d 838, 841 (9th Cir. 2011), to be exercised on a case-by-case basis, *Cole*, 366 F.3d at 816.

The Supreme Court has enjoined: "district courts will … not unduly delay their own rulings; and that, where appropriate, corrective mandamus will issue from the courts of appeals." *Spencer v. Kemna*, 523 U.S. 1, 18 (1998).

THE REASONS WHY THE WRIT SHOULD ISSUE

The district court's refusals to order a decision in this case and to revoke its reference to the MJ fulfill the criteria for mandamus relief.

I. IT IS LONG PAST TIME TO DECIDE THIS CASE

A. Application of the *Bauman* Guidelines

1. Petitioner Has No Other Means to Obtain the Relief

As to the first *Bauman* factor, Hunt clearly cannot challenge by direct appeal the district judge's refusal to compel the MJ to issue an R&R. There is no final

decision (*see Catlin v. United* States, 324 U.S. 229, 233 (1945) (defining "final decision" as one that "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment")), and, thus, this Court would be without jurisdiction to consider an appeal under 28 U.S.C. § 1291. *See, e.g., United States v. Chaudhry*, 630 F.3d 875 (9th Cir. 2011) (dismissing government appeal for that reason).

Thus, the first *Bauman* factor weighs in favor of mandamus relief. The district court's order is interlocutory and non-appealable under 28 U.S.C. § 1291.[11] It is also not appealable under 28 U.S.C. § 1292(b) because that court did not certify the issues for appellate review. The district court's clear error in refusing to decide this case after 13 years is insulated from normal appellate review.

[11] The district court's decision also does not fall under the collateral-order doctrine, which allows for appeal of a small class of interlocutory orders that do not terminate the litigation, but sufficiently affect it so as to be treated as if final. *Bagdasarian Productions, LLC v. Twentieth Century Fox Film Corp.*, 673 F.3d 1267, 1272 (9th Cir. 2012). There are three requirements for an interlocutory order to be appealable, and all of them must be satisfied. *Cordoza v. Pac. States Steel Corp.*, 320 F.3d 989, 997 (9th Cir. 2003). The first is that the order be "conclusive." *See, e.g., Osband v. Woodford*, 290 F.3d 1036, 1039 (9th Cir. 2002). The district court's order at issue herein is not. *Cf. Lewis v. Ayers*, 681 F.3d 992, 997 (9th Cir. 2012) (holding competency determination in habeas case was not immediately appealable order in part because petitioner remained free to raise issue again). Here, likewise, Hunt could again raise the delay issue in the district court.

2. Petitioner Will Be Damaged in a Way Not Correctable on Appeal

This factor is closely related to the first one. *Bauman*, 557 F.2d at 654. A post-judgment appeal would not provide a remedy for the denial of Hunt's established right (*see* subsection 3, *infra*) to a swift adjudication of his claim. No post-judgment review can efface the damage caused by the district court's order.

Moreover, "a petitioner is damaged or prejudiced [with respect to the second *Bauman* factor] if his claim will be moot on appeal." *SG Cowen Sec. Corp. v. U.S. Dist. Ct.,* 189 F.3d 909, 914 (9th Cir. 1999). When the district court ultimately rules, any claim of pre-ruling delay will become moot. *Cf. Hassine v. Zimmerman*, 160 F.3d 941, 955 (3d Cir. 1998) ("[T]o the extent that … delay in the processing of a collateral petition violates due process, we hold that the petitioner's remedy, if any, is through such avenues as a lawsuit for damages or a writ of mandamus rather than through the habeas corpus proceeding itself.").

Finally, "[u]nder the second factor, we also consider the substantial costs imposed on the public interest." *Perry v. Schwarzenegger*, 591 F.3d 1147, 1158 (9th Cir. 2010). Across a broad range of contexts, delays in the administration of justice have been seen as contrary to the public interest and corrosive of public confidence. *See, e.g., Mann v. Reynolds*, 46 F.3d 1055, 1063 (10th Cir. 1995) (in criminal appeals); Advisory Committee Notes to Fed. R. Crim. P. 50(b) (in criminal cases); *Potomac Elec. Power Co. v. ICC*, 702 F.2d 1026, 1034 (D.C.Cir.

1983) (in the processes of administrative agencies); Inst. for the Advancement of the Am. Legal Sys., Civil Case Processing in the Fed. Dist. Courts: A 21st Century Analysis 1 (2009) ("[F]or the general public, extended cases epitomize government inefficiency and drive reduced public confidence in the judicial system.").

The second *Bauman* factor, like the first, favors mandamus relief.

3. The District Court's Order Is Clearly Erroneous

The clear-error factor is "highly significant" as "failure to show clear error may be dispositive of the petition." *Cohen v. U.S. Dist. Ct. for Northern Dist. of Cal.*, 586 F.3d 703, 708 (9th Cir. 2009) (citations omitted). A question of law is "clearly erroneous" for purposes of mandamus analysis if this Court is left with the "definite and firm conviction that a mistake has been committed." *Id.* (citations omitted). The district court's decision to do nothing in the face of the passage of 13 years without a decision in a habeas case is clear error.

As this Court has long since recognized, habeas corpus "is a speedy remedy, entitled by statute to special, preferential consideration to insure expeditious hearing and determination." *Van Buskirk v. Wilkinson*, 216 F.2d 735, 737-38 (9th Cir. 1954); *see also Fay v. Noia,* 372 U.S. 391, 400 (1963), overruled in part on other grounds by *Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992) (describing the writ as "swift and imperative remedy"); *id.* at 401 ("prompt and efficacious remedy"); *Cafafas v. LaVallee*, 391 U.S. 234, 238 (1968) ("effective and speedy instrument

by which judicial inquiry may be had into the legality of the detention of a person"); 28 U.S.C. § 1657 (mandating priority to habeas corpus cases over other civil cases); *Ruiz v. Cady*, 660 F.2d 337, 340 (7th Cir. 1981) (noting that Congress has directed that habeas petitions be reviewed forthwith and that the Supreme Court has emphasized that habeas corpus proceedings are intended to provide "swift, flexible, and summary determinations"); *Fischer v. Ozaukee Cnty. Circuit Court*, 741 F.Supp.2d 944, 962 (E.D.Wis. 2010) (rejecting state's motion to reconsider grant of habeas petition on ground that it was too swift and "remind[ing] the respondent that in the context of petitions for writs of habeas corpus, courts are explicitly required by law to expedite the[ir] consideration").

District courts are, indeed, expressly directed to act with dispatch in habeas cases. *See* 28 U.S.C. § 2243 (directing courts to "summarily hear and determine the facts, and dispose of [a habeas petition] as law and justice require"). This is an imperative of which this Court is well aware. *See Yong v. I.N.S.*, 208 F.3d 1116, 1120 (9th Cir. 2000) (noting that several courts have "issued writs of mandamus to direct district courts to consider habeas petitions that have languished in their care" and granting mandamus relief). "The Supreme Court has said, time and again, that prompt resolution of prisoners' claims is a principal function of habeas." *Chatman-Bey v. Thornburgh*, 864 F.2d 804, 814 (D.C. Cir. 1988), citing *Rose v.*

Lundy, 455 U.S. 509, 520 (1981); *Braden v. 30th Jud. Circuit Court of Ky.*, 410 U.S. 484 (1973).

In *Johnson v. Rogers*, 917 F.2d 1283, 1284-85 (10th Cir. 1990), the court held that 14 *months* was too long to decide that habeas case and granted mandamus relief, finding that "petitioner has established a clear and indisputable right to have his petition expeditiously heard and decided, and he has no alternative remedy."

The court reached the same result in *Jones v. Shell*, 572 F.2d 1278, 1280 (8th Cir. 1978) (*per curiam*), also involving a 14-month delay. The *Jones* court wrote that the "writ of habeas corpus, challenging illegality of detention, is reduced to a sham if the trial courts do not act within a reasonable time," and that "[h]abeas corpus procedure should not be so dilatory or technical as to deny a petitioner a hearing and ruling on the merits of his claim within a reasonable time." This Court quoted *Jones* approvingly in *Yong*, 208 F.3d at 1120.

In *McClellan v. Young*, 421 F.2d 690, 691 (6th Cir. 1970), the court granted mandamus and ordered the resolution of a habeas case that was delayed several months pending a Supreme Court decision and input from a law-school clinic.

Motivated by such concerns, Senior Judge Weinstein of the Eastern District of New York issued an Order Withdrawing Power of Magistrates over Habeas Corpus Matters (*In re Habeas Corpus Cases*, 03-Misc-0066 (E.D.N.Y. May 9, 2003)) and assigned 500 cases to himself for resolution. Judge Weinstein directed

the special master appointed to assist him to "follow [the] rules requiring prompt decisions." *In re Habeas Corpus Cases*, 216 F.R.D. 52, 52 (E.D.N.Y. 2003). The Judge noted that "Congress has decreed that those in state custody … are entitled to a prompt ruling." *Id.* He added that "habeas corpus matters are to be accorded a high priority; they must be resolved promptly by the court." *Id.* at 53, citing *Ruby v. United States,* 341 F.2d 585, 586-87 (9th Cir. 1965). "Undue delay in the disposition of habeas corpus cases is unacceptable." *Id.*

Indeed, one of the primary goals of Congress in enacting AEDPA was to reduce delay. *See, e.g.,* H.R. Conf. Rep. No. 104-23, at 9 (1995).

Thus, the district court committed clear error in denying petitioner's motion to decide his habeas case as he had a "clear and indisputable" right to a ruling long ago. It is not a discretionary act he challenges – a district court has no discretion to allow a properly filed habeas petition to languish indeterminately. *See Post v. Gilmore*, 111 F.3d 556, 557 (7th Cir. 1997) ("[A] petition under § 2254 is governed by the norm that a district court must exercise its full statutory jurisdiction."). By tolerating a 13-year delay – now over 14 years– the lower court has failed to exercise that jurisdiction. It is clear error.

4. Whether the District Court's Order Is an Oft-Repeated Error or Manifests a Persistent Disregard of the Rules

Of the five guidelines, this is the least applicable. This is not a case where the district judge is persistently disregarding the federal rules. (*But see* Ex. 3 (MJ

persistently intercepting objections under 28 U.S.C. § 636(b).) Nor is this error an oft-repeated one because a 14-year delay in deciding a habeas case is, thankfully, *sui generis*. The absence of this factor, however, does not bar relief.

As noted above, *Bauman* sets out guidelines, not prerequisites. *See, e.g., Bauman*, 527 F.2d at 650; *Valenzuela-Gonzalez v. U.S. Dist. Ct*., 915 F.2d 1276, 1279 (9th Cir. 1990) ("[A]ll five factors need not be satisfied at once."). Because the district court committed clear error, and because the other factors favor relief, this Court should issue the writ.

5. The District Court's Order Raises Issues of First Impression and Warrants Supervisory Mandamus Intervention

Although Hunt cannot state with certainty that this Court has *never* addressed a claim that a 14-year wait for a decision in a habeas case violates the petitioner's right to a swift adjudication, he ventures a guess that it has not. This case likely presents a justice-delayed-is-justice-denied claim that is unprecedented.

Moreover, this petition could properly be viewed as presenting a "supervisory mandamus" case. When a mandamus petition "raises an important issue of first impression ... a petitioner need show only 'ordinary (as opposed to clear) error.' " *San Jose Mercury News, Inc. v. U.S. Dist. Ct.*, 187 F.3d 1096, 1100 (9th Cir. 1999); *see also In re Cement Antitrust Litigation*, 688 F.2d at 1307.

> Certain concepts related to the traditional use of mandamus are not necessarily applicable in supervisory mandamus cases, or,

> at the least, are applied differently…. In supervisory mandamus cases involving questions of law of major importance to the district courts, the purpose of our review – and the reason for our correcting an error made by a trial judge – is to provide necessary guidance to the district courts and to assist them in their efforts to ensure that the judicial system operates in an orderly and efficient manner.

In re Gonzales, 623 F.3d 1242, 1246 (9th Cir. 2010) (citations, internal quotation marks, and brackets omitted).

The 14-year delay countenanced by the district court makes a mockery of the sacrosanct promise of the Suspension Clause to furnish a speedy remedy for violations of the Constitution. Through intervention in this case, this Court can provide "necessary guidance" to the district courts.

B. Another Relevant Factor

As Hunt alluded to at the outset, the interminable wait is especially prejudicial because his petition is so clearly meritorious. This is not a case in which AEDPA-mandated deference will defeat his claims, which include the most formidable judicial and attorney misconduct claims that this Court has likely ever seen (*see* Exs. 1 and 2; doc. 191). This Court should review the entirety of Exs. 1 and Ex. 2, which have record citations, but here are a few of the *undisputed* facts:

Four days before opening statements in his *capital* case, Hunt learned that the trial court, Judge Rittenband,[12] had secretly conspired with Hunt's lawyer,

Arthur Barens, to arrange for his other lawyer, Richard Chier, to have "nothing to do actively in the trial," that is, to not to speak in front of the jury. Incredibly, Barens had suppressed the Faustian bargain he had struck, telling neither his client nor his co-counsel about it. The judge, this time on the record (goaded by Barens' feigned ignorance as to why the judge, halfway through juror voir dire, suddenly stopped permitting Chier to speak), made official what he had tried to achieve covertly, namely, relegating the far more experienced and prepared Chier to a non-speaking role. Barens' secret deal with the judge permitted Barens to add public compensation to the consideration he had agreed upon (and had received in full)[13] when he had been privately retained.[14]

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[12] This is the same judge who was disgraced for the manner in which he handled the prosecution of Roman Polanski. *Cf. Polanski v. Superior Court*, 180 Cal.App.4th 507, 512, 514, 102 Cal.Rptr.3d 696 (2009) (taking note of the "extremely serious allegations of judicial … misconduct that have been brought forward," which "are in many cases supported by considerable evidence…. To the extent that these allegations are true – and from the documentary evidence filed with this court, it appears to this court that there is a substantial probability that a court conducting an evidentiary hearing would conclude that many, if not all, are true – they demonstrate [on the part of Judge Rittenband] malfeasance, improper contact with the media concerning a pending case, and unethical conduct.").

[13] Since such "double dipping" is not contemplated by any of the pertinent California statutes, it should come as no surprise that Barens perjured himself about the nature, amount, and timing of the compensation he had received pursuant to his contract with Hunt.

[14] Another judge had refused to appoint Barens, finding he had to defend the case to its conclusion based on his having been retained, and, indeed, Judge Rittenband himself had denied Barens' appointment 17 days earlier for the very same reason. Barens later lamented his ungovernable greed, telling his outraged co-counsel Chier, "I can't help myself when it comes to money."

When the *quid pro quo* agreement was revealed, the judge would not permit either the silenced Chier or Hunt to speak. When asked, "Does the client have anything to say about this, Your Honor? he responded, unequivocally enough, "No," thereby steamrolling Hunt's constitutional right to choice of privately retained counsel without obtaining a waiver thereof. Moreover, the attorneys had prepared the defense and divided up their labors on the assumption that each would fully participate. Barens, the lone defense attorney left to speak to the jury, and perhaps chastened by the presence of Chier and Hunt, initially asserted that he had informed Hunt before being retained that he was unwilling to take on this complex case without "associate counsel of a co-counsel status" because he was too inexperienced, and hence unable to "prepare" or "execute" the trial on his own. Barens, however, under threat of the revocation of his appointment, ultimately declared his unwillingness to relinquish county money and his personal "satisfaction" with the deal. The *prosecutor* took a "firm" contrary position. "Gravely concerned" about the trial court's infringement on Hunt's right to counsel of choice, he objected *on Hunt's behalf* ("I think that what is in the best interest of the defendant, is not for the Court to determine..."). The judge responded, "I am running this trial, not you nor they [the defense]." With Barens "satisfied," and thus unwilling to further represent the position of his client (who wished to regain control of who would speak for him), Chier and Hunt filed a writ petition seeking to overturn the formerly secret deal

between Barens and Judge Rittenband. Later, a former prosecutor (who was a close personal friend of the judge) and Chier would provide declarations revealing the personal and extra-judicial motives that animated the judge's decision to silence Chier and commandeer control over who would speak for Hunt. The several constitutional violations that flowed from this judicially bartered-for betrayal are spelled out in Hunt's habeas petition (doc. 190; Ex. 1).

Despite the extraordinary nature of these events immediately preceding opening statements in a capital trial, there is a plethora of additional jaw-dropping facts with respect to how the judge conducted Hunt's trial. Those, too, are spelled out in the petition and supporting documents (*e.g.,* doc. 191). One such extraordinary fact bears description here, however, because it proves "with laboratory precision" the prejudice Hunt suffered on account of the trial errors he challenges in his petition. The state presented the evidence of his alleged murder offense *twice* – once in the trial at issue, and once as part of a second murder prosecution, in a trial unencumbered by a judge and defense attorney conspiring to advance personal agendas utterly alien to their lawful roles. At the second trial, at which petitioner represented himself, eight of the jurors were neither convinced of his guilt of the murder for which he had been convicted nor of that for which he was then being tried. These jurors, who saw and heard nearly all the prosecution witnesses who had testified at the first trial (and all of the important ones), found them incredible and

believed Hunt not guilty, conclusions made even more remarkable by the fact that they had learned in the course of the trial that Hunt had already been convicted of that crime. The second jury heard from 44 defense witnesses addressing the murder of which petitioner had been convicted; at the preceding trial when the defense was being run by the utterly compromised Barens, the jury heard just 4. Barens actually admitted during that trial that he did not have the opportunity to work on the defense case until after the prosecution rested(!) Moreover, since all three guilt- and penalty-phase investigators quit (citing Barens' unethical and incompetent orientation to his duties) and Chier was silenced, the neglect of the defense case was total.

In point of fact, the state's theory underlying its prosecution of Hunt has long since collapsed. Although four members of the so-called "Billionaire Boys Club" were prosecuted under that theory, murder charges against the other three were all dropped long ago. The state tried and failed to obtain a murder conviction in two trials against James Pittman.[15] In *Eslaminia v. White,* 136 F.3d 1234 (9th Cir. 1998), this Court reversed denial of habeas relief for one of the other three just 10 years after his state conviction and the murder charge was subsequently dropped against him. The same is true for the third and last codefendant, Arben Dosti – he was freed

[15] When Pittman's case was tried before Judge Rittenband, the vote was 11-1 in favor of conviction; when another judge presided, the vote was 10-2 for acquittal.

pursuant to the ruling in *Eslaminia*. As for Hunt's second trial, it ended with an 8-4 vote in his favor and the charges being dropped.

It is in light of facts such as these that the 14-years-and-counting time span challenged herein should be assessed.

II. THE MAGISTRATE SHOULD BE REMOVED FROM THE CASE

As discussed above, the district court committed a fundamental misapplication of habeas principles in refusing to allowing Hunt's case to remain undecided this long. That clear error alone justifies mandamus relief. But that court committed another error that also warrants relief, namely, refusing to remove the MJ from the case. An Order directing the prompt disposition of his case would provide cold comfort to Hunt if the MJ is not removed.

Surely this Court will understand the delicate position in which the MJ has put petitioner. Petitioner has waited over 13 months since the decision at issue for good reasons. He risks further alienating both the MJ and the district judge with each additional complaint he registers at what has been going on, but what else can he do? He has repeatedly sought a decision from the lower court, only to be repeatedly rebuffed. He has thrice sought removal of the MJ from the case, only thrice to be denied. It has gotten to the point where the costs in terms of further alienating the decisionmakers are outweighed by the cost of unbounded waiting. What is one in his position to do, when yet another year is lost without any tangible

evidence of the "progress" that the district court used to justify its decision to do nothing?

Petitioner, of course, has no idea what is going on behind the scenes, but what he does know is worrisome enough. Upon information and belief, the MJ was away on an extended medical leave of absence during the year prior to petitioner's request to revoke the reference to him, yet no apparent effort was made during all that time to ensure petitioner's case would not simply languish. When the impact of that illness is viewed in conjunction with the MJ's unjustified expressions of pique with petitioner and his attorney (*see, e.g.,* fn. 10, *supra*) and rulings that are both illogical and unmoored to the actual facts of this case, the picture is a troubling one indeed.

The MJ has demonstrated clearly enough his own perception of the endless waiting, namely, that it is the product of the need to control an unruly *pro se* litigant. If this Court examines all the filings of petitioner prior to the time he was represented by counsel, *i.e.,* for the vast majority of the 14 years, it will find no hint of an abusive litigant. The picture that emerges is of a *pro se* litigant repeatedly and intelligently complying with the rules and the MJ's interlocutory orders, no matter how unreasonable the latter might be, while objecting to various flawed dispositive orders; and an MJ who seems to have taken Hunt's spirited, and often successful, advocacy personally.

The MJ is, by all appearances, punishing petitioner for seeking to avail himself of the rights conferred upon him by federal statutes and decisional law. Back in 2006, the MJ essentially threatened petitioner, writing that, unless petitioner "voluntarily reduc[ed] the true number of surviving claims in his fourth amended petition to what he considers in good faith to be his best two or three potentially meritorious claims," he could give up all hope of an expedited resolution of this case. (Doc. 211.) When petitioner did not surrender to that unlawfully imposed dilemma, the MJ was true to his word. Having shifted the blame onto petitioner for the "inordinate time" the MJ was taking to review the case (*see id.* ("The reason this case has taken an inordinate time to review is largely due to Petitioner's own litigation tactics.")), the MJ apparently came to believe that *no* amount of time was too long. Meanwhile, he continued to pressure Hunt to limit himself to the least number of claims. (*See, e.g.,* doc. 247 at 4-5.)[16]

The MJ's explicit statement of his exasperation with Hunt's refusal to voluntarily dismiss most of his claims followed a history of procedural and

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[16] As petitioner has previously pointed out (doc. 254 at 2), *if* his claims were somehow too substantively and procedurally complex for a speedy resolution, the proper response is not to bully him to throw away meritorious claims, but to adopt reasonable measures to address the problem. It is not *his* fault that so many things went so horribly awry in his state proceedings. Moreover, the fact that none of these claims could simply be rejected out of hand, and thereby not cause the MJ to dedicate an "inordinate" amount of time to them, is sufficient testament to their non-frivolous nature, and to the wrongfulness of the MJ's censorious stance.

substantive errors, many of which were egregious. Petitioner detailed the early history in his first effort to remove the MJ. (*See* Ex. 3.) Several of those errors are so transparently wrong as to be collectively bewildering – *e.g.,* what MJ is unaware of the duty to issue an R&R rather than an Order? – but the errors did not stop there. In addition to those committed pre-remand, a spate of additional errors ensued. (*See, e.g.,* doc. 214.)

Page constraints necessarily limit discussion of those errors, but one may serve to illustrate. In his R&R of March 31, 2006 (doc. 207), the lone substantive work product authored by the MJ post-remand, he considered respondent's motion to dismiss certain claims as time-barred. Respondent argued that these claims did not relate back to Hunt's first amended petition. (*Id.* at 6-7.) Hunt countered that respondent had asked the wrong question as the proper inquiry was whether the claims related back to his original petition. The MJ sided with respondent, finding that the initial petition had not provided fair notice of the claims. (*Id.* at 7.) He repeated his earlier conclusions that said petition, 72 pages in length, had been too prolix to serve that function, a problem compounded by Hunt's "failing to use the Court-approved petition form…." (*Id.* at 8.)

This Court should review the habeas petition that initiated this case (doc. 1; Ex. 5). The notion that it did not provide fair notice of its claims is absurd. The initially assigned MJ had no problem with it in that regard – he ordered respondent

to file an answer, and then a return (doc. 13). Moreover, the MJ was simply wrong about the most basic fact – Hunt *had* used the Court-approved petition form. (*See* doc. 1; Ex. 5.) There is absolutely nothing improper or unusual about supplementing that form with a longer petition; it is done all the time.

There should be no question but that, in the hands of any other MJ, Hunt's habeas case would have been resolved years ago, indeed, probably more than a decade ago. "[J]ustice must satisfy the appearance of justice." *Offutt v. United States*, 348 U.S. 11, 14 (1954). The MJ is required to "hold the balance nice, clear and true," *Caperton v. A.T. Massey Coal Co., Inc*., 556 U.S. 868, 879 (2009) (internal quotation marks and citations omitted), but that no longer seems possible. His own actions and failure to rule raise too many grave questions within the context of this case to permit his continued involvement. Any adverse R&R issued by the MJ at this juncture, following the 14 years and the multiple challenges those years have compelled petitioner to launch against him, will not have the appearance of justice.

The case was referred to the MJ pursuant to 28 U.S.C. § 636(b). (Docs. 2, 17.) Unlike § 636(c), § 636(b) contains no limitation on a district court's power to resume control over a case that has previously been referred to an MJ. *Cf. Hollines v. Estelle*, 569 F.Supp. 146, 150 (W.D.Tex. 1983) (citing court's earlier vacating of its § 636(b) reference without reference to any standard for such action). The

unique combination of facts in this case – the 14 years, the multiple denials of petitioner's efforts to secure a decision, the tacit animosity, rulings inexplicable on any basis other than that animosity, and an illness of undetermined impact – should convince this Court that a remedy is required.

CONCLUSION

Mandamus is to be invoked only in extraordinary situations, but if any situation qualifies as extraordinary, it is petitioner's. He has done nothing to warrant the 14-year wait imposed upon him; he cannot credibly be construed as the cause of this epic delay. The MJ has always had both the power and the duty to resolve this case expeditiously.[17] Hunt has, from the outset of the litigation, timely complied with all court orders. He has incurred the MJ's wrath for vigorously (and appropriately) representing himself. Although his case may not yet rival in terms of time's passage Dickens' *Jarndyce v. Jarndyce*, which "drags its dreary length before the court" for generations (Charles Dickens, Bleak House 8 (George Ford & Sylvère Monod eds., W.W. Norton & Co. 1977) (1853)), it is getting uncomfortably close, in a case where it is petitioner's *liberty* that is at stake. *Cf. Post v. Gilmore*, 111 F.3d at 557 ("Liberty's priority over compensation is why 28

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[17] Petitioner well understands that the district court lost jurisdiction during the 5 years that his case was on appeal, but those 5 years were lost as a result of the erroneous non-exhaustions findings of the MJ, who later reversed himself as to them.

U.S.C. § 1657 specifies that requests for collateral relief go to the head of the queue."). "Courts must act with diligence to dispose of pending litigation, if they are to merit public confidence and overcome the age old stigma cast upon them by 'the law's delay.' " *Natural Resources, Inc. v. Wineberg*, 349 F.2d 685, 692 (9th Cir. 1965). This Court should enforce that precept. The lone way of doing so, while preserving petitioner's right to a fair adjudication of his claim, is to order a resolution of the case by a set deadline and the immediate cessation of all involvement by the MJ.

Dated: July 24, 2012

Respectfully submitted,

/s/ Gary K. Dubcoff
Gary K. Dubcoff

Counsel for Petitioner
JOSEPH HUNT

CERTIFICATE OF SERVICE

I, Gary K. Dubcoff, hereby certify that I this day served true and correct copies of the foregoing **PETITION FOR WRIT OF MANDAMUS AND STAY OF PROCEEDINGS** by mailing said copies, via federal express, to:

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Dated: July 24, 2012

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