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IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
(SOUTHERN DIVISION)

JOSEPH HUNT,

Petitioner,

v.

TIM VIRGA, Warden,

Respondent.

Case No. CV 98-5280 RHW

PETITIONER'S NOTICE OF MOTION AND MOTION FOR RELIEF FROM JUDGMENT; MEMORANDUM OF POINTS AND AUTHORITIES

Date: TBD
Time: TBD
Place: Ctrm. of the Hon. Robert H. Whaley

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TO: TIM VIRGA, RESPONDENT; AND ELAINE F. TUMONIS, DEPUTY ATTORNEY GENERAL, COUNSEL FOR RESPONDENT

PLEASE TAKE NOTICE that at a date and time to be determined by the Court, petitioner Joseph Hunt, by and through his counsel, will and hereby does move this Court, pursuant to Fed. R. Civ. P. 60(b)(6), for relief from the judgment ordered against him in this Court's Order Denying Petitioner's Fourth Amended Petition (doc. 261, hereinafter "Order"). As grounds therefor, he asserts that the Order was predicated on purported failings in his Fourth Amended Petition and failings in meeting his habeas burdens, but those failings were *not his fault*. They were, rather, the direct result of the unreasonable constraints imposed upon him in the course of this litigation.

This motion is based on the instant Notice of Motion and Motion; the incorporated Memorandum of Points and Authorities, *infra*; Fed. R. Civ. P. 60(b)(6); all relevant constitutional, statutory, and case-law authority; this Court's inherent and supervisory powers; this Court's files and records in this case; and such further argument, oral evidence, and documentary evidence as may be presented at the hearing on this motion.

Dated: February 28, 2013

Respectfully submitted,

/s/ Gary K. Dubcoff
Gary K. Dubcoff

Counsel for Petitioner
JOSEPH HUNT

MEMORANDUM OF POINTS AND AUTHORITIES

The Order reflects the tremendous amount of work involved in simply reviewing the habeas petition, the answer, the reply, and the state record. Having done so, it repeatedly finds petitioner's efforts to prove his case wanting. For example, the Order is harshly critical of petitioner's Fourth Amended Petition:

> In his petition, Petitioner did not attempt to argue how these alleged defects in the proceedings resulted in a violation of his constitutional rights, nor attempt to show how the state court's decisions on these claims were contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or were based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding. Rather, the FAP reads like a laundry lists of things that Petitioner believes went wrong at his trial. As such, addressing Petitioner's claims was a daunting task.

(Order at 25.)

The Order, however, makes no acknowledgment of the constraints placed on petitioner's efforts to litigate his case, including those specifically placed on his Fourth Amended Petition, while concomitantly failing to acknowledge, let alone address, those efforts that, nonetheless, appear in this Court's files, albeit ordered "stricken" by the magistrate judge formerly assigned the case. The Order, consequently, repeatedly makes findings and reaches conclusions that do not take into account the powerful arguments made by petitioner in support of his claims, which would have been part and parcel of the record but for their being unfairly and inappropriately purged along the way. The Order, likewise, does not take into account Hunt's inability to include those arguments in his two pleadings – his petition and reply – given the harsh restrictions placed on their format and length, respectively (though this case involves his suffering from the second most serious punishment that can be meted out by our laws – life without the possibility of parole). This

Court should, consequently, order relief from the judgment entered against him and consider the arguments he has previously made on the very issues that the Order premised its contrary conclusions. Fed. R. Civ. P. 60(b)(6) provides a procedural mechanism for its doing so. Petitioner was constructively barred by the magistrate judge from meeting his AEDPA burdens.

BACKGROUND LEGAL PRINCIPLES

Fed. R. Civ. P. 60, governing relief from a final judgment or order, contains a catchall provision, authorizing district courts to grant relief to a party for "any other reason that justifies relief" beyond those specifically enumerated in the Rule. Fed. R. Civ. P. 60(b)(6). "Such motion must only be made "within a reasonable time." Fed. R. Civ. P. 60(c)(1).

"Since Rule 60(b) is remedial in nature, it must be liberally applied." *In re Hammer*, 940 F.2d 524, 525 (9th Cir. 1991). The catchall provision "vests power in courts adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice." *Klapprott v. United States*, 335 U.S. 601, 615, 69 S.Ct. 384, 93 L.Ed. 266 (1949). A party moving for relief under its strictures "must demonstrate extraordinary circumstances which prevented or rendered him unable to prosecute his case." *Lal v. California,* 610 F.3d 518, 524 (9th Cir. 2010) (citations, internal quotation marks, and brackets omitted); *see also Community Dental Servs. v. Tani*, 282 F.3d 1164, 1168 (9th Cir. 2002) (movant must demonstrate injury and "circumstances beyond his control that prevented him from proceeding with ... the action in a proper fashion").

As with Hunt's post-Order motion filed under Fed. R. Civ. P. 59(e), he may also proceed under Rule 60(b) in a habeas case, where, as here, he is challenging the manner in which his federal habeas petition was adjudicated. *See Gonzalez v. Crosby,* 545 U.S. 524, 532, 534, 125 S.Ct. 2641, 162 L.Ed.2d 480 (2005) (holding that Rule 60(b) motion that attacks "some defect in the integrity of the federal habeas proceedings" "has an unquestionably valid role to play in habeas cases").

THE RELEVANT PROCEDURAL HISTORY

The original 74-page petition in this case was filed on June 30, 1998. (Doc. 1.) A 663-page memorandum of points and authorities was filed in support of the petition (docs. 3, 4, 7), together with a motion to exceed page limitations (doc. 12).[1] Respondent was ordered to file a return (doc. 13), and he did (doc. 15). Magistrate Judge Robbins recused himself following those filings, and Magistrate Judge Nakazato (hereinafter, the Magistrate) was assigned. (Doc. 17.) The latter's first actions were to "strike," but not purge from the record, the original petition and memorandum, and to vacate Magistrate Judge Robbins' order. (Doc. 20.) Petitioner was directed to file a First Amended Petition not to exceed a total of 25 pages (including the pages of the court-approved form petition). (*Id.*)

The Magistrate expressly ordered petitioner *not* to include any argument or authorities in his petition. (Doc. 20 at 3.)[2] In other words, the Magistrate expressly dictated the very format of the petition that this Court would later find, with its implicit criticism of petitioner, so "daunting" (Order at 25).

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[1] Petitioner is all-too-aware that his filing a memorandum of this size was what set the magistrate judge, who dismissed it out of hand, down the path he was to follow. Yet, appointed appellate counsel in his state proceedings filed a 660-page opening brief, a reply brief of over 400 pages, and an additional 400+ pages of habeas pleadings on his behalf. In light of the fact that at least half of his federal sub-claims arose *after* appellate counsel left the case, as well as the heavy burdens that a federal habeas petitioner must bear, the 663 pages of briefing was, in fact, a reasonable condensation by a *pro se* litigant. It should not have been met with overt judicial hostility.

[2] "The facts supporting each claim or ground for habeas relief must be stated *briefly*, without argument, conclusions, colloquy, or citation to legal authorities. … Petitioner must state the claims … raised in the present proceeding, in the following manner … : Ground One: Petitioner's Fourteenth Amendment right to due process was violated by the trial judge's – (1) antagonism and bias against defense counsel; (2) introduction of matters relating to the other murder charge then pending against petitioner; (3) pro-prosecution bias; … etc." (Emphasis in original.)

Petitioner was also given permission to file a 50-page memorandum of points and authorities that was not subject to the above content limitations. (Doc. 20.)

After complying with the Magistrate's directions (docs. 24, 25), petitioner filed a series of motions (also in 1998). Some of them sought orders directing respondent to produce documents that petitioner sought in order to bring an "intrinsic" challenge to the state habeas court's factfinding (docs. 36, 70, 72); another sought leave to propound requests for admissions upon respondent (doc. 34); another sought expansion of the record (doc. 40); another sought an order requiring respondent to "complete their presentation of procedural defenses or face waiver thereof" (doc. 65); another sought to invalidate the findings of the LAC habeas court's July 12, 1996, decision and the state appellate court's January 15, 1998, decision on the ground that his unequivocal request for self-representation had been denied (doc. 42); and the last motion sought to establish that the January 15, 1998, procedural denial of petitioner's augmented judicial bias claim (doc. 6, Ex. M at 12) divested respondent of AEDPA deference for what is now labeled Claim 2 (doc. 43). All the motions were denied. (Docs. 68, 81.)[3]

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[3] In denying the motions, the Magistrate characterized all of them as "premature, unnecessary and frivolous." (Docs. 68, 81.) The motions were directed at either laying the foundation for (docs. 36, 70, 72), or mounting (doc. 42), an "intrinsic" challenge to the LAC habeas court's findings, and had an obvious and legitimate purpose. As for documents 34 and 40, they were pragmatic attempts to narrow the evidentiary issues without a hearing. The theory behind document 43 was later endorsed by the Ninth Circuit in *Pirtle v. Morgan*, 313 F.3d 1160, 1165-1167 (9th Cir. 2002), *i.e.*, that a claim denied on state procedural grounds was not "adjudicated on the merits" within the meaning of 28 U.S.C. § 2254(d). The sensible motive behind document 65 was to forestall a couple of years of litigation on procedural default questions subsequent to the then ongoing round of litigation on exhaustion. As the motions themselves indicated, the impetus for filing them came straight out of the leading treatise on habeas corpus, R. Hertz & J. Liebman, *Federal Habeas Corpus Practice and Procedure*; the federal habeas statutes; the Federal Rules of Civil Procedure; and Rules Governing Section 2254 Cases in the United States District Courts. These motions were neither "frivolous" nor "unnecessary." As for being "premature," given that petitioner was never given an opportunity to raise them again, that is surely debatable.

Importantly, these denials came with a succession of frightening warnings:

> Petitioner is ordered to refrain from filing premature, unnecessary, and frivolous papers in the future. Petitioner is cautioned that his failure to comply with this Order may result in the dismissal of the entire action with prejudice for failure to obey this Court Order.

(Doc. 68.)

> Petitioner is again ordered to refrain from filing premature, unnecessary, and frivolous papers.… This is Petitioner's *last* warning.

(Doc. 81 (emphasis in original).)

Petitioner objected to the above-quoted paragraph in document 81, citing the chilling effect it would have on his advocacy. (Docs. 88, 89.) Even assuming that the motions were all that the Magistrate found them to be, they had been drawn in good faith, and each stated a basis in law for the relief sought. As petitioner contended, how could he be expected to know in the future that a motion he deemed vital would not prove, in the Magistrate's eyes, to be "frivolous" – and thus result in the termination of his case? (*Id.*) The Magistrate denied petitioner's objection, repeating in the process the threat of dismissal for another violation. (Doc. 100.)

The material point for the instant motion is that, regardless of whether the Magistrate's response to petitioner's good-faith efforts to prosecute his case and to do so without avoidable delays was justified (and that it was not surely contributed to the Ninth Circuit's grant of his mandamus petition ordering the withdrawal of the reference of the case to the Magistrate), the effect of the Magistrate's admonitions was necessarily to scare the wits out of petitioner and to chill his filing any more motions. Any objectively reasonable petitioner in that position would have reacted in the same manner.

In late 1999, *i.e.*, over a year after the filing of the First Amended Petition (doc. 24), the Magistrate issued an order finding certain claims unexhausted (doc. 106)

(findings that respondent would later repudiate and the Magistrate, later rescind (doc. 207 at 24)). Petitioner was permitted to file up to a 25-page Second Amended Petition, but it was to contain only those claims that the Magistrate deemed exhausted. (Doc. 106 at 46-47.) Significantly, the 50-page memorandum of points and authorities that petitioner had filed in support of his First Amended Petition (doc. 25) was implicitly nullified by the same order. (Doc. 106 at 46.) Petitioner was not given leave to file a new one. (Doc. 106 at 46-47.)

Petitioner filed his Second Amended Petition (doc. 147) in compliance with the format prescriptions that he had been given regarding prisoner petitions, *i.e.*, those contained in document 20.

Following remand from the Ninth Circuit (doc. 180), Judge Keller directed petitioner to file a Fourth Amended Petition, drawn up in such a way that the Court and respondent would be able to verify whether all of petitioner's legal theories, and every single supporting allegation of fact upon which he intended to ultimately rely, were exhausted:

> The new amended petition must be prepared using this court's approved habeas form and, for continuity, it shall be labeled as Hunt's "Fourth Amended Petition." Further, each ground must be separately numbered and it must cite to the portions of Hunt's state briefs or petitions where the federal legal theory and operative facts of the ground were raised on direct and collateral review, and it must do so in a manner that will enable Respondent and the Court to readily determine whether each ground was fairly presented to the state courts in the manner required by *Baldwin* and the aforementioned exhaustion cases. If a ground is based upon multiple subparts, the page(s) of the specific state court petition(s) where each factual predicate was raised

> shall be cited in brackets immediately following each factual predicate.

(Doc. 188 at 24.) Again, no provision was made to allow petitioner to file a memorandum of points and authorities in support of the petition. (*Id.* at 24-26.)

Petitioner filed the Fourth Amended Petition in compliance with the content and format specifications expressed in both document 20 and document 188. (*See* doc. 190 (Fourth Amended Petition); doc. 191 ("Detailed Statement of Factual Allegations" supporting that petition); doc. 189 (application explaining why compliance with doc. 188 required the "Detailed Statement").)

On June 18, 2008, the Magistrate issued a "Final Briefing Order" directing respondent to file an answer and up to a 50-page supporting memorandum. (Docs. 231-33.) Petitioner was given leave to file a reply, but there were a couple of catches:

> Petitioner's Reply shall contain *all* of Petitioner's reply arguments, it may not exceed *twenty-five* pages in length, and it cannot be augmented or supplemented by any separately filed documents, all of which shall be construed as an attempt to circumvent the page limitation set by this Order and will either be rejected for filing or will be stricken from the record if inadvertently filed by the Clerk's office.

(*Id.*)

On July 3, 2008, "Petitioner's application for reconsideration …" of the "page limits on the Traverse" was filed. (Doc. 234.) Petitioner asked for 60 pages, explaining:

> Petitioner has the burden of proof. Respondent may baldly assert substantive defenses (e.g., 28 U.S.C. § 2254(d), (e), *Teague*, etc.), while Petitioner must weave the facts and law into coherent arguments for relief. He must specify the failings in the State rulings and proceedings. In contrast, the State opinions, and Respondent's Answer, will

> be presumed to invoke every principle in favor of the verdict that this Court can find support for in the precedent of the U.S. Supreme Court.… [T]he petition lists hundreds of examples of how Petitioner's constitutional rights were violated and at least sixty matters that could have been stand-alone claims.

(Doc. 234.) The application listed six other reasons for the requested relief (*id.*), closing with this prophetic passage:

> Petitioner recently had the experience with this Court of having sub-claims dismissed because he did not squeeze them into the First Amended Petition, which this Court limited to 25 pages (17 if you exclude the habeas form). No one disputes that all the sub-claims in question were present in the more lengthy 'original federal petition'.
>
> Now, this Court limits Petitioner's traverse to 25-pages. Will it then predicate aspects of its R&R on lacunas in Petitioner's arguments – lacunas which will then exist solely because of that page limitation? Will it assert that Petitioner has not met his burden – a burden perhaps often impossible to carry in the space allotted?

(Doc. 234 at 3.)

When the application was summarily denied (doc. 235), petitioner felt compelled to retain counsel, who entered his appearance some 15 days following that denial (doc. 236). Counsel then filed his own application to exceed the page limitation (doc. 243), which also expounded upon the impossibility of meeting petitioner's various burdens under AEDPA in light of the extensive state court rulings, *i.e.*, the 188-page opinion denying the appeal (doc. 5, Ex. A), the 38-page decision of the LAC habeas court (*id.*, Ex. B), and the 13-page 1998 decision of the state appellate court (*id.,* Ex. M). Counsel

explained that, in his view, it was impossible to comply with *both* of the two, then-extant orders, one requiring that he provide *all* reply arguments, the other, that he do so in no more than 25 pages. (Doc. 243 at 1.) He supported the application with a declaration seeking to explain why that was so and illustrating what would necessarily be omitted were the Magistrate to insist upon the 25-page limit. (*Id.* at 3-10.) For example, counsel's application contained an exhibit, an excerpt from the original memorandum of points and authorities (docs. 3, 4, and 5), which had been filed with the petition that initiated these proceedings (doc. 1) on June 30, 1998 petition. The 11-page excerpt illustrated the sort of argument on the applicable AEDPA and *Strickland* burdens that petitioner had once supplied (only to be stricken), and could supply again if only given the opportunity. (*See* Doc. 243, Ex. A.) It was but one illustration.

The Magistrate denied counsel's application on September 10, 2008, reasoning that petitioner had already been allowed to file 241 pages, *i.e.*, the 50-page Fourth Amended Petition (doc. 190) and the 191-page "Detailed Statement" (doc. 191),[4] to explain himself. (Doc. 247 at 3.) Of course, as noted, those two documents were, of necessity, tailored to the narrowly drawn orders with which petitioner had to comply (doc. 20; doc. 188 at 24-27).

[4] The clear implication of page 24 of Judge Keller's order (doc. 188), quoted, *supra,* was that any factual allegations not listed in the Fourth Amended Petition would be deemed waived and that any fact which petitioner had not explicitly mentioned in the state pleadings would be deemed unexhausted; hence, petitioner's 191-page list of every relevant fact. Although both implications were contrary to controlling Ninth Circuit precedent (*see, e.g., Weaver v. Thompson*, 197 F.3d 359, 364 (9th Cir. 1999) ("[N]ew factual allegations do not render a claim unexhausted unless they fundamentally alter the legal claim already considered by the state courts.") (citations and internal quotation marks omitted)), no objectively reasonable petitioner would have reacted any differently.

ARGUMENT

I. RELIEF FROM JUDGMENT IS WARRANTED BECAUSE PETITIONER WAS NOT PERMITTED TO PROSECUTE HIS CASE IN A PROPER FASHION

Under the force of orders from the Magistrate, since removed from the case, not a single line in the 241 pages identified by him as warranting the severe curtailment of legal argument he imposed, applied the controlling federal authorities; explained why the LAC habeas court's factual findings failed an "intrinsic review"; addressed on a claim-by-claim basis whether 28 U.S.C. § 2254(d) applied, and to the extent that it did, whether the various factual findings of the state courts were clearly erroneous; presented claim-by-claim or cumulative prejudice arguments; offered a statement of the facts considered by his 1987 jury, *etc.* Very few of the lines discussed the state courts' legal analyses and whether they were "objectively unreasonable" or "contrary to" controlling Supreme Court authority under AEDPA's gateway tests.

Petitioner was then given 25 pages in his reply to do all of those things. As contemporaneously averred in the declaration of undersigned counsel (doc. 243 at 3-10), there was simply no way to make the legal arguments that had to be made in a case of this complexity and magnitude in 25 pages. How could he *possibly,* in that allotted space, rebut the 250 pages of state court decisions, let alone provide a discussion of the myriad relevant facts integrated with the governing law? Given this Court's efforts to date in this case, it must know that he could not. Yet, that was what was mandated.

Petitioner was entitled to better. He could not conceivably, in 25 pages, do those things that he had been *affirmatively precluded* from doing earlier with respect to facts that took almost 200 pages just to list and to state court decisions that weighed in at nearly 250 pages. The Order itself required 138 pages to deny the Fourth Amended Petition, even though its principal feature was to merely point out, one claim at a time, that petitioner failed to overcome the various state findings. Petitioner, however, never had a fair chance to do so.

His Fourteenth Amendment right to due process was violated by the series of orders issued by the Magistrate, detailed *supra,* which made it impossible to do what the federal habeas statutes required of him. It is for that reason that he should be afforded relief from judgment.

One additional point bears making – petitioner is not using the instant motion as a "do-over" for failing to meet his "duty to take legal steps to protect his own interests." 11 Charles A. Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 2864 (2d ed. 1995). On the contrary, he zealously protested – to the extent he could in light of the Magistrate's threats to terminate the litigation if he did not toe the line drawn for him – to the constraints repeatedly foisted upon him during the course of this litigation. He tried on multiple occasions to have the Magistrate removed. (*See Hunt v. Pliler,* 336 F.3d 839, 847 (9th Cir. 2003); *see also* docs. 219, 251.) He twice asked for leave to file a reply of reasonable length. (*See* docs. 234, 243.) He tried to file a memorandum of law explaining why he was entitled to habeas relief. (Docs. 3, 4, and 7.) He did not sit on his hands. It was the *extrinsic* force of the Magistrate's orders that prevented him from taking the legal steps to protect his own interests.

CONCLUSION

As this Court is aware, petitioner was made to wait over 14 years for the Order. He believed that, once the magistrate judge primarily responsible for that delay was removed, the assigned district judge could not deny him habeas relief in light of the nauseating record created by the state trial judge and defense counsel that appeared on its face to contain numerous, blatant constitutional violations. Petitioner failed to take into account, however, that the impact of the Magistrate's management of the case would linger far beyond his removal upon the assignment of this Court to address his claims. That impact precluded him from "proceeding with ... the action in a proper fashion."

The court of appeals granted his mandamus petition to remove the Magistrate despite the fact that the writ of mandamus "is a drastic and extraordinary remedy reserved

for really extraordinary causes." *United States v. Guerrero*, 693 F.3d 990, 999 (9th Cir. 2012) (citation omitted). Likewise, the grant of a Rule 60(b)(6) motion requires "extraordinary circumstances," here, those preventing the movant from effectively prosecuting his case. It was the selfsame extraordinary circumstances created by the Magistrate's management of this case, which prompted the appellate court to grant Hunt's writ petition, that should warrant this Court's granting the instant motion.

Petitioner does not seek a fresh opportunity to meet his burdens. Rather, he respectfully asks simply that this Court consider the documents already on file that fully vindicate his claims, notwithstanding 28 U.S.C. §§ 2254(d) and 2254(e). Specifically, he requests that:

1. The Magistrate's order (doc. 19) striking petitioner's 1998 memorandum of points and authorities (docs. 3, 4, and 7) be vacated;
2. Pages 95 to 465 and 490 to 500 of that memorandum be read and considered by this Court, which should have properly been before this Court prior to its ruling on Claim 1;
3. Pages 466 to 511 and 633 to 639 of the memorandum (doc. 7) be read as they contain several "intrinsic" challenges to the LAC habeas court's findings;
4. The Magistrate's order (doc. 120) denying petitioner's application for leave to file his supplement regarding Claim 2 (doc. 118) be vacated; and
5. Pages 1 to 83 of that supplement, and pages 16 to 79 of the 1998 memorandum of points and authorities (doc. 3), be read and considered by this Court, both of which documents should have properly been before this Court prior to its ruling on Claim 2.

Should the Court agree to do so, as an aid to its use of documents 3, 4, and 7, petitioner appends hereto as Exhibit 1 a new table of contents for those documents. This is necessary in light of the fact that the numbering of the claims in the original petition differs from that of the Fourth Amended Petition. The new table of contents will allow this Court

to access in an orderly fashion the passages from the original memorandum as they relate to the Fourth Amended Petition's claims.

A Rule 60(b)(6) motion should be granted if justice requires it. *Klapprott v. United States*, 335 U.S. at 615; *Seven Elves, Inc. v. Eskenazi*, 635 F.2d 396, 402 (5th Cir. 1981) ("Rule 60(b) is a grand reservoir of equitable power to do justice in a particular case ….") (citation and internal quotation marks omitted); *cf. Smith v. Muccino,* 223 F.Supp.2d 396, 401 (D.Conn. 2002) (granting relief to prisoner under Rule 60(b)(6) where court had committed legal error in granting defendants' motion for judgment on the pleadings and said motion "was largely without merit"). What justice should be deemed as requiring in this case is a disposition that follows from a reasoned evaluation of all the legal arguments supporting petitioner's claim to habeas relief. Such a disposition, not reflected in the extant Order, would result in the issuance of a writ of habeas corpus. It is because that is so that petitioner would suffer the requisite injury from denial of the instant motion and the reasoned evaluation it seeks.

Dated: February 28, 2013

Respectfully submitted,

/s/ Gary K. Dubcoff
Gary K. Dubcoff

Counsel for Petitioner
JOSEPH HUNT