# Supreme Court of the United States
# Office of the Clerk
# Washington, DC 20543-0001

Scott S. Harris
Clerk of the Court
(202) 479-3011

April 1, 2019

Mr. Vincent Johnson
Prisoner ID A688-089
Chillicothe Correctional Institution
P.O. Box 5500
Chillicothe, OH 45601

Re: Vincent Johnson
v. United States Court of Appeals for the Sixth Circuit
No. 18-7688

Dear Mr. Johnson:

The Court today entered the following order in the above-entitled case:

The petition for a writ of certiorari is denied.

Sincerely,

Scott S. Harris

Scott S. Harris, Clerk

Appendix A

No. 18-3492

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT



In re: VINCENT JOHNSON, )
)
Petitioner. )

ORDER

BEFORE: BOGGS, CLAY, and KETHLEDGE, Circuit Judges.

Vincent Johnson petitions for a writ of mandamus and moves for leave to proceed *in forma pauperis*. Johnson seeks a writ of mandamus pursuant to 28 U.S.C. §§ 1651 and 1361 to compel the clerk of the court to file a motion he submitted pursuant to "Federal Rule of Civil Procedure 60(b)(6)" in his habeas corpus appeal, 16-4076.

Mandamus relief is not warranted. "[M]andamus relief is an extraordinary remedy, only infrequently utilized by this court." *John B. v. Goetz*, 531 F.3d 448, 457 (6th Cir. 2008) (quoting *In re Perrigo Co.*, 128 F.3d 430, 435 (6th Cir. 1997)). To obtain mandamus relief, the petitioner must show, among other things, a "clear and indisputable" right to issuance of the writ. *In re U.S.*, 817 F.3d 953, 960 (6th Cir. 2016) (quoting *Cheney v. U.S. Dist. Court*, 542 U.S. 367, 381 (2004)). Johnson has not made such a showing. In his habeas corpus proceeding, the clerk of the court refused to file Johnson's "Rule 60(b)" motion for an entirely proper reason: the case was closed. Specifically, this Court had denied a COA, and the Supreme Court had denied certiorari. Without a COA, the case could not continue. *See* 28 U.S.C. § 2253(c)(1)(A) ("Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from the final order in a habeas corpus proceeding[.]").

Therefore, Johnson's petition for mandamus fails and must be denied. Should Johnson have a valid claim to present, he may file a motion under 28 U.S.C. § 2244 for leave to file a second or successive habeas corpus petition under 28 U.S.C. § 2254.

The petition for writ of mandamus is **DENIED**, and the motion to proceed *in forma pauperis* is **DENIED AS MOOT**.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

No. 18-3492

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

**FILED**
Sep 05, 2018
DEBORAH S. HUNT, Clerk

IN RE: VINCENT JOHNSON,

Petitioner.

ORDER

**BEFORE:** BOGGS, CLAY, and KETHLEDGE, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

**ENTERED BY ORDER OF THE COURT**

**Deborah S. Hunt, Clerk**

Appendix C

**UNITED STATES COURT OF APPEALS**
**FOR THE SIXTH CIRCUIT**

| | |
|---|---|
| **VINCENT JOHNSON ,** Petitioner-Appellant | Case No. 16-4076 |
| **v.** | |
| **CHARLOTTE JENKINS,** Respondent-Appelle | |

**RULE 60(b)(6) MOTION**

Now comes Vincent johnson Pro Se asking this court to set aside judgment denying his COA in the above mentioned case. Persuant to Buck v. Davis 137 S. Ct. 759. Petitioner states there was a defect in the integrity of the proceedings in which petitioner's COA was denyed. Therefor in good conscience this court's judgment should not be enforced. See attached Memorandom.

VINCENT JOHNSON
688-089

Appendix D

## MEMORANDUM IN SUPPORT

Pursaunt to 60(b)(6) of the Fedral Rules of Civil Procedure petitioner seeks reopening of the court's April 27, 2017 opinion and order denying his request for a certifcate of appealability. Rule 60(b) allows a party to seek relief from a finale judgement and request reopening of his case under a limited set of circumstances. The decision to grant 60(b)(6) relief is a case by case inquiry that requires the trial court to intensively balance numerous factors, including the command of the court's conscience that justice be done inlight of all the facts. **Thompson v. Bell, 580 F. 3d 423, 442 (6th Cir. 2009)**. Futher, public policy favoring finality of judgments and termination of litigation contrains relief under the provision of rule 60(b), under which a court may grant relief, only in exceptional extraordinary circumstances where principle of equity mandate relief. **Franklin v. Jenkins, 839 3d. 465, 472(6th Cir. 2016).**

Petitioner states that the court missapplied the standard governing the issuance of certifcate of appealability, in view of **Buck v. Davis 137 S .Ct. at 759.** In **Davis,** the Supreme Court held, until a petitioner secures a C.O.A. a circuit court should not decide the merits on a applicatin for a certificate of appealability see, **Miller El v. Cockwell 537 U.S. 322, 336.** A C.O.A. may be issued only if the petitioner makes a substanial showing of the denial of a constitutional right 28 U.S.C 2253(c)(2). A petitioner satifies this standard by demonstrating that jurist of reason could disagree with the District court's resolution of his constitutional claim or that jurist could conclud the issue

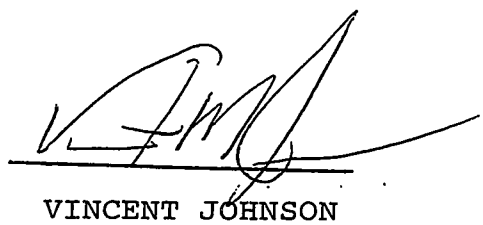
presented are adequate to deserve encouragment to proceed futher. **Miller El v. Cockwell 537 U.S. 322, 327 (2003).** In the case sub judice the court soley relied on the Dist. court's findings of a procedural bar and disregauarded petitioner supplement to ground one in it's intial analysis and essentially decided this case on the merits. To propperly determin weather or not C.O.A. should have been granted the court should have included the supplement argument to ground one in its examination and ask only if the petitioner has shown the Dist. court's resolution debatable. **Miller 537 U.S. at 327,348.** When reviewing the court's opinion there is nothing which would give one reason to conclud that the court considered the supplement argument in its inquiry on weather there was substantial showing of the denial of a constitutional right. The threshold inquiry the court made to ground one was , weather the claim was coqnizable for hebeas review. **See third paragraph of pg. two.** This should not be the primary question at the C.O.A. stage. The court misconstrude the supplement claim as a seperate argument, when fact it is a addition to claim one and therefor should have been examined as one argument . When reviewing the court's opinion to the supplement argument, the court ruled,"**reasonable jurist could not disagree with the District court's conclusion that petitioner felled to exghaust this claim" . see paragraph 2 pg. 3.**

When the District court has denied a 2254 petition on procedural grounds a petitioner must show "that jurist of reason would find it debatable weather the petition states a valid claim of the denial of a constitutional right and that jurist of reason would find it debatable weather the Dist. court was correct in its procedural ruling." **Slack v. McDaniel 529 U.S. 473, 484 (2000).**

In this case the court's inquiry into the procedraul bar is not asking weather or not petitioner felled to make a showing the procedural bar is debatable among jurist of reason, rather the court is implying petitioner has felled to show the procedural bar is incorrect. Petitioner argues that this decission was reached by the court making a determination into the merits of the procedural default. This is evident by the court's opinion in the last sentence on pg. 3, as this court agreed with the District court's resalution it stated **" Because Johnson felled to support his argument with any Federal cases or state cases relying on federal law, did not allege facts well within the mainstream of constitutional law and has not cited any circumstances excusing his procedural default, reasonable jurist could not disagree with the district court's procedural ruling."**

The COA inquiry is not coextensive with a merit analysis. see **Buck v. Davis 137 S. Ct. 759.** When dealing with a procedural bar at the COA stage, the only question is weather the applicant has shown "that jurist of reason would find the district court's procedraul bar debatable." **Slack v. McDaniel 529 U.S. 473, 484 (2000).** Weather petitioner felled to support his argument with any federal cases or state cases relying on federal law, or cite any circumstances excusing the procedraul default are ultimate merit determination of this case the court should not reach. At the COA stage a petitioner is not required to present circumstances excusing a percieved default. This places a heavy burden on a petitioner at the COA stage. **see Miller El 537 U.S. at 336,337.** When a court of appeals sidesteps the COA process by first deciding the merits of a appeal and then justisfying its denial of the COA based on the adjudication of the actual merits it is essence deciding an appeal without jurisdiction. **See Buck v. Davis 137 S. Ct. 759.**

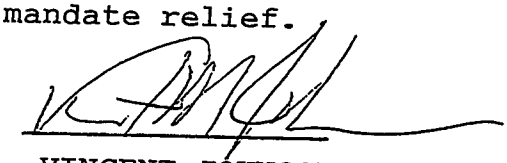
The manner inwhich the court analyzed and then denied petitioner's request for COA created a situation which cannot fairly or logically be ignored. The court's interpertation of a COA inquiry required the petitioner to make a ultimate showing of merit rather than a preliminary showing of the claim being debatable. A review of this argument will show extraordinary circumstances in the court's analysis to deny petitioner's request. First the court seperated the U.S. Supreme Court presidence presented in the suplementary argument to claim one from claim one. Second the threshold inquiry the court made to claim one was weather it was cognizable for habeas review. Third the court procedurally bared the suplementary claim based on its determination of the merits of the default. It is for these reason movant respectfully request that his 60(b)(6) motion be granted.



VINCENT JOHNSON

## CONCLUSION

The court's seperation of the supplement argument to claim one was outside the parameter of a initial COA analysis. The only determination the court was required to make was wether petitioner has made a substantial showing of a denial of a constitutional right and wether resonable jurist could disagree with the Dist. court's resaloution of the claim. When dealing with the procedural bar the court was required to make a determination on wether resonable jurist could find the procedural bar debatable. Movant asserts that he has persued every available avenue to remedy this mistake. As there is no other corse of action and for the reasons argued within this motion petitioner states that he has demonstrated exceptional and extraordinary circumstances where the princple of equity mandate relief.



VINCENT JOHNSON

## CERTIFICATE OF SERVICE

I Vincent Johnson under oath do sware that a copy of this motion has been sent to the U.S. Attorney Generals office on this day of 12-5 2018 by U.S. mail.

VINCENT JOHNSON 688089
CHILLICOTHE CORRECTION
P.O. BOX 5500 45601
Chillicothe Ohio

**UNITED STATES COURT OF APPEALS**
FOR THE SIXTH CIRCUIT
100 EAST FIFTH STREET, ROOM 540
Deborah S. Hunt
Clerk
POTTER STEWART U.S. COURTHOUSE
CINCINNATI, OHIO 45202-3988
Tel. (513) 564-7000
www.ca6.uscourts.gov

Filed: January 02, 2018

Mr. Vincent Johnson
Chillicothe Correctional Institution
P.O. Box 5500
Chillicothe, OH 45601

Re: Case No. 16-4076, *Vincent Johnson v. Charlotte Jenkins*
Originating Case No. : 2:15-cv-00971

Dear Mr. Johnson:

Please find enclosed, unfiled, your motion to reopen and set aside judgment Rule 60(b)(6). Please be advised that your case is closed, therefore, your documents will not be filed. No further correspondence will be forthcoming from this office.Type your text here.

Sincerely yours,

s/Leon T. Korotko
Case Manager
Direct Dial No. 513-564-7014

cc: Ms. Maura O'Neill Jaite

Appendix E

**UNITED STATES COURT OF APPEALS**
FOR THE SIXTH CIRCUIT
100 EAST FIFTH STREET, ROOM 540
POTTER STEWART U.S. COURTHOUSE
CINCINNATI, OHIO 45202-3988

DEBORAH S. HUNT
CLERK

TELEPHONE
(513) 564-7000

January 17, 2018

Vincent Johnson
#688089
Chillicothe Correctional Institution
P.O. Box 5500
Chillicothe, OH 45601

Re: 16-4076, *Johnson v. Jenkins*

Dear Mr. Johnson,

Your recent letter to Chief Judge Cole was forwarded to me for review and response. Judges of this court do not correspond with litigants regarding cases that are or were pending before the court.

In your letter, you ask about a Rule 60(b)(6) motion asking the court to reopen and set aside the judgment in your case. As you know, in your appeal here, the court denied a certificate of appealability. Your petition for en banc rehearing was circulated to the entire court, and after review, the court denied rehearing. This terminated your case because this appeal could not proceed without a certificate of appealability.

Your Rule 60(b) motion was twice returned to you because this court as an appellate court does not review Rule 60 motions; such motions are generally filed in the trial court with respect to trial court proceedings.

Sincerely,

Susan Rogers

Susan Rogers
Chief Deputy Clerk

Appendix F

**IN THE UNITED STATES DISTRICT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION**

**VINCENT JOHNSON,**

**Petitioner,**

**v.**

**WARDEN, CHILLICOTHE
CORRECTIONAL INSTITUTION,**

**Respondent.**

**CASE NO. 2:15-CV-00971
JUDGE JAMES L. GRAHAM
Magistrate Judge Elizabeth A. Preston Deavers**

## OPINION AND ORDER

On September 15, 2016, *Judgment* was entered dismissing the petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. (ECF No. 19.) On September 26, 2016, the Court issued an *Opinion and Order* denying the request for a certificate of appealability. (ECF No. 22.) On April 27, 2017, the United States Court of Appeals for the Sixth Circuit denied Petitioner's application for a certificate of appealability. (ECF No. 25.) Petitioner has filed a *Motion to Set Aside Judgment*. (ECF No. 26.) For the reasons that follow, the motion (ECF No. 26) is **DENIED.**

Petitioner seeks reconsideration pursuant to Rule 60(b)(6) of the Federal Rules of Civil Procedure of the Court's September 16, 2016, *Opinion and Order* denying his request for a certificate of appealability. Referring to *Buck v. Davis*, -- U.S. --, 137 S.Ct. 759 (2017), Petitioner contends that the Court improperly denied his request for a certificate of appealability.

Assuming that Petitioner's motion may properly be addressed under Rule 60(b) (*see Gonzalez v. Crosby*, 545 U.S. 524, 531 (2005) (Rule 60(b) cannot be used to circumvent the limitations on the filing of successive habeas corpus petitions under 28 U.S.C. § 2244(b)(3)), the record nonetheless fails to reflect that relief is warranted. "[T]he decision to grant Rule 60(b)(6)

relief is a case-by-case inquiry that requires the trial court to intensively balance numerous factors, including the competing policies of the finality of judgments and the incessant command of the court's conscience that justice be done in light of all the facts." *Thompson v. Bell*, 580 F.3d 423, 442 (6th Cir. 2009) (citing *Blue Diamond Coal Co. v. Trustees of UMWA Combined Benefits Fund*, 249 F.3d 519, 529 (6th Cir. 2001)). Further, "public policy favoring finality of judgments and termination of litigation" constrains relief under the provision of Rule 60(b); "[p]articularly strict standards apply to motions made pursuant to Rule 60(b)(6), under which a court may grant relief " 'only in exceptional or extraordinary circumstances' where principles of equity 'mandate' relief." *Franklin v. Jenkins*, 839 F.3d 465, 472 (6th Cir. 2016) (citations omitted). Such are not the circumstances here.

Petitioner maintains that the Court misapplied the standard governing the issuance of a certificate of appealability, in view of *Buck*, 137 S.Ct. at 759. In *Buck*, "the Supreme Court held a circuit court should not decide the merits on an application for a certificate of appealability, but just the debatability question." *Dilingham v. Warden*, No. 1:13-cv-468, 2017 WL 2569754, at *2 (S.D. Ohio June 14, 2017). "To put the merits question first, the Court said, is to decide the merits of an appeal without jurisdiction to do so because appellate jurisdiction depends on there being an issued certificate of appealability." *Id.* However, *Buck* does not assist Petitioner here. *See id.* (It is only in the Court of Appeals that "the appealability question comes first as held in *Buck*."); *see also United States v. Alford*, No. 3:00-cr-065, 2017 WL 1734225, at *2 (S.D. Ohio May 4, 2017) (concluding that *Buck* does not retroactively apply to cases on collateral review).

Moreover,

> once this Court has made a decision regarding appealability and the matter is addressed *de novo* by the Sixth Circuit, this Court's decision becomes moot. And the Sixth Circuit's decision regarding whether a certificate of appealability should or should not issue

> becomes the law of the case and must be followed by this Court. Therefore, Cook cannot seek relief from this Court based upon a claim that an incorrect decision was made on issuance of a certificate of appealability. If he clams the error was committed by this Court, the issue is moot because it was addressed subsequently by the Sixth Circuit *de novo*. Conversely, if he claims that the Sixth Circuit erred in not issuing a certificate of appealability, he is making a claim beyond the reach of this Court unless and until the Sixth Circuit permits a second or successive motion to be filed.

*United States v. Cook*, No. 5:06-183-DCR, 2017 WL 2872369, at *3 (E.D. Ky. July 5, 2017); *see also United States v. Alford*, 2017 WL 1734225, at *2 ("[T]his Court does not have jurisdiction to change a decision of the Sixth Circuit."); *Dilingham,* 2017 WL 2569754, at *2 ("[W]e have no power to issue a certificate when the court of appeals has determined on the same record that was before us that a certificate is not warranted.").

Therefore, Petitioner's *Motion to Set Aside Judgment* (ECF No. 26) is **DENIED.**

**IT IS SO ORDERED.**

Date: August 17, 2017

s/ James L. Graham
JAMES L. GRAHAM
United States District Judge

No. 16-4076

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT



VINCENT JOHNSON,

Petitioner-Appellant,

v.

CHARLOTTE JENKINS, Warden,

Respondent-Appellee.

ORDER

Vincent Johnson, an Ohio prisoner proceeding pro se, appeals the district court's judgment dismissing his petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254. He has filed an application for a certificate of appealability ("COA"). *See* Fed. R. App. P. 22(b)(1). He has also filed three motions for leave to proceed in forma pauperis ("IFP") on appeal. *See* Fed. R. App. P. 24(a)(5). The warden opposes Johnson's COA application and IFP motions.

In 2013, a jury convicted Johnson on two counts of rape, one count of attempted rape, one count of kidnapping, one count of abduction, and one count of domestic violence, with specifications. Johnson's convictions arose from an incident during which he beat his girlfriend, urinated on her, and then sexually assaulted her. The trial court sentenced Johnson to an aggregate term of thirty-nine years of imprisonment. The Ohio Court of Appeals affirmed Johnson's convictions but remanded for resentencing, *State v. V.J.*, No. 13AP–799, 2014 WL 2781598 (Ohio Ct. App. June 17, 2014), and the Ohio Supreme Court denied leave to appeal. The trial court resentenced Johnson to an aggregate term of thirty-nine years, and Johnson voluntarily dismissed his appeal from the trial court's resentencing decision.

Johnson then filed this § 2254 habeas petition, raising two grounds for relief: (1) the trial court violated state evidentiary rules and his rights to due process and equal protection by admitting DNA evidence; and (2) the trial court violated his state and federal constitutional rights by amending the indictment without grand jury intervention. Johnson later filed, with leave of the court, a supplementary memorandum as to his first ground for relief. The magistrate judge entered a report recommending that Johnson's petition be dismissed. Over Johnson's objections, the district court adopted the report and recommendation, dismissed Johnson's petition, and declined to issue a COA.

Johnson now seeks a COA on both grounds for relief presented in his petition.

A COA may issue only if a petitioner makes "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). "A petitioner satisfies this standard by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). When the district court has denied a § 2254 petition on procedural grounds, a petitioner must show "that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

In his first ground for relief, Johnson argues that the trial court violated state evidentiary rules and his rights to due process and equal protection by admitting DNA evidence from semen recovered during the victim's sexual assault examination. Johnson claims that this evidence was irrelevant and unfairly prejudicial because the victim admitted at trial to having had consensual sex with Johnson less than seventy-two hours before the DNA evidence was collected. To the extent that Johnson argues the trial court violated state evidentiary rules, reasonable jurists could not disagree with the district court's conclusion that this claim was not cognizable on habeas review. *See Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991). Habeas review of state evidentiary rulings is "extremely limited." *Giles v. Schotten*, 449 F.3d 698, 704 (6th Cir. 2006). State courts

are the "final arbiters" of a state law's meaning and application, and a federal court is not the proper forum to adjudicate such issues. *Summers v. Leis*, 368 F.3d 881, 892 (6th Cir. 2004). In rejecting Johnson's claim, the Ohio Court of Appeals cited the state's rules of evidence and concluded that the DNA evidence was relevant because it corroborated the victim's testimony and was not prejudicial because it "would be there anyway from the previous act." The district court properly determined, based on the state appellate court's ruling, that the admission of the DNA evidence did not prejudice Johnson to the extent that he was denied a fundamentally fair trial, so as to warrant habeas relief. *See McAdoo v. Elo*, 365 F.3d 487, 494 (6th Cir. 2004).

To the extent that Johnson argues the trial court violated his federal constitutional rights in admitting the DNA evidence, reasonable jurists could not disagree with the district court's conclusion that he failed to properly exhaust this claim. "The federal courts do not have jurisdiction to consider a claim in a *habeas* petition that was not 'fairly presented' to the state courts." *McMeans v. Brigano*, 228 F.3d 674, 681 (6th Cir. 2000). In order to meet the fair-presentment requirement, a petitioner must "assert[] both the factual and legal basis for his claim to the state courts." *Id.* This requirement may be met in four ways: "(1) reliance upon federal cases employing constitutional analysis; (2) reliance upon state cases employing federal constitutional analysis; (3) phrasing the claim in terms of constitutional law or in terms sufficiently particular to allege a denial of a specific constitutional right; or (4) alleging facts well within the mainstream of constitutional law." *Id.* Johnson argued in the Ohio Court of Appeals that the admission of the DNA evidence violated his right to due process and equal protection. However, "[g]eneral allegations of the denial of rights to a 'fair trial' and 'due process' do not 'fairly present' claims that specific constitutional rights were violated." *Id.* Because Johnson failed to support his argument with any federal cases or state cases relying on federal law, did not "alleg[e] facts well within the mainstream of constitutional law," and has not cited any circumstances excusing his procedural default, reasonable jurists could not disagree with the district court's procedural ruling. *Id.*

In his second ground for relief, Johnson argues that the trial court violated his state and federal constitutional rights by amending Counts Seven and Eight of the indictment without grand jury intervention. To the extent that Johnson asserts a violation of his state constitutional rights, reasonable jurists could not disagree with the district court's conclusion that this claim was not cognizable on habeas review. *See Estelle*, 502 U.S. at 67-68. To the extent that Johnson asserts a violation of his federal constitutional rights, "due process mandates only that the indictment provide the defendant with 'fair notice of the charges against him to permit adequate preparation of his defense.'" *Williams v. Haviland*, 467 F.3d 527, 535 (6th Cir. 2006) (quoting *Koontz v. Glossa*, 731 F.2d 365, 369 (6th Cir. 1984)). Counts Seven and Eight charged Johnson with abduction and domestic violence and, in amending the indictment, the trial court removed from these counts only repeat-violent-offender specifications. Because the trial court did not change the name or identity of the predicate offenses charged in Counts Seven and Eight, reasonable jurists could not disagree with the district court's conclusion that the indictment was constitutionally sufficient. *See id.*

For these reasons, Johnson's COA application is **DENIED** and his IFP motions are **DENIED** as moot.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

Additional material from this filing is available in the Clerk's Office.