EXHIBIT-G

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO

UNITED STATES OF AMERICA

v.

REYNALDO DIAZ-GUZMAN

§ **JUDGMENT IN A CRIMINAL CASE**
§
§
§ Case Number: **5:17-CR-00525-SO(1)**
§ USM Number: **65654-060**
§ **Charles E. Fleming**
§ Defendant's Attorney

THE DEFENDANT:

☒	pleaded guilty to count(s)	**Count 1 of the Indictment**
☐	pleaded guilty to count(s) before a U.S. Magistrate Judge, which was accepted by the court.	
☐	pleaded nolo contendere to count(s) which was accepted by the court	
☐	was found guilty on count(s) after a plea of not guilty	

The defendant is adjudicated guilty of these offenses:

Title & Section / Nature of Offense	**Offense Ended**	**Count**
21:841(a)(1) and (b)(1)(A) Possession With Intent To Distribute Heroin	11/14/2017	1

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s)

☐ Count(s) ☐ is ☐ are dismissed on the motion of the United States

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

December 10, 2018
Date of Imposition of Judgment

/s/ Solomon Oliver, Jr.
Signature of Judge

Solomon Oliver, Jr., U. S. District Judge
Name and Title of Judge

December 12, 2018
Date

DEFENDANT: REYNALDO DIAZ-GUZMAN
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IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:

120 months as to count 1.

☒ The court makes the following recommendations to the Bureau of Prisons:
Participation in the Bureau's Intensive Drug Treatment Program, if applicable; Placement at FCI Danbury, CT; Benefit of the Second Chance Act; Participation in the Bureau's Inmate Financial Responsibility Program at a rate of not less than 10%.

☒ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at ☐ a.m. ☐ p.m. on

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to

at _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

By
DEPUTY UNITED STATES MARSHAL

DEFENDANT: REYNALDO DIAZ-GUZMAN
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SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of : **five (5) years.**

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
   - ☐ The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. (*check if applicable*)
4. ☐ You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution *(check if applicable)*
5. ☒ You must cooperate in the collection of DNA as directed by the probation officer. (*check if applicable*)
6. ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, et seq.) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which you reside, work, are a student, or were convicted of a qualifying offense. (*check if applicable*)
7. ☐ You must participate in an approved program for domestic violence. (*check if applicable*)

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

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STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change. If not in compliance with the condition of supervision requiring full-time occupation, you may be directed to perform up to 20 hours of community service per week until employed, as approved or directed by the pretrial services and probation officer.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. As directed by the probation officer, you shall notify third parties who may be impacted by the nature of the conduct underlying your current or prior offense(s) of conviction and/or shall permit the probation officer to make such notifications, and/or confirm your compliance with this requirement.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. I understand additional information regarding these conditions is available at the www.uscourts.gov.

Defendant's Signature _____ Date _____

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SPECIAL CONDITIONS OF SUPERVISION

Substance Abuse Treatment and Testing
The defendant shall participate in an approved program of substance abuse testing and/or outpatient or inpatient substance abuse treatment as directed by their supervising officer; and abide by the rules of the treatment program. The probation officer will supervise your participation in the program (provider, location, modality, duration, intensity, etc.). The defendant shall not obstruct or attempt to obstruct or tamper, in any fashion, with the efficiency and accuracy of any prohibited substance testing.

Alcohol Restriction
You must not use or possess alcohol.

Search / Seizure
You must submit your person, property, house, residence, vehicle, papers, computers (as defined in 18 U.S.C. § 1030(e)(1)), other electronic communications or data storage devices or media, or office, to a search conducted by a United States probation officer. Failure to submit to a search may be grounds for revocation of release. You must warn any other occupants that the premises may be subject to searches pursuant to this condition.
The probation officer may conduct a search under this condition only when reasonable suspicion exists that you have violated a condition of supervision and that the areas to be searched contain evidence of this violation. Any search must be conducted at a reasonable time and in a reasonable manner.

Gambling Restriction
You must not engage in any form of gambling (including, but not limited to, lotteries, online wagering, sports betting) and you must not enter any casino or other establishment where gambling is the primary purpose (e.g., horse race tracks, off-track betting establishments).

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CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	JVTA Assessment*	Fine	Restitution
TOTALS	$100			$.00

☐ The determination of restitution is deferred until . An *Amended Judgment in a Criminal Case (AO245C)* will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

☐ Restitution amount ordered pursuant to plea agreement $

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ the interest requirement is waived for the ☐ fine ☐ restitution

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22
** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

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SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A ☐ Lump sum payments of $ _____ due immediately, balance due

☐ not later than , or

☐ in accordance ☐ C, ☐ D, ☐ E, or ☐ F below; or

B ☒ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☒ F below); or

C ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after the date of this judgment; or

D ☐ Payment in equal 20 *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ *(e.g., 30 or 60 days)* after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☒ Special instructions regarding the payment of criminal monetary penalties:
It is ordered that the Defendant shall pay to the United States a special assessment of $10,000,000.00 for Count 1, which shall be due immediately. Said special assessment shall be paid to the Clerk, U.S. District Court.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several
See above for Defendant and Co-Defendant Names and Case Numbers *(including defendant number)*, Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

☐ Defendant shall receive credit on his restitution obligation for recovery from other defendants who contributed to the same loss that gave rise to defendant's restitution obligation.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) JVTA Assessment, (8) penalties, and (9) costs, including cost of prosecution and court costs.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

REYNALDO DIAZ-GUZMAN,	)	Case Nos.: 5:19 CV 1316
	)	5:17 CR 525
Petitioner	)	
	)	
v.	)	JUDGE SOLOMON OLIVER, JR.
	)	
UNITED STATES OF AMERICA,	)	
	)	
Respondent	)	ORDER

Currently pending before the court in the above-captioned case are several motions filed by Petitioner Reynaldo Diaz-Guzman ("Diaz-Guzman" or "Petitioner") seeking post-conviction relief: (1) Motion to Vacate under 28 U.S.C. § 2255 ("§ 2255 Petition") (ECF No. 1 in Case No. 5:19 CV 1316; ECF No. 27 in Case No. 5:17 CR 525);[1] (2) Motion to Appoint Counsel under § 2255 ("Motion to Appoint Counsel") (ECF No. 28); and (3) Motion to Amend the Motion to Vacate under 28 U.S.C. § 2255 ("Motion to Amend") (ECF No. 31). For the following reasons, the court grants Petitioner's Motion to Amend; however, the court denies the Amended § 2255 Petition and Petitioner's Motion to Appoint Counsel.

I. BACKGROUND

On December 13, 2017, a federal grand jury in the Northern District of Ohio returned an Indictment against Diaz-Guzman on one count of knowingly and intentionally possessing with intent to distribute more than one thousand (1,000) grams of a substance containing a detectable amount

[1] All following citations reflect the document numbering in Case No. 5:17 CR 525.

of heroin in violation of 21 U.S.C. §§ 842(a)(1) and 841(b)(1)(A)(I). (Indictment at 1, ECF No. 1). An arrest warrant issued the same day, but Diaz-Guzman was not arrested until May 31, 2018. (Arrest Warrant, ECF No. 2; Mins. of Proceedings on May 31, 2018, Non-document.)

Diaz-Guzman pled guilty to the Indictment on August 27, 2018. (Mins. of Proceedings on August 27, 2018, Non-document.) The court then sentenced Diaz-Guzman on December 10, 2018, to one hundred and twenty (120) months' imprisonment followed by five (5) years' supervised release. (Judgment, ECF No. 23.) The term of imprisonment reflected the mandatory minimum sentence that attached to Diaz-Guzman's conviction. Diaz-Guzman did not appeal his conviction or sentence.

On June 7, 2019, Petitioner timely filed a § 2255 Petition (ECF No. 27) and a Motion to Appoint Counsel (ECF No. 28). The § 2255 Petition raised twelve different arguments—mostly presented as ineffective assistance of counsel claims—which derive from two main theories: (1) the federal court lacked jurisdiction because the federal indictment was filed while state charges were pending, and (2) unnecessary delays violated Petitioner's speedy trial rights. On August 1, 2019, before the Government submitted its response, Petitioner filed a Motion to Amend the § 2255 Petition (ECF No. 31). The Amended § 2255 Petition revises Petitioner's claims and consolidates them into nine arguments; but the substance largely mirrors and regurgitates content from the initial Petition. The Government responded to the initial § 2255 Petition on August 7, 2019, but it has not responded to Petitioner's Amended § 2255 Petition. (*See* Gov't Resp., ECF No. 32.)

II. LEGAL STANDARD

Section 2255, Title 28 of the United States Code, allows a district court to vacate, set aside, or correct a federal sentence that was imposed in violation of the Constitution or laws of the United States or by a court without jurisdiction, that exceeds the maximum sentence authorized by law, or

that is otherwise subject to collateral attack. 28 U.S.C. § 2255. Collateral relief, however, is limited, and "[o]nce [a] defendant's chance to appeal has been waived or exhausted, . . . we are entitled to presume he stands fairly and finally convicted" and "a collateral challenge may not do service for an appeal." *United States v. Frady*, 456 U.S. 152, 164–65 (1982).

Generally, to prevail on a § 2255 motion alleging a constitutional error, the petitioner must show an error of constitutional magnitude, which had a substantial and injurious effect or influence on the proceedings. *Brecht v. Abrahamson*, 507 U.S. 619, 637–38 (1993); *see also Murr v. United States*, 200 F.3d 895, 906 (6th Cir. 2000) (confirming the *Brecht* standard applies in § 2255 actions, as well as § 2254 actions). On collateral review, it is the movant's burden to establish his right to relief. *See McQueen v. United States*, 58 F. App'x 73, 76 (6th Cir. 2003).

The Sixth Amendment guarantees all defendants the right to constitutionally effective assistance of counsel. However, because counsel is presumed effective, a petitioner has a significant hurdle in establishing a claim of ineffective assistance of counsel. *Blackburn v. Foltz*, 828 F.2d 1177, 1180 (6th Cir. 1987) (citing *Strickland v. Washington*, 466 U.S. 668, 689 (1984)). Under *Strickland v. Washington*, a petitioner must show both: (1) that counsel's errors were so serious that he was not functioning as the counsel guaranteed by the Sixth Amendment, and (2) that counsel's deficient performance prejudiced the defense. 466 U.S. 668, 687 (1984). To show an attorney's performance was deficient, a defendant "must show that counsel's representation fell below an objective standard of reasonableness." *Id.* at 687–88. In making this determination, the court must "presume that counsel's advocacy 'fell within the wide range of reasonable professional assistance.'" *Blackburn*, 828 F.2d at 1180 (quoting *Strickland*, 466 U.S. at 689). Therefore, "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." *Strickland*, 466 U.S. at 690. The petitioner must also demonstrate that the inadequate performance

resulted in prejudice, such that the petitioner was deprived of a fair trial. *Id.* at 687. In the context of a guilty plea, prejudice exists when "there is a reasonable probability that, but for counsel's errors, [the defendant] would not have pleaded guilty and would have insisted on going to trial." *Hill v. Lockhart*, 474 U.S. 52, 59 (1985). But "[a]n error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." *Strickland*, 466 U.S. at 691.

III. LAW AND ANALYSIS

A. Motion to Amend

Rule 15 of the Federal Rules of Civil Procedure governs motions to amend a § 2255 petition. *See Oleson v. United States*, 27 F. App'x 566, 568 (6th Cir. 2001); *see also Waller v. United States*, No. 08-CV-936, 2010 WL 750219, at *4 n.6 (N.D. Ohio Feb. 26, 2010). Rule 15(a) provides, in pertinent part, that a party may amend its pleading "once as a matter of course within: (A) 21 days after serving it, or (B) if the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading or 21 days after service of a motion under Rule 12(b), (e), or (f), whichever is earlier." Fed. R. Civ. P. 15(a)(1). Amendments also must comply with the one-year statute of limitations applicable to § 2255 petitions, which runs from the date final judgment is entered on the conviction. *See Oleson*, 27 F. App'x at 570; 28 U.S.C. § 2255(f).

Petitioner filed his initial § 2255 Petition and his Motion to Amend well within the one-year limitations period. The court entered judgment on December 12, 2018, and the judgment of conviction became final fourteen days later after Diaz-Guzman chose not to file a notice of appeal. *See* Fed. R. App. P. 4(b)(1). Thus, the initial § 2255 Petition, filed on June 7, 2019, and the Amended § 2255 Petition, filed on August 1, 2019, were both timely. Moreover, Petitioner filed the Motion to Amend before the Government filed its Response. Accordingly, because Petitioner was

entitled to amend his § 2255 Petition as a matter of course under Rule 15(a), the court grants Petitioner's Motion to Amend.

Though the Government's Response addresses only the initial § 2255 Petition, it effectively responds to the Amended § 2255 Petition as well. Petitioner does not raise new arguments in the Amended § 2255 Petition but rather revises and consolidates the arguments he made previously. Accordingly, the court does not require the Government to submit an amended response.

B. Procedural Default

A criminal defendant generally must raise constitutional or statutory challenges on direct appeal before bringing a collateral challenge via a § 2255 motion. *See Weinberger v. United States*, 268 F.3d 346, 351 (6th Cir.2001). Failing to do so results in procedural default. *Id.* If a defendant procedurally defaults a claim by failing to raise it on direct appeal, the claim can be raised in a § 2255 motion only on a showing (1) of cause to excuse the default or (2) actual innocence. *See Bousley v. United States*, 523 U.S. 614, 621 (1998). However, the Sixth Circuit has held that ineffective assistance of counsel claims are not subject to the normal procedural default rules because they are "best brought by a defendant in a post-conviction proceeding under 28 U.S.C. § 2255 so that the parties can develop an adequate record on the issue." *United States v. Seymour*, 38 F.3d 261, 263 (6th Cir.1994) (citation omitted). Thus, ineffective assistance of counsel claims are subject to review as long as the petitioner timely raises them in a § 2255 Petition. *See Hughes v. United States*, 258 F.3d 453, 457 n.2 (6th Cir. 2001).

Petitioner's claims therefore are not procedurally defaulted to the extent they assert ineffective assistance of counsel. However, any claims not properly framed as ineffective assistance of counsel claims are defaulted unless Petitioner shows cause excusing the failure to raise them on direct appeal.

C. Amended § 2255 Petition

The Amended § 2255 Petition presents nine arguments.[2] First (Argument A), Petitioner asserts that counsel was deficient for failing to argue that the federal prosecutor improperly influenced the grand jury in violation of the Fifth Amendment's Due Process Clause. (Am. Pet. at 3–4, ECF No. 31.) Second (Argument B), Petitioner argues that counsel was constitutionally ineffective because he did not raise a speedy trial challenge based on the five-month delay between the federal indictment and Petitioner's arraignment. (*Id.* at 5–13.) Third (Argument C), Petitioner asserts that federal prosecutors withheld exculpatory information. (*Id.* at 14.) Petitioner's next five arguments (Arguments D–H) present various claims that counsel's inadequate assistance undermined the effectiveness of Petitioner's guilty plea. (*Id.* at 15–33.) Finally (Argument I), Petitioner argues that counsel was constitutionally deficient for failing to file a direct appeal. (*Id.* at 34–37.) The court addresses each of Petitioner's claims in turn.

1. Improper Influence on Grand Jury

Petitioner first claims that his counsel provided constitutionally inadequate assistance by failing to "argue that the prosecutor influenced the grand jury decision to indict." *Id.* at 3. It is true that courts can set aside an indictment if prosecutorial misconduct "'substantially influenced the grand jury's decision to indict,' or if there is 'grave doubt' that the decision to indict was free from

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[2] Several arguments from Petitioner's initial § 2255 Petition do not appear in the Amended § 2255 Petition. These arguments include that (i) counsel should have requested a *Franks* hearing to challenge the legality of the arrest warrant (Argument E in the initial § 2255 Petition) (Pet. at 10–12, ECF No. 27-1); (ii) counsel should have sought a continuance in light of the First Step Act (Argument K) (*id.* at 21–22); and (iii) counsel failed to object to the presentence investigative report (Argument L) (*id.* at 23–24). Because Petitioner dropped these arguments from his Amended § 2255 Petition, they are not presently before the court. However, even if these arguments were before the court, they would be rejected as plainly meritless for the reasons the Government identifies in its Response. (*See* Gov't Resp. at 5–9, 13–14, ECF No. 32).

the substantial influence of such violations." *Bank of Nova Scotia v. United States*, 487 U.S. 250, 256 (1988) (quoting *United States v. Mechanik*, 475 U.S. 66, 78 (1986)). However, Petitioner does not identify any alleged misconduct that infected the grand jury proceeding in this case. (*See* Gov't Resp. at 8, ECF No. 32.) Indeed, the Amended § 2255 Petition does nothing more than recite legal standards before conclusorily stating that counsel was "ineffective for failing to file a pretrial motion and argue that the prosecutor influenced the Grand Jury decision to indict." (Am. Pet. at 4, ECF No. 31.) The initial § 2255 Petition references the ongoing state criminal proceedings as the source of the violation, (*see* Pet. at 5–6, ECF No. 27-1), but those references are scrubbed from the Amended § 2255 Petition. Regardless, the fact that a federal indictment issued while state criminal prosecutions were pending does not violate due process. Because Petitioner cannot point to any violation or error that allegedly influenced the grand jury, the court finds that counsel's performance was not deficient for failing to raise these arguments. Nor has Petitioner suffered any prejudice. Accordingly, Petitioner's first argument fails.

2. Speedy Trial Right

Next, Petitioner argues that counsel was constitutionally deficient for not raising a speedy trial challenge to dismiss the indictment. (Am. Pet. at 5–13, ECF No. 31.) Petitioner makes arguments based on the Speedy Trial Act, the Fifth Amendment Due Process Clause,[3] and the Sixth Amendment, apparently challenging delays that occurred both before and after the indictment was issued. (*Id.*)

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[3] The Amended § 2255 Petition discusses due process and the Due Process Clause, but it does not explicitly invoke the Fifth Amendment. The court views this as an unintentional mistake since Petitioner seems to conflate the applicable constitutional provisions. (*See* Am. Pet. at 5, ECF No. 31 (referencing the "Due Process Clause of the Sixth Amendment").) Giving Petitioner the benefit of the doubt, the court interprets the Amended § 2255 Petition broadly and assumes Petitioner intended to make arguments based on both the Fifth and Sixth Amendments.

The Speedy Trial Act of 1974 imposes deadlines for key stages of federal criminal proceedings. *See* 18 U.S.C. § 3161 *et seq.* As Petitioner notes in the Amended § 2255 Petition (Am. Pet. at 6, ECF No. 31), the Act requires federal charges to be brought within thirty days of the arrest or service of summons on the defendant. *See* 18 U.S.C. § 3161(b). The Act also protects against post-indictment delay by requiring that a criminal defendant's trial commence within seventy days after the defendant is charged or makes an initial appearance in court, whichever is later. *See* 18 U.S.C. § 3161(c)(1). If the government misses these deadlines, the defendant can have the charges dropped. 18 U.S.C. § 3162(a)(2).

Although Petitioner suggests that the federal prosecution missed these deadlines, the record does not support that claim. The federal indictment issued one month after the acts giving rise to Diaz-Guzman's conviction. But that delay did not run afoul of the Speedy Trial Act because the indictment issued *before* the federal arrest warrant was executed and, in any event, within thirty days of the commencement of criminal proceedings. As for post-indictment delay, the seventy-day clock started to run only after May 31, 2018, when Diaz-Guzman made his initial appearance in the Northern District for arraignment before Magistrate Judge Burke. Before that time, "Diaz-Guzman was outside the Northern District of Ohio on bond release following his arraignment in his Summit County case." (Gov't Resp. at 3, 7, ECF No. 32.) And then, after his federal arraignment, Diaz-Guzman waived his speedy trial right and requested that the court continue his trial date. (*See* Mot. to Continue, ECF No. 15.) Accordingly, there was no violation of the Speedy Trial Act.

Pre-indictment delay can violate the Fifth Amendment's Due Process Clause even if it does not violate applicable federal statutes. But to establish a constitutional due process violation warranting dismissal of the charges, the defendant must show that the pre-indictment delay caused "substantial prejudice to his right to a fair trial and . . . was an intentional device by the government

to gain a tactical advantage." *Parker v. Burt*, 595 F. App'x 595, 601 (6th Cir. 2015). Here, the one-month delay between Diaz-Guzman's offense and his federal indictment does not implicate due process concerns. Petitioner suffered no prejudice as a result of this short delay, and the Government gained no tactical advantage. The month instead reflects a reasonable amount of time necessary for the Government to conduct its investigation. (*See* Gov't Resp. at 9, ECF No. 32.)

Post-indictment delay also can warrant dismissal. These delays are governed by the Sixth Amendment speedy trial guarantee rather than the Fifth Amendment's Due Process Clause. *See United States v. Watford*, 468 F.3d 891, 901 (6th Cir. 2006) (citation omitted). The Sixth Amendment guarantees that, "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial." U.S. Const. amend. VI. To determine whether a delay violates the Sixth Amendment, "[t]he Supreme Court has rejected rigid rules . . . in favor of an ad hoc balancing approach" based on four factors: "(1) whether the delay was uncommonly long; (2) the reason for the delay; (3) whether the defendant asserted his right to a speedy trial; and (4) whether prejudice resulted to the defendant." *Watford*, 468 F.3d at 901 (citations and quotations omitted) (stating the standard established in *Barker v. Wingo*, 407 U.S. 514 (1972)).

After considering the four *Barker* factors, the court finds no violation of Petitioner's Sixth Amendment speedy trial rights. First, although the gap between the indictment and Diaz-Guzman's arraignment stretched more than five months, a delay of that length is neither uncommonly long nor presumptively prejudicial. *See Watford*, 468 F.3d at 901 (citing *Wilson v. Mitchell*, 250 F.3d 388, 394 (6th Cir.2001); *United States v. Mundt*, 29 F.3d 233, 235 (6th Cir.1994)). Second, as discussed earlier, Petitioner has not shown that the Government waited for an improper purpose, such as to gain tactical advantage. The reason for delay instead seems to be, as the Government claims, that Diaz-Guzman was not in the Northern District of Ohio for those five months. (Gov't Resp. at 7, ECF

No. 32.) Third, the record does not show that Petitioner asserted his speedy trial right. Finally, the court finds that Petitioner was not prejudiced by the delay. Because Petitioner was not detained during these months, the delay did not constitute "oppressive pretrial incarceration." *United States v. Ferreira*, 665 F.3d 701, 706 (6th Cir. 2011) (quoting *Barker*, 407 U.S. at 532). Moreover, the threat of federal prosecution did not add significant anxiety or concern beyond what already existed due to the state proceedings. *See Ferreira*, 665 F.3d at 706. Most importantly, the delay in no way impaired Diaz-Guzman's defense. *See id.*

Because the underlying claims are without merit, the court finds that the conduct of Petitioner's counsel "fell within the wide range of reasonable professional assistance." *Blackburn*, 828 F.2d at 1180 (quoting *Strickland*, 466 U.S. at 689). But even assuming *arguendo* that an objectively reasonable attorney would have raised these arguments challenging the indictment, Petitioner's claims still fail because he suffered no prejudice.

3. *Brady* Violations

Third, Petitioner asserts that prosecutors withheld exculpatory evidence in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). (*See* Am. Pet. at 14, ECF No. 31.) This claim, unlike Petitioner's other arguments, is not framed as an ineffective assistance of counsel claim and therefore is procedurally defaulted. But even if this claim was not barred, it still would fail. Petitioner offers nothing but legal standards and conclusions, and there is no evidence in the record that prosecutors withheld any evidence—exculpatory or otherwise. To the extent Petitioner's claim is grounded in the theory that prosecutors withheld "the fact that they did not have jurisdiction or probable cause," (*see* Pet. at 15, ECF No. 27-1), that argument is plainly meritless.

4. Guilty Plea

Petitioner also makes several arguments regarding his guilty plea. (*See* Am. Pet. at 15–33, ECF No. 31.) These assertions amount to three main claims: (1) Petitioner's counsel was constitutionally ineffective for failing to file a motion to withdraw the guilty plea, (2) the plea was not knowingly or voluntarily made because counsel failed to inform Petitioner about the charges and their consequences, and (3) counsel misadvised Petitioner to plead guilty. (*Id.*) If Petitioner now challenges his plea for lack of voluntariness and intelligence, that claim is procedurally defaulted because he did not first raise it on direct appeal. *Bousley*, 523 U.S. at 621. But even if construed as ineffective assistance of counsel claims, Petitioner's arguments still fail because they rest on flawed premises.

The Amended § 2255 Petition presents legal standards and conclusions but provides little factual support for Petitioner's guilty plea arguments. In the few instances that Petitioner does offer support, he appears to be relying again on the mistaken belief that the federal court lacked jurisdiction while the state criminal proceedings were pending. (*See* Am. Pet. at 20, ECF No. 31 ("the Government may not constitutionally prosecute without jurisdiction"); *id.* at 24 (arguing that counsel "erroneously advis[ed] Petitioner to accept an ambiguous plea to an indictment which the Government did not have jurisdiction to begin with"); *id.* at 32 ("counsel never informed Petitioner that when the government does not have jurisdiction over the case . . . the government is precluded by the U.S. Constitution from hauling Petitioner into court").)

There is no basis for Petitioner's ineffective assistance of counsel claims as they relate to his guilty plea. The record shows that Petitioner's guilty plea was both voluntary and intelligent, and there is no suggestion that Petitioner was dissatisfied with his counsel at any time during the proceedings. (*See* Gov't Resp. at 11, ECF No. 31.) Petitioner's mistaken understanding of federal

jurisdiction does not support an ineffective assistance of counsel claim. Accordingly, the court finds that counsel was not constitutionally deficient for failing to raise these arguments, and Petitioner did not suffer any prejudice.

5. Direct Appeal

Finally, Petitioner argues that his counsel was ineffective for failing to file a direct appeal. But this argument is undermined by Petitioner's own admission that, following his sentencing and the court's entry of judgment, Petitioner "agreed with Attorney Fleming" that "there was nothing to appeal and that Petitioner got the best deal." (Am. Pet. at 34, ECF No. 31.) Further, Petitioner admits that he did not change his mind about appealing until "a couple of months" later. (*Id.*) By that time, in February 2019, two months had passed since the judgment of conviction, and the window for appeal had closed. *See* Fed. R. App. P. 4(b)(1).Petitioner's argument here appears grounded again in a misunderstanding of jurisdiction. (*See* Am. Pet. at 34 (noting that "Petitioner is not learned in the law in general, let alone the complexities of jurisdiction").)

The court cannot fault Petitioner's counsel for letting the deadline pass without filing an appeal given the lack of appealable issues and the fact that Petitioner did not request an appeal until it was already too late. The "obvious jurisdictional and constitutional issues" Petitioner contends his counsel should have raised are actually far from obvious. (Am. Pet. at 34, ECF No. 31.) In fact, they are meritless. Accordingly, the court finds that counsel's failure to raise them is objectively reasonable and caused no prejudice to Petitioner.

D. Appointment of Counsel

Diaz-Guzman, as a habeas petitioner, does not have an absolute right to be represented by counsel. *See Wright v. West*, 505 U.S. 277, 293 (1992). The Rules Governing Section 2255 Proceedings do require the court to appoint counsel for an indigent petitioner if an evidentiary

hearing is necessary. Rules Governing § 2255 Proceedings 8(c); *see also Young v. United States*, No. 15-4063, 2017 WL 4358942, at *2 (6th Cir. Feb. 28, 2017) (holding that appointed counsel is mandatory at § 2255 evidentiary hearings). But the decision whether to appoint counsel is otherwise left to the sound discretion of the district court. Here, the court finds that there is nothing to suggest that "the interests of justice" require appointment of counsel. *See* 18 U.S.C. § 3006A(a)(2). Accordingly, the court denies Petitioner's Motion to Appoint Counsel.

IV. CONCLUSION

For the foregoing reasons, the court grants Petitioner's Motion to Amend (ECF No. 31); however, the court denies Petitioner's Amended § 2255 Petition (ECF No. 31) and Petitioner's Motion to Appoint Counsel (ECF No. 28).

IT IS SO ORDERED.

/s/ SOLOMON OLIVER, JR.
UNITED STATES DISTRICT JUDGE

October 24, 2019

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

REYNALDO DIAZ-GUZMAN,	)	Case Nos.: 5:19 CV 1316
	)	5:17 CR 525
Petitioner	)	
	)	
v.	)	JUDGE SOLOMON OLIVER, JR.
	)	
UNITED STATES OF AMERICA,	)	
	)	
Respondent	)	JUDGMENT ENTRY

The court, having denied Petitioner's Amended Motion to Vacate under 28 U.S.C. § 2255, (*See* ECF No. 31 in Case No. 5:17 CR 525), in a separate Order on this same date, hereby enters judgment for Respondent and against Petitioner. The court certifies, pursuant to 28 U.S.C. § 1915(a)(3), that an appeal from this decision could not be taken in good faith, and that there is no basis upon which to issue a certificate of appealability. 28 U.S.C. § 2253(c); Fed. R. App. P. 22(b).

IT IS SO ORDERED.

/s/ SOLOMON OLIVER, JR.
UNITED STATES DISTRICT JUDGE

October 24, 2019

EXHIBIT-H

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

Tel. (513) 564-7000
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Filed: August 11, 2020

Mr. Reynaldo Diaz-Guzman
F.C.I. Loretto
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Cresson, PA 16630

Mr. David M. Toepfer
Office of the U.S. Attorney
100 E. Federal Street
Suite 325
Youngstown, OH 44503

Re: Case No. 19-4104, *Reynaldo Diaz-Guzman v. USA*
Originating Case No. : 5:19-cv-01316 : 5:17-cr-00525-1

Dear Mr. Diaz-Guzman and Counsel,

The Court issued the enclosed Order today in this case.

Sincerely yours,

s/Jill E Colyer
Case Manager
Direct Dial No. 513-564-7024

cc: Ms. Sandy Opacich

Enclosure

No mandate to issue

No. 19-4104

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

REYNALDO DIAZ-GUZMAN,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

ORDER

Before: LARSEN, Circuit Judge.

Reynaldo Diaz-Guzman, a federal prisoner proceeding pro se, appeals a district court judgment denying his amended motion to vacate his sentence under 28 U.S.C. § 2255. Diaz-Guzman has filed an application for a certificate of appealability ("COA"). *See* Fed. R. App. P. 22(b). He also moves to proceed in forma pauperis on appeal.

On December 12, 2017, an Ohio grand jury indicted Diaz-Guzman for several drug-related offenses and resisting arrest. Based on the same criminal conduct, on December 13, 2017, a federal grand jury indicted Diaz-Guzman for knowingly and intentionally possessing with intent to distribute more than one thousand grams of a substance containing a detectable amount of heroin, in violation of 21 U.S.C. § 841. Although an arrest warrant was issued the same day, Diaz-Guzman was not arrested on the federal charge until May 31, 2018, and he was arraigned that same day. On August 27, 2018, Diaz-Guzman pleaded guilty to the charge set forth in the federal indictment, and the district court later sentenced him to 120 months of imprisonment. He did not appeal.

In June 2019, Diaz-Guzman filed a § 2255 motion, claiming that counsel was ineffective for failing to: move to dismiss the indictment because the prosecutor allegedly violated his Fifth Amendment rights by improperly influencing the grand jury to issue an indictment despite the pending state criminal charge (claims A and B); move to dismiss the indictment based on an

alleged violation of his right to a speedy trial (claims C and D); request a hearing under *Franks v. Delaware*, 438 U.S. 154 (1978), to challenge the allegedly illegal arrest warrant (claim E); adequately investigate Diaz-Guzman's case in order to present a defense based on the lack of subject matter jurisdiction and move to dismiss the indictment on that basis (claim F); move to withdraw Diaz-Guzman's guilty plea (claim H); advise Diaz-Guzman of the nature of the charges filed against him, resulting in an unknowing and involuntary guilty plea, because the court allegedly lacked jurisdiction in light of the pending state criminal charges at the time of the federal indictment (claims I-J); seek a continuance in light of the First Step Act (claim K); object to the presentence report and argue for a lesser sentence (claim L); and file a notice of appeal that Diaz-Guzman requested approximately two months after his sentence was imposed (claim M). Finally, Diaz-Guzman also claimed that the prosecutor withheld exculpatory evidence, in violation of his due process rights under *Brady v. Maryland*, 373 U.S. 83 (1963) (claim G). Thereafter, Diaz-Guzman moved to amend his § 2255 motion, consolidating his grounds for relief into nine claims and dropping claims E, K, and L.

The district court granted the motion to amend, but it denied Diaz-Guzman relief under § 2255, concluding that his ineffective-assistance-of-counsel claims lacked merit and that his *Brady* claim was procedurally defaulted.

Diaz-Guzman seeks a COA as to each of his claims. He also argues that the district court erred when it failed to address the grounds for relief asserted in claims E, K, and L and when it denied his § 2255 motion without conducting an evidentiary hearing.

A COA may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). When the district court's denial is on the merits, "[t]he petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). When the district court's denial is based on a procedural ruling, the petitioner must demonstrate that "jurists of reason would find it debatable

whether the [motion] 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." *Id.*

Ineffective Assistance of Counsel

In order to prevail on a claim that counsel rendered ineffective assistance, Diaz-Guzman must show that counsel's performance was objectively unreasonable and that there is a reasonable probability that, absent counsel's errors, he would not have pleaded guilty. *See Hill v. Lockhart*, 474 U.S. 52, 58-59 (1985); *Strickland v. Washington*, 466 U.S. 668, 687-89 (1984).

1. Improper Influence on Grand Jury

Reasonable jurists would not debate the district court's determination that counsel was not ineffective for failing to challenge the prosecutor's allegedly improper influence on the grand jury proceedings. Referencing numerous legal standards, Diaz-Guzman conclusorily alleged that the prosecutor "influenced the Grand Jury decision to indict, and there was 'grave doubt' that the decision to indict was free from substantial influence," but he failed to allege any specific misconduct by the prosecutor. To the extent that Diaz-Guzman contended that the prosecutor could not pursue a federal indictment while the state criminal charges were pending, that contention was erroneous. "Under the dual sovereignty doctrine, the federal government and a state may separately prosecute a defendant for the same criminal conduct." *United States v. Archibald*, 685 F.3d 553, 556 n.1 (6th Cir. 2012). Counsel does not perform ineffectively by declining to raise meritless issues.

2. Speedy Trial

Reasonable jurists would not debate the district court's determination that counsel was not ineffective for failing to move to dismiss the indictment based on alleged violations of Diaz-Guzman's rights under the Speedy Trial Act, the Fifth Amendment's Due Process Clause, and the Sixth Amendment, based on delays that occurred both before and after he was indicted.

The Speedy Trial Act provides that "[a]ny information or indictment charging an individual with the commission of an offense shall be filed within thirty days from the date on which such individual was arrested or served with a summons in connection with such charges." 18 U.S.C.

§ 3161(b). The Act also requires a defendant to be tried "within seventy days from the filing date" of the indictment or the defendant's appearance "before a judicial officer . . . whichever date last occurs." 18 U.S.C. § 3161(c)(1). Reasonable jurists would agree that neither of these provisions was violated in Diaz-Guzman's case, given that he was indicted *before* his arrest and that he twice moved for and obtained a continuance before pleading guilty eighty-eight days after his arraignment.

Diaz-Guzman challenged the one-month delay between his offense and the federal indictment. "The Due Process Clause 'requires the dismissal of an indictment . . . if the defendant can prove that the Government's delay in bringing the indictment was a deliberate device to gain an advantage over him and that it caused him actual prejudice in presenting his defense.'" *Parker v. Burt*, 595 F. App'x 595, 601 (6th Cir. 2015) (quoting *United States v. Gouveia*, 467 U.S. 180, 192 (1984)). Here, Diaz-Guzman's criminal conduct occurred on November 14, 2017, and he was indicted on December 13, 2017. Reasonable jurists would agree that this one-month delay did not implicate any due-process concerns because a month is a reasonable amount of time for the government to conduct a criminal investigation and Diaz-Guzman made no showing of prejudice.

Diaz-Guzman also challenged the five-and-one-half-month delay between his indictment and his arraignment under the Sixth Amendment. The following four factors are considered and balanced to determine whether a Sixth Amendment speedy trial violation has occurred: "Length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." *Barker v. Wingo*, 407 U.S. 514, 530 (1972). Reasonable jurists could not debate the district court's conclusion that the four *Barker* factors did not weigh in favor of finding a speedy trial violation. First, the length of the delay was neither uncommonly long nor presumptively prejudicial. When the delay approaches one year, it is "presumptively prejudicial," and the court should address the other three factors. *United States v. Jackson*, 473 F.3d 660, 665 (6th Cir. 2007); *United States v. Watford*, 468 F.3d 891, 901 (6th Cir. 2006). Here, the delay was not even six months. Where the length of the delay is "not uncommonly long," there is no need to reach the remaining three factors. *United States v. Gardner*, 488 F.3d 700, 719 (6th Cir. 2007) (265-day

right to appeal on December 10, 2018, he consulted with counsel about an appeal and agreed with counsel that "there was nothing to appeal and that [he] got the best deal." Diaz-Guzman alleged that in February 2019 he changed his mind and requested that counsel file a notice of appeal. But by then it was too late to appeal. *See* Fed. R. App. P. 4(b)(1)(A). Because Diaz-Guzman conceded that counsel consulted with him about an appeal and that they agreed that there were no appealable issues, reasonable jurists would agree that counsel was not ineffective for failing to file a notice of appeal within the fourteen-day appeal period. *See, e.g.*, *Shelton v. United States*, 378 F. App'x 536, 539 (6th Cir. 2010).

5. Remaining Issues

Reasonable jurists could not debate the district court's determination that Diaz-Guzman abandoned his claims that counsel was ineffective for failing to request a *Franks* hearing, seek a continuance in light of the First Step Act, and object to the presentence report (claims E, K, and L). "Normally, an amended complaint supersedes the original complaint" under Federal Rule of Civil Procedure 15(a). *Pac. Bell Tel. Co. v. Linkline Commc'ns, Inc.*, 555 U.S. 438, 456 n.4 (2009). "If, however, the party submitting the pleading clearly intended the latter pleading to supplement, rather than supersede, the original pleading, some or all of the original pleading can be incorporated in the amended pleading." *Clark v. Johnston*, 413 F. App'x 804, 811-12 (6th Cir. 2011) (citing 6 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1476 (3d ed. 2010)). No such intent was clearly evident in Diaz-Guzman's amended § 2255 motion.

Reasonable jurists would also not debate the district court's decision to deny the § 2255 motion without conducting an evidentiary hearing, because, for the reasons expressed above, "the motion and the files and records of the case conclusively show that [Diaz-Guzman] is entitled to no relief." 28 U.S.C. § 2255(b); *see also Valentine v. United States*, 488 F.3d 325, 333 (6th Cir. 2007).

Procedural Default

Finally, reasonable jurists would not debate the district court's ruling that Diaz-Guzman procedurally defaulted his *Brady* claim by not raising the issue on direct appeal. Generally, if a

defendant fails to assert a claim on direct appeal, it is procedurally defaulted. *Regalado v. United States*, 334 F.3d 520, 528 (6th Cir. 2003). A procedurally defaulted claim "may be raised in habeas only if the defendant can first demonstrate either 'cause' and actual 'prejudice,' or that he is 'actually innocent.'" *Bousley v. United States*, 523 U.S. 614, 622 (1998) (citations omitted) (quoting *Murray v. Carrier*, 477 U.S. 478, 485, 496 (1986)). Diaz-Guzman failed to make either showing. Although he attempts to show cause by claiming that counsel was ineffective for failing to pursue a belated direct appeal two months after he was sentenced, that argument fails for the reasons discussed above.

Accordingly, Diaz-Guzman's application for a COA is **DENIED**, and the motion to proceed in forma pauperis is **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.