

21-5216  
NO. \_\_\_\_\_

ORIGINAL

IN THE SUPREME COURT OF THE UNITED STATES

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Supreme Court, U.S.  
FILED

JUN 17 2021

OFFICE OF THE CLERK

FREDIE PHILLIP KORYAL,

Petitioner,

v.

SARAH SCHROEDER,

Respondent.

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On Petition for Writ of Certiorari to the  
United States Court of Appeals for the Sixth Circuit

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PETITION FOR WRIT OF CERTIORARI

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**\*NOTICE:** This document was prepared with the assistance of a non-attorney prisoner assigned to the Legal Writer Program with the Michigan Department of Corrections.

## **QUESTIONS PRESENTED**

1. DID THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN AND THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT ERRONEOUSLY DENY MR. KORYAL'S REQUEST FOR A CERTIFICATE OF APPEALABILITY IN THIS HABEAS CORPUS CASE WHERE JURISTS OF REASON COULD CLEARLY DEBATE WHETHER KORYAL'S CONSTITUTIONAL RIGHTS WERE VIOLATED?

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## ORDERS BELOW

The United States Court of Appeals for the Sixth Circuit denied Mr. Koryal a certificate of appealability in an unpublished Order dated March 8, 2021. This Order is reproduced in the appendix to this petition as Appendix A and is cited at *Koryal v. Schroeder*, 2021 U.S. App. LEXIS 6758 (6<sup>th</sup> Cir. Mar. 8, 2021).

The United States District Court for the Eastern District of Michigan denied Mr. Koryal's application for leave to proceed *in forma pauperis* on appeal in an unpublished Order dated October 1, 2020. This Order is reproduced in the appendix to this petition as Appendix B.

The United States District Court for the Eastern District of Michigan summarily dismissed Mr. Koryal's petition for writ of habeas corpus, denied certificate of appealability, and denied leave to proceed *in forma pauperis* on appeal in an unpublished Opinion, Order and Judgment dated August 12, 2020. This Opinion, Judgment and Order is reproduced in the appendix to this petition as Appendix C and is cited at *Koryal v. Schroeder*, 2020 U.S. Dist. LEXIS 144570, 2020 WL 8765935 (E.D. Mich., Aug. 12, 2020).

The Michigan supreme court denied Mr. Koryal leave to appeal on direct appeal of his State court judgment in an Order dated February 4, 2020. This Order is reproduced in the appendix to this petition as Appendix D and is cited at *People v. Koryal*, 505 Mich. 978, 937 N.W.2d 675 (2020).

On direct appeal of Mr. Koryal's State court judgment, the Michigan court of appeals affirmed Mr. Koryal's convictions in an unpublished Opinion dated August 29, 2019. This Opinion is reproduced in the appendix to this petition as Appendix E and is cited at *People v. Koryal*, 2019 Mich. App. LEXIS 5090, 2019 WL 4126571 (Mich. Ct. App., Aug. 29, 2019).

## **STATEMENT OF JURISDICTION**

The final judgment dismissing Mr. Koryal's habeas corpus petition in this case was entered by the United States District Court for the Eastern District of Michigan on August 12, 2020. On the same date, the district court denied a certificate of appealability with respect to the one ground raised in the habeas petition in the same opinion and order that it issued denying the writ. See Appendix C. The Petitioner filed a timely notice of appeal. The United States Court of Appeals for the Sixth Circuit subsequently issued an order denying a certificate of appealability on March 8, 2021. See Appendix A.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

## **STATUTORY PROVISIONS INVOLVED**

### **28 U.S.C. § 1254(1):**

Cases in the courts of appeals may be reviewed by the Supreme Court by . . . writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

### **28 U.S.C. § 2253(c):**

(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—

- (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or
- (B) the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

## **STATEMENT OF THE CASE**

Petitioner Freddie Phillip Koryal is a state prisoner confined at the Alger Correctional Facility in Munising, Michigan. On June 19, 2020, Petitioner filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. In the habeas petition, Petitioner challenged his state-court convictions of three Counts of First-Degree Criminal Sexual Conduct, Mich. Comp. Laws §



750.520(b)(1)(f) (personal injury); One Count of Assault With Intent to do Great Bodily Harm Less Than Murder (AWIGBH), Mich. Comp. Laws § 750.84; and One Count of Domestic Violence, Mich. Comp. Laws § 750.812.

Petitioner was convicted following a jury trial in the Oakland County Circuit Court. The Michigan Court of Appeals described the relevant facts as follows:

#### THE VICTIM'S TESTIMONY

Defendant and the victim lived together at a residence in Rochester Hills, Michigan. On June 12, 2017, sometime after 9:00 p.m., defendant and the victim returned home. The victim gave the following account of the events that occurred that evening. Around 10:00 p.m. or 10:30 p.m., the victim attempted to fall sleep, but defendant was talking loudly on the phone. Defendant told the person on the phone that he was going to kick the victim's ass because "she's a bitch, she's a whore, and she's embarrassed me." After defendant concluded the phone call, he entered the bedroom, put his foot on the edge of the bed, and asked the victim if she heard his telephone conversation. The victim lied and said "no" because she was afraid and did not want to argue with or aggravate defendant.

Defendant then slapped the victim's face and punched her in the head. Defendant told her to undress because he wanted to have sex; defendant made the victim perform oral sex on him, and defendant also performed oral sex on the victim. The victim did not want to have sex but complied with defendant's demands because she was afraid defendant was going to kill her. During sex, defendant told the victim that she was a "bitch," "whore," and "slave," and that he was going to kill her and bury her body in the backyard. Defendant pulled and tore the victim's hair out of her head and continually struck her. Defendant pressed his fingers onto the victim's windpipe and squeezed her neck to prevent her from breathing. Defendant put his hand on the victim's nose and mouth, and he put two or three fingers down the victim's throat. The victim could not breathe; she thought she was going to die. Defendant put a pillow on the victim's face and squeezed; she kept asking him to stop and tried to push him away from her but was not strong enough to do so.

Defendant wanted the victim to look for a piece of lingerie he had bought her. The victim found the top part of the lingerie, and defendant hit her because she was unable to find the bottom. The victim put on the top part of the lingerie, but defendant nonetheless continued to hit her. Defendant put the victim in a headlock; she then bit his finger to try to get away from him. Defendant's finger started to bleed, and he had to look for a towel. When defendant went to the bathroom, the victim ran out of the side door of the house and across the street to a neighbor's house. The victim knocked on the neighbor's front door and yelled for help. Because no one answered the door, the victim ran toward the backyard. While the victim was at the side of the neighbor's house, she saw defendant come outside; defendant told someone over the phone that his finger was bleeding, a "crazy girl" attacked him, he needed help, and he was dying. The neighbor testified that he went to the front door and no one was there, but he found the victim, who was "nude from about the middle of her back down," inside his enclosed back porch. The neighbor called 911.

#### DEFENDANT'S TESTIMONY

Defendant's version of events differed from the victim's version of events, as they disagreed about whether the sexual relations that they had on the night in question were consensual and whether defendant caused the victim's numerous physical injuries. Defendant testified that the victim called him a "bitch" and that this upset him. Defendant testified that, after the victim called him this, he asked the victim whether she wanted to have sexual relations and she agreed. Defendant admitted that he asked the victim to dress in lingerie and that she did so. Defendant testified that they had consensual sex and that he did not assault the victim. Defendant testified that, after they had sexual relations, he was still bothered that the victim called him a "bitch" and he decided to leave her, so he began to pack his belongings. Defendant claimed that the victim was upset that he was leaving her, and she began slapping and choking herself while yelling, screaming, and pushing defendant. He further claimed that he went out the front door of the residence because he thought the victim was going to retrieve a gun to kill him or herself.

#### FIRST-RESPONDER TESTIMONY

Deputy Che McNeary of the Oakland County Sheriff's Office testified that when he arrived on scene at about 2:30 a.m., he saw defendant lying face-down on the driveway, wearing only his underwear. Defendant was talking to the emergency-dispatch operator on a cell phone that was lying on the ground next to him. Deputy McNeary testified that defendant was screaming and

yelling that his girlfriend had bitten his finger. Deputy McNeary asked defendant why he was lying face-down on the ground, to which defendant replied that he wanted the deputy to handcuff him. Although Deputy McNeary told defendant that he was unaware that defendant had done anything wrong, defendant insisted that he was giving himself up to police. Deputy McNeary therefore placed defendant in the back of his patrol car. The victim then emerged from the neighbor's porch, yelling that defendant had assaulted her. Police witnesses testified that the victim appeared to be crying, shaking, scared, and embarrassed by her state of undress. Deputy Donald Greenwald testified that the victim was "extremely distraught" and "crying hysterically." He testified that the victim claimed to have been punched in the head several times, and complained that her head was hurting. A deputy took the victim inside the house and she put on some clothes. One of the responding paramedics testified that he examined the victim on scene and that she appeared "very upset," "scared," and "kind of frantic." The victim told the paramedic that she had been punched in the head and that she had been sexually assaulted. Without objection by defense counsel, the trial court admitted into evidence the fire department report which stated:

PT [patient] stated that she was assaulted by her significant other and claimed that he punched her in the back and the head. PT further stated that she was forced to have sexual intercourse with significant other as well. Physical assessment found no obvious signs of injury, however, PT was visibly scared and upset.

The victim asked to go to the hospital for further treatment, and the paramedics transported her to the emergency room.

#### DR. NAKAHODL'S TESTIMONY

The victim arrived at Crittenton Hospital at 3:30 a.m. Dr. Katia Nakahodl, an emergency-room physician, testified at trial as an expert witness in the field of emergency medicine. Dr. Nakahodl treated the victim in the emergency room. Consistent with her standard practice when treating patients, Dr. Nakahodl asked the victim what occurred to determine the appropriate medical treatment. In this case, the victim was "crying" and "hysterical," with an elevated heart rate, and it took Dr. Nakahodl 20 to 30 minutes to calm her down enough to be able to ask the victim what had happened.

Dr. Nakahodl explained that, once she calmed down, the victim conveyed to her what happened that night, so she could "get an idea of what we would need to focus on in terms of assessing her,

you know, with x-rays or imaging and things like that, and what we needed to examine physically." Without objection by defense counsel, Dr. Nakahodl testified that the victim told her the following:

[S]he basically said that she was assaulted by her fiancé; that he had come into her room and woke her up. I think—I think he woke her up by—by punching her, punched her multiple times, and then forced her to have vaginal intercourse. I mean, yeah, and then he punched her in the face, punched her in the mouth. This kind of went on and on. He then made her stand in the kitchen. I remember this clearly. He had gotten her some lingerie from three years ago, and he forced her to put it on, and stand under the kitchen light just, like, with the lingerie on, and apparently he thought that the strings were placed incorrectly, so then he flew into another rage. I think he pushed her down. With her hands behind her back, I think he started punching her in the back at that point. He then was dragging her around the house, kind of berating her, punching or kicking her. I know that this went on—it sounds like it went on for a couple of hours. And then, finally, she was able to—I think [sic] her in a headlock, she bit his finger, and then it startled him, and that she was able to finally get away.

Dr. Nakahodl also testified that the victim appeared to feel "devastated" and "ashamed" by what happened, and that the victim was "blaming herself" because she had not told anyone that defendant had been abusing her for several months.

After hearing the victim's account of how she incurred her injuries, Dr. Nakahodl then performed a physical examination of the victim. She discovered that the victim had bruising on the left side of her face and jaw; there was a linear, superficial abrasion on her neck; there were red marks that looked like finger marks on the front part of her neck and right upper arm; there were bruises over her knees, lower legs, left elbow, left side of her neck, and upper back. In summary, Dr. Nakahodl testified that there were multiple contusions and abrasions all over the victim's body. In addition, Dr. Nakahodl observed that the victim had spasms in her upper back, and she testified that such spasms can occur when a patient has been punched. Dr. Nakahodl performed imaging of the victim's head, facial bones, neck, and spine. A CAT scan showed soft-tissue swelling on the left frontal scalp, and Dr. Nakahodl testified that such swelling can occur when a patient has been punched.

#### DR. NAKAHODL'S WRITTEN REPORT

At the end of Dr. Nakahodl's testimony, the prosecutor sought to admit the doctor's written medical report into evidence. Defense counsel objected to the admission of the report, arguing that no foundation had been laid to indicate that the victim's statements in the doctor's report were made during the course of medical treatment or were necessary for such treatment. The trial court overruled defendant's objection, ruling that the prosecutor had laid the proper foundation for the admission of the report because she established that the victim's statements to the doctor were made for the purpose of obtaining medical treatment.

#### NURSE ZALECKI-BERTALAN'S TESTIMONY AND WRITTEN REPORT

Once the victim was released from the emergency room, the police transported the victim to see Diane Zalecki- Bertalan, a sexual-assault-nurse examiner. Zalecki-Bertalan testified at trial as an expert witness in the fields of forensic nursing and strangulation. Consistent with her standard practice when performing sexual-assault examinations, Zalecki-Bertalan asked the victim demographic information, contact information, and obtained a medical history before asking her what occurred during the assault. Zalecki-Bertalan testified that the purpose of obtaining a patient's narrative is to determine how to conduct the physical examination, such as knowing where to look for signs of injury and collecting evidence. Zalecki-Bertalan testified that she uses a patient's narrative to understand the patient's injuries, treat those injuries, create a future treatment plan, and implement safety planning.

In addition to testifying regarding her recollection of the victim's treatment, Zalecki-Bertalan read the following from her medical report:

[The victim] indicated that she had been sleeping, and she said that the assailant had been drinking. She said she was aware of things in and out. And she remembered him being on the phone and talking to himself. He opened the door. "He made me take off my clothes. He pulled my hair, slapping me. Kept pulling my hair. He put his hand over my mouth. I couldn't breathe or talk." And that's — "And then he put his fingers down throat. He kept saying, 'I love you,' and then he would hit me. He started having sex," and I would have said tell me more about that, "and penis in vagina on top of me. I went along because I was afraid. He made me do oral sex, his penis in my mouth. He then made me go in the corner with my hands behind my back on my knees, and he said, 'If you move, I'll hurt—hit you.' Then, he made me leave the room. He made me

put on lingerie. I was in the kitchen. The hits got harder in my head. We got in the living room, and he dragged me by the hair, punched me in the face. It got worse, the hitting. He dragged me to the kitchen. I bit his finger. There was blood. He called 9-1-1. I went into the shed. The police came."

After obtaining that general narrative, Zalecki-Bertalan asked the victim whether she had been strangled. The victim told her that defendant kept putting his hands around her neck and exerting pressure so that she could neither speak nor breathe. The victim said that defendant put a pillow over her mouth and nose, and she thought she was going to die. Zalecki-Bertalan examined the victim's head to investigate the claims of strangulation, and observed bruises and abrasions on the victim's face, neck, jaw, and scalp. In addition, she observed that the victim's eyes were swollen. The victim reported dizziness with headache and throat pain, and Zalecki-Bertalan noted that the victim's voice was raspy. As a result of the victim's disclosures, Zalecki-Bertalan conducted a pregnancy test, which was negative. Zalecki-Bertalan also obtained a urine specimen, which was bloody. Zalecki-Bertalan provided the victim with information regarding treatment for sexually transmitted infection, as well as advice regarding her strangulation injuries.

*People v. Koryal*, No. 343794, 2019 Mich. App. LEXIS 5090, 2017 WL 4126571 (Mich. Ct. App., Aug. 29, 2019). See Appendix E. Petitioner's conviction was affirmed on appeal. See *id.*; lv. den. 505 Mich. 978, 937 N.W.2d 675 (Mich. 2020). See Appendix D.

Mr. Koryal subsequently filed a petition for writ of habeas corpus in the United States District Court for the Eastern District of Michigan, which is the subject of the instant petition for certiorari. The district court had jurisdiction over this habeas proceeding under 28 U.S.C. § 2254. Mr. Koryal's petition raised the following ground for relief: (I.) Petitioner was denied his due process right to a fair trial guaranteed by the united states constitution, Am XIV; where the trial court abused its discretion by permitting Dr. Katia Nakahodl and Diane Zalecki-Bertalan to offer evidence that was not reasonably related to medical diagnosis and treatment. See Appendix F. On August 12, 2020, the district court summarily dismissed Mr. Koryal's petition for writ of

habeas corpus, denied certificate of appealability, and denied leave to proceed *in forma pauperis* on appeal. See Appendix C.

Mr. Koryal timely filed a Notice of Appeal to the United States Court of Appeals for the Sixth Circuit. On March 8, 2021, the Sixth Circuit denied Mr. Koryal's request for a certificate of appealability. See Appendix A.

Mr. Koryal asserts that he is entitled to proceed on appeal to the United States Court of Appeals for the Sixth Circuit with respect to the claim raised his habeas petition, and he petitions this Court for permission to do so.

### **REASONS FOR GRANTING THE WRIT**

#### **I. THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN AND THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT ERRONEOUSLY DENIED MR. KORYAL'S REQUEST FOR A CERTIFICATE OF APPEALABILITY IN THIS HABEAS CORPUS CASE WHERE JURISTS OF REASON COULD CLEARLY DEBATE WHETHER KORYAL'S CONSTITUTIONAL RIGHTS WERE VIOLATED.**

Mr. Koryal raised one ground for relief in his petition for writ of habeas corpus in the district court. Mr. Koryal has made a substantial showing of the denial of a constitutional right, as required by 28 U.S.C. § 2253(c)(2), with respect to the ground raised in the habeas petition, which alleges that: (I.) Petitioner was denied his due process right to a fair trial guaranteed by the united states constitution, Am XIV; where the trial court abused its discretion by permitting Dr. Katia Nakahodl and Diane Zalecki-Bertalan to offer evidence that was not reasonably related to medical diagnosis and treatment.

Prior to the effective date of the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat 1214, a certificate of probable cause was required before an appeal from a federal district court order could be taken in habeas cases. In order to

obtain a certificate of probable cause a petitioner was required to make a “substantial showing of the denial of (a) federal right” *Barefoot v. Estelle*, 463 U.S. 880, 103 S. Ct. 3383, 77 L. Ed. 2d 1090 (1983). Under *Barefoot*, all doubts are to be resolved in favor of the petitioner in making this determination. *Barefoot, supra*, 463 U.S. at 893, n. 4. The probable cause standard in this context was intended to be a low hurdle to surmount, and has been noted to require only “something more than the absence of frivolity.” *Barefoot, supra*, 463 U.S. at 893.

Obviously, Mr. Koryal is not required to show that he should prevail on the merits as in every case where a certificate of appealability is requested the district court has made a determination against the petitioner on the merits.

Under *Barefoot*, this Court has instructed that the certificate should be issued when a petitioner shows that “the issues are debatable among jurists of reason,” or “a court could resolve the issues in a different manner,” or “the issues are adequate to deserve encouragement to proceed further,” or the issues are not “squarely foreclosed by statute, rule or authoritative court decision or [not] lacking any factual basis in the record.” *Barefoot, supra*, 463 U.S. at 894.

While *Barefoot, supra*, was obviously issued when the required certificate was one of probable cause, this Court, along with several circuits, has held that there is no real change from the showing required for a certificate of probable cause now that the required certificate is one of appealability under the AEDPA. *Slack v. McDaniel*, 529 U.S. 473, 483-484, 120 S.Ct. 1595, 146 L.Ed.2d 542 (2000). See also *Reyes v. Keane*, 90 F.3d 676 (2<sup>nd</sup> Cir. 1996). In fact, the intent of Congress in this respect when passing the AEDPA was to codify the *Barefoot* standard. *Slack v. McDaniel, supra*, 120 S.Ct. at 1603; *Lennox v. Evans*, 87 F.3d 431 (10<sup>th</sup> Cir. 1996); *Lyons v. Ohio Adult Parole Authority*, 105 F.3d 1063 (6<sup>th</sup> Cir. 1997) (noting that “the AEDPA merely codifies the *Barefoot* standard” and that the only difference in the statutory language is an applicant



seeking a certificate of appealability must make “a substantial showing of the denial of a constitutional right.”) (emphasis added).

In *Miller-El v. Cockrell*, 537 U.S. 322, 336, 340, 123 S. Ct. 1029, 154 L. Ed. 2d 931 (2003), this Court reaffirmed its prior holding in *Slack* when it stressed that the AEDPA’s section 2253(c) “codified our standard, announced in *Barefoot v. Estelle* [ ], for determining what constitutes the requisite showing [for obtaining leave to appeal a district court’s denial of habeas corpus relief]. Under the controlling standard, a petitioner must ‘sho[w] that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner’ or that the issues presented were ‘adequate to deserve encouragement to proceed further.’” *Miller-El, supra*. This Court further stressed in *Miller-El* that the standard for a certificate of appealability is “much less stringent” than the standard for success on the merits, and that petitioners need not show that they are likely to succeed on appeal or that any reasonable jurist would, after hearing the appeal, rule in their favor. *Id.* Rather, the petitioner need only show that “reasonable jurists would find the district court’s assessment of the constitutional claims debatable or wrong. *Id.*

A fair review of the issue that Mr. Koryal raised in his habeas petition (see Appendix F), demonstrates that the claim raised in the habeas proceedings below are substantial in that reasonable jurists could, at the very least, debate whether the ground raised in the habeas petition should have been resolved in a different manner by the district court judge.

Rather than reiterate argument in the district court pleadings below, Mr. Koryal will, for the most part, rely on the arguments he raised in his habeas petition (see Appendix F), incorporated here by reference, in support of his position that the issue raised in the habeas proceedings is adequate to deserve encouragement to proceed further on appeal.

However, in addition to these arguments, Mr. Koryal would strongly emphasize that the district court's Opinion, Order and Judgment summarily dismissing Mr. Koryal's petition for writ of habeas corpus, denying certificate of appealability, and denying leave to proceed *in forma pauperis* on appeal. was based, in large part, upon the findings of fact made by the Michigan Court of Appeals. (See Appendix E). Like that last reasoned state court decision, the district court's Opinion, Order and Judgment did not and could not in its cursory Rule 4 dismissal consider or review facts favorable to the petitioner's claims. See *Burden v. Zant*, 498 U.S. 433 (1991) (finding lower court erred in failing to apply presumption of correctness to facts favorable to petitioner where finding or stating facts favorable to the petitioner).

Moreover, sua sponte dismissal of habeas actions is appropriate only when the petition presents obviously untenable arguments that further factual development, legal explication, or the assistance of counsel cannot make tenable. *Cuadra v. Sullivan*, 837 F.2d 56, 58–59 (2nd Cir. 1988); *Williams v. Kullman*, 722 F.2d 1048, 1050 (2d Cir. 1983). In *Blackledge v. Allison*, 431 U.S. 63 (1977); the Supreme Court held that “the critical question” which must be answered affirmatively to justify summary dismissal is whether the “allegations, when viewed against the record [available to the court are] so ‘palpably incredible,’ so ‘patently frivolous or false,’ as to warrant summary dismissal.” See also, *Machibroda v. United States*, 368 U.S. 487, 495 (1962); *Pennsylvania ex rel. Herman v. Claudy*, 350 U.S. 116, 119 (1956)).

For the “palpably incredible” and “patently frivolous” standard to be met, the petition's legal argument must be wholly foreclosed by prior precedent or wholly unreasonable. *Norman v. McCotter*, 765 F.2d 504, 509 (5th Cir. 1985).

Additionally, pro se petitions are held to a less stringent summary dismissal standard than petitions filed by counsel. *Brown v. Roe*, 279 F.3d 742, 745–46 (9th Cir. 2002). Accordingly, the

courts have viewed pro se habeas corpus petitions and analogous pleadings “with the greatest liberality” in deciding whether or not to dismiss them summarily. *Estelle v. Gamble*, 429 U.S. 97, at 106 (1976).

Unless patently false, the facts alleged in the petition must be presumed to be true for summary dismissal purposes. *Blackledge v. Allison*, 431 U.S. 63, 76 (1977); *Walton v. Johnson*, 407 F.3d 285, 295 (4<sup>th</sup> Cir. 2005) (district court’s grant of summary judgment “cannot stand because ... the court resolved a factual dispute in favor of the Government” rather than following rule that “truth of the facts alleged in Walton’s petition” must be “assume[d]”). If the facts alleged “point to a ‘real possibility of constitutional error,’” summary dismissal is not appropriate. *Blackledge*, 431 U.S. at 75 n.7 (quoting Advisory Committee Note to Rule 4 of the Rules Governing Section 2254 Cases in the United States District Courts [summary dismissal should not occur in a fact-dependent case until the state makes all the relevant records {including “transcripts, sentencing records, and copies of state court opinions”} available to the court pursuant to Habeas Rule 5]). Consequently, summary dismissal generally is inappropriate in fact-bound cases until the court carefully examines all state court opinions, transcripts of state court hearings, and other records relevant to the petition.

#### **Facts At-Issue:**

This case involves allegations by his fiancée Chanel Cholagh that Petitioner Freddie Phillip Koryal raped and assaulted her. Whereas, Mr. Koryal’s trial testimony was that he and his fiancée had consensual sex, Ms. Cholagh assaulted him not limited to biting his pinkie drawing blood, had assaulted him in the past and that Ms. Cholagh’s injuries were self-inflicted when she became upset that Mr. Koryal was leaving her. (See Appendix E.)

### **Favorable Facts not Considered or Reviewed:**

The following facts favorable to Petitioner's claim was not considered or reviewed by the state courts and district court: (1) Paramedic David Kopko did not notice any obvious injuries to Ms. Cholagh at the scene (TR I at 209-210)<sup>1</sup>; (2) Ms. Cholagh had assaulted Petitioner in the past (TR III at 101-103); (3) Petitioner called 911 emergency services stating that his girlfriend (Shanel Cholagh) had bit his finger drawing blood (TR I at 171-175); and Ms. Cholagh told Dr. Nakahodl that Petitioner punched her in the face & mouth repeatedly (TR III at 44) Dr. Nakahodl indicated that Ms. Cholagh had some bruising on the left side of her face (TR III at 30), agreed that if somebody was punched in the face 20 times by somebody wearing rings on their fingers, she would expect to see marks if the ring made contact with the face, the doctor identified the rings on Mr. Koryal's right hand (TR III at 37).

In failing to consider or review the above facts favorable to Petitioner, the Michigan Court of Appeals, district court and for that matter the Sixth Circuit Court of Appeals adopted the rationale that Petitioner was not denied a fair trial where it was determined that Dr. Katia Nakahodl and Diane Zalecki-Bertalan's Hearsay Testimonial Evidence of Shanel Cholagh was reasonably related to diagnosis and treatment of Shanel Cholagh.

The problem with this rationale is that it is based on mistaken facts limited to those that may tend to indicate that Chloagh's statements were reasonably necessary for medical diagnosis and treatment under Mich. R. Evid. 803(4) and thus, non-testimonial; where a fair reading of the complete record that bears the presumption of correctness to facts favorable to both the state and Petitioner (*Burden v. Zant, supra* and *Blackledge v. Allison, supra*), indicate that Shanel Cholagh's statements were testimonial in both nature and context.

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<sup>1</sup> All references to "TR I" in this Petition are as to Appendix G; "TR II" are as to Appendix H; and "TR III" are as to Appendix I.

More importantly, the failure to consider or review facts in the complete Habeas Rule 5 record precludes review of the totality of the circumstances. *Idaho v. Wright*, 497 U.S. 805 (1990).

So, any finding from an incomplete record that Shanel Cholagh's statements reiterated by Nakahodl or Zalecki Beertalan were non-testimonial or were reasonably necessary for medical diagnosis and treatment is speculative and in error. *Idaho v. Wright, supra*.

**Petitioner was Denied his Right to a Fair Trial Where the Trial Court Abused its Discretion by Permitting Dr. Katia Nakahodl and Diane Zalecki-Bertalan to Offer Hearsay Testimonial Evidence That was not Reasonably Related to Diagnosis and Treatment of Shanel Cholagh.**

The provisions of Mich. R. Evid. 803(4) permit the admission of statements made for purposes of medical treatment or medical diagnosis in connection with treatment. There are two rationales for the rule: (1) the patient's statements are likely to be reliable because the patient has a strong motivation to tell the truth since diagnosis and treatment depend, in large part, on what the patient says to the doctor; and (2) facts which are reliable enough to serve as a basis for medical diagnosis are also reliable enough to be an exception to the hearsay rule. *Morrow v Bofferding*, 458 Mich 617, 630; 581 NW2d 696 (1998).

If a test is adopted which required such statements to be "reasonably pertinent" to diagnosis or treatment before they are admissible, a two-part test should be applied: (1) the declarant's motive must be consistent with the purposes of the rule; and (2) it must be reasonable for the doctor to rely on the information in diagnosis and treatment. *People v. Wilkins*, 134 Mich. App. 39 (1984).

In order to determine whether a sexual abuse victim's statements to a sexual assault nurse examiner (SANE) are testimonial, the reviewing court must consider the totality of the

circumstances and determine whether they would lead an objective witness to reasonably believe that the complainant's statements would be available for use in a later prosecution or that the primary purpose of the SANE's questioning was to establish past events potentially relevant to a later prosecution rather than to meet an ongoing emergency. (The Court listed some of the facts considered by courts of other states). The trial court erred by making its admissibility determination based solely on the forensic form completed by the SANE, and failing to consider whether the circumstances indicated that the statements were testimonial. *People v. Spangler*, 285 Mich. App. 136 (2009).

Likewise, a statement made to an examining physician created error as there were insufficient particularized guarantees of trustworthiness under the totality of the circumstances. The presence of corroborating circumstances is not relevant to trustworthiness, but only to a harmless error analysis. *Idaho v. Wright*, 497 U.S. 805 (1990).

Had the following facts favorable to Petitioner's claim been considered or reviewed by the state courts and district court [(1) Paramedic David Kopko did not notice any obvious injuries to Ms. Cholagh at the scene (TR I at 209-210); (2) Ms. Cholagh had assaulted Petitioner in the past (TR III at 101-103); (3) Petitioner called 911 emergency services stating that his girlfriend (Shanel Cholagh) had bit his finger drawing blood (TR I at 171-175); and Ms. Cholagh told Dr. Nakahodl that Petitioner punched her in the face & mouth repeatedly (TR III at 44) Dr. Nakahodl indicated that Ms. Cholagh had some bruising on the left side of her face (TR III at 30), agreed that if somebody was punched in the face 20 times by somebody wearing rings on their fingers, she would expect to see marks if the ring made contact with the face, the doctor identified the rings on Mr. Koryal's right hand (TR III at 37).]; the totality of circumstances would have clearly drawn into question Ms. Cholagh's motive and trustworthiness in her

statements to Dr. Nakahodl and SANE Zalecki-Bertalan. *Merrow, supra, Wilkins, supra, Spangler, supra* and *Idaho v Wright, supra*.

Specifically, Ms. Cholagh's statements to Dr. Nakahodl and SANE Zalecki-Bertalan inconsistent to her wounds demonstrate motive and intent outside the scope of seeking medical treatment; to avoid prosecution for her assault on Petitioner and revenge against Petitioner for attempting to leave her. In an obvious credibility contest between Petitioner and Ms. Cholagh the ruling bolstered Cholagh's hearsay testimonial version of events told through medical experts; as such, the ruling was especially egregious resulting in denial of fundamental fairness violating due process warranting habeas relief. *Wilson v. Sheldon*, 874 F.3d 470, 475 (6<sup>th</sup> Cir. 2017) (citing *Bugh v. Mitchell*, 329 F.3d 496, 512 (6<sup>th</sup> Cir. 2003)), Examination of the totality of circumstances move Cholagh's statements Dr. Nakahodl and SANE Zalecki-Bertalan into the realm of testimonial; thus denying Petitioner a fair trial under the XIV Amendment to the United States Constitution. *Merrow, supra, Wilkins, supra, Spangler, supra* and *Idaho v Wright, supra*.

For all of the above reasons and light of the erroneous findings of fact that were utilized by the state courts, Petitioner contends that reasonable jurists could conclude that the decision of the Michigan Court of Appeals affirming Mr. Koryal's convictions "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." *Id.* § 2254(d)(2). As such, to the extent that the district court judge relied on the Michigan Court of Appeals' erroneous findings of fact in denying the issue raised in Mr. Koryal's habeas petition, Petitioner strongly suggests that "reasonable jurists could debate whether the petition should have been resolved in a different manner" or that the issue presented were "adequate to deserve encouragement to proceed further" on appeal. *See Miller-El, supra*.

Mr. Koryal would strongly urge that the decisions of the district court and Sixth Circuit Court of Appeals in declining to issue a certificate of appealability in this instance, with respect to the claim raised in the habeas petition, was such a departure from the accepted and usual course of judicial proceedings as to call for this Court's supervisory power to intervene in the matter because the pertinent question—to wit, whether the Michigan Court of Appeals' decision affirming Mr. Koryal's convictions "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding"—is clearly and unequivocally debatable among reasonable jurists, a court *could* resolve this issue in a different manner, the issue is not lacking *any* factual basis in the record, and, ultimately, the issue deserves encouragement to proceed further.

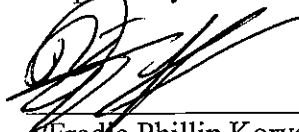
The denial of a certificate of appealability here would effectively preclude appellate review in relation to the ground raised in the habeas corpus petition, despite the fact that the claim raised in the habeas petition deserve encouragement to proceed further on appeal. The requirement of a certificate of appealability is designed to bar frivolous appeals, not to preclude appellate review of cases involving substantial issues. *See Moore's Federal Practice* (2d Ed), § 220.03. Nonetheless, that is just what has happened here; substantial issues are being passed upon without the benefit of full appellate review. A fair review of the record in this case clearly demonstrates that a certificate of appealability should issue with respect to the claim raised and that the decisions of the district court and Sixth Circuit Court of Appeals declining to issue the same without benefit of full review of Habeas Rule 5 materials were an extraordinary departure from the accepted and usual course of judicial proceedings in these types of cases.



### CONCLUSION

WHEREFORE, for the foregoing reasons, Petitioner Koryal respectfully asks this Honorable Court to grant certiorari in this case and remand this matter to the United States Court of Appeals for the Sixth Circuit for full appellate review of the issue that was raised in Koryal's petition for writ of habeas corpus that this Court determines has met the appropriate standard for full appellate review.

Respectfully Submitted,



Date: 6/4/21

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