DOCKET NO: _____

SUPREME COURT OF THE UNITED STATES

MATTHEW MOORE,

Petitioner,

vs.

THOMAS MACKIE,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

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MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

NOW COMES Defendant-Petitioner, MATTHEW MOORE , by and through his attorney, RICHARD D. KORN, and respectfully moves this Honorable Court, pursuant to Rule 39 of the Rules of the Supreme Court of the United States, for leave to file the attached Petition for a Writ of Certiorari without prepayment of costs, and to proceed *in forma pauperis*, and in support of this motion states as follows:

1. Defendant-Petitioner is indigent and was represented in the United States District Court for the Eastern District of Michigan, and in the United States Court of Appeals for the Sixth Circuit, by counsel appointed under the Criminal Justice Act, 18 U.S.C. § 3006A.

2. Prior to Counsel's appointment by the United States District Court for the Eastern District of Michigan, Defendant-Petitioner filed numerous *pro se* pleadings in the State trial and appellate courts, some of which may have sought leave to proceed *in forma pauperis*. Some of these requests may have been denied for procedural reasons unrelated to Defendant-Petitioner's indigence. Counsel is unaware of any court, state or federal, having entered a finding that Defendant-Petitioner was not indigent.

Wherefore, Defendant-Petitioner respectfully moves this Honorable Court to grant leave to file the attached Petition for a Writ of Certiorari without prepayment of costs and to proceed *in forma pauperis*.

Dated: 02-28-22

Respectfully submitted,

s/Richard D. Korn
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QUESTIONS PRESENTED FOR REVIEW

QUESTION I

WAS DEFENDANT-PETITIONER DENIED EFFECTIVE ASSISTANCE OF COUNSEL AND UNCONSTITUTIONALLY COERCED INTO TAKING A PATERNITY BLOOD TEST IN JUVENILE COURT THAT RESULTED IN HIS CONVICTION OF CRIMINAL SEXUAL CONDUCT IN THE FIRST DEGREE IN THE WAYNE COUNTY CIRCUIT COURT AND A SENTENCE OF IMPRISONMENT OF TWENTY TO FORTY YEARS, IN VIOLATION OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION?

QUESTION II

WAS DEFENDANT-PETITIONER DENIED HIS SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL DURING THE PLEA PROCEEDINGS IN THE WAYNE COUNTY CIRCUIT COURT AND ON APPEAL IN THE MICHIGAN COURT OF APPEALS?

QUESTION III

DID THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT UNLAWFULLY DEPRIVE DEFENDANT-PETITIONER APPELLATE REVIEW OF THE DISTRICT COURT'S DENIAL OF HIS PETITION FOR A WRIT OF HABEAS CORPUS, FILED IN ACCORDANCE WITH 28 U.S.C. § 2254, BY ERRONEOUSLY DENYING HIS MOTION FOR A CERTIFICATE OF APPEALABILITY?

LIST OF ALL PROCEEDINGS IN STATE AND FEDERAL TRIAL AND APPELLATE COURTS RELATED TO THE CASE

United States District Court for the Eastern District of Michigan:

Matthew Moore v. Thomas Mackie

Docket No. 16-10874

Opinion and Order Denying Petition for Writ of Habeas Corpus Entered: February 8, 2021

Amended Opinion and Order Entered: April 16, 2021

United States Court of Appeals for the Sixth Circuit:

Matthew Moore v. Les Parish, Warden

Docket No. 21-1259

Order Denying Certificate of Appealability Entered: November 29, 2021

Wayne County Circuit Court

People of the State of Michigan v. Matthew Moore

Case No. 11-12535

Judgment of Conviction and Sentence Entered: March 26, 2012

Opinion and Order Denying Motion for Relief from Judgment Entered: May 23, 2014

Michigan Court of Appeals

People of the State of Michigan v. Matthew Moore

Docket No. 310823

Order Denying Delayed Application for Leave to Appeal
Entered: October 25, 2012

Docket No. 324618

Order Denying Delayed Application for Leave to Appeal
Entered: December 29, 2014

Order Denying Motion for Reconsideration Entered: February 17, 2015

Michigan Supreme Court

People of the State of Michigan v. Matthew Moore

Docket No. 146393

Order Denying Application for Leave to Appeal Entered: April 1, 2013

Order Denying Motion for Reconsideration Entered: September 3, 2013

Docket No. 151406

Order Denying Application for Leave to Appeal Entered: December 22, 2015

Wayne County Juvenile Court

In re Davis, Mcgee, and Moore, Minors

Case Nos. 11-501042 and 11-501-043

Order Terminating Parental Rights Entered: February 10, 2012

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D. Petitioner's Motion for Reconsideration and Amendment of Judgment - United States District Court for the Eastern District of Michigan - Filed February 22, 2021 - *Matthew Moore v. Thomas Mackie*, Docket No. 16-10874, ECF No. 58, Page 1-7, Page ID No. 1392-1398

E. Opinion and Order Entered by the Honorable Linda V. Parker of the United States District Court for the Eastern District of Michigan Granting in Part and Denying in Part Motion for Reconsideration, and Denying as Moot Motion for Stay and Abeyance - Filed April 16, 2021 - *Matthew Moore v. Thomas Mackie*, Docket No. 16-10874, ECF No. 62, Pages 1- 5, Page ID Nos. 1420 - 1424

F. Wayne County Circuit Court Judgment of Conviction and Sentence - Entered March 26, 2012 in Case No. 11-12535 - *Matthew Moore v. Thomas Mackie*, Docket No. 16-10874, ECF No. 12-8, Page 16, Page ID No. 361

G. Order of the Michigan Court of Appeals Denying Petitioner's Delayed Application for Leave to Appeal Plea-Based Conviction of Criminal Sexual Conduct entered October 25, 2012, Docket No. 310823, Page 1, *Matthew Moore v. Thomas Mackie*, Docket No. 16-10874, ECF No. 12-8, Page 1, Page ID No. 346

H. Order of the Michigan Supreme Court, entered April 1, 2013, Docket No. 146393, Denying Application for Leave to Appeal Michigan Court of Appeals October 25, 2012 Order Denying Petitioner's Delayed Application for Leave to Appeal Plea-Based Conviction of Criminal Sexual Conduct, Page 1, *Matthew Moore v. Thomas Mackie*, Docket No. 16-10874, ECF No. 12-9, Page 1, Page ID No. 367

I. Order of Michigan Supreme Court entered September 3, 2013, Docket No. 146393, Denying Motion for Reconsideration of Michigan Supreme Court Order entered April 1, 2013

J. Petitioner's *Pro Se* Motion for Relief from Judgment filed pursuant to M.C.R. § 6.500 in Wayne County Circuit Court on February 19, 2014 in Case No. 11-12535 - Pages 1-2, 36, *Matthew Moore v. Thomas Mackie*, Docket No. 16-10874, ECF No. 12-5, Pages 1-2, 36, Page ID Nos. 179-180, 214 (highlight added)

K. Petitioner's *Pro Se* Supplemental Brief to Motion for Relief from Judgment filed pursuant to M.C.R. § 6.500 in Wayne County Circuit Court on February 19, 2014 in Case No. 11-12535 - Pages 5,13, *Matthew Moore v. Thomas Mackie*, Docket No. 16-10874, ECF No. 12-6, Pages 5,13, Page ID Nos. 264, 272 (highlight added)

L. Opinion and Order Denying Petitioner's *Pro Se* Motion for Relief from Judgment filed pursuant to M.C.R. § 6.500, entered by the Honorable Patricia P. Fresard of the Wayne County Circuit Court on May 23, 2014 in Case No. 11-12535 - *Matthew Moore v. Thomas Mackie*, Docket No. 16-10874, ECF No. 12-7, Pages 1-4, Page ID Nos. 342-345

M. Order of the Michigan Court of Appeals Denying Petitioner's Delayed Application for Leave to Appeal Opinion and Order Denying Petitioner's *Pro Se* Motion for Relief from Judgment filed pursuant to M.C.R. § 6.500, entered December 29, 2014, Docket No. 324618, Page 1, *Matthew Moore v. Thomas Mackie*, Docket No. 16-10874, ECF No. 12-10, Page 1, Page ID No. 460

N. Order of the Michigan Court of Appeals, entered February 17, 2015, Denying Motion for Reconsideration of December 29, 2014 Order Denying Petitioner's Delayed Application for Leave to Appeal Opinion and Order Denying Petitioner's *Pro Se* Motion for Relief from Judgment filed pursuant to M.C.R. § 6.500, Docket No. 324618, Page 1

O. Order of Michigan Supreme Court, entered December 22, 2015, Denying December 29, 2014 Order of the Michigan Court of Appeals Denying Petitioner's Delayed Application for Leave to Appeal Opinion and Order Denying Petitioner's *Pro Se* Motion for Relief from Judgment filed pursuant to M.C.R. § 6.500, entered December 29, 2014

TABLE OF CITED AUTHORITIES

UNITED STATES CONSTITUTION

UNITED STATES SUPREME COURT CASES

UNITED STATES SUPREME COURT CASES (CON'T)

UNITED STATES COURT OF APPEALS CASES

UNITED STATES COURT RULES

UNITED STATES STATUTES

MICHIGAN STATUTES

MICHIGAN COURT RULES

CITATIONS OF LOWER COURT OPINIONS AND ORDERS

Petitioner was charged in Wayne County Circuit Court, Case No. 11-12535, with two counts of Criminal Sexual Conduct in the First Degree, M.C.L. § 750.520b(1). On February 16, 2012 Petitioner pled guilty to one count of Criminal Sexual Conduct in the First Degree in accordance with a written plea agreement that contained a sentence agreement of 20 to 40 years in prison. On March 16, 2012, the trial court imposed upon Petitioner the agreed upon sentence of a minimum of 20 years to a maximum of 40 years in prison. On June 15, 2012, Petitioner filed a Delayed Application for Leave to Appeal with the Michigan Court of Appeals, Docket No. 310823, challenging his plea based conviction solely on competency and allocution grounds, which was denied in an Order entered October 25, 2012. Petitioner then filed an Application for Leave to Appeal with the Michigan Supreme Court, Michigan Supreme Court No. 146393, on December 19, 2012, that was denied in an Order entered April 1, 2013. Petitioner's Motion for Reconsideration was denied by the Michigan Supreme Court on September 3, 2013

On February 19, 2014, Petitioner filed a Motion for Relief from Judgment in the Wayne County Circuit Court pursuant to M.C.R. § 6.500 et seq. An Order denying Petitioner's Motion for Relief from Judgment was entered by the Honorable Patricia P. Fresard on May 23, 2014. Petitioner filed a Delayed Application for Leave to Appeal with the Michigan Court of Appeals, Docket No. 324618, that was denied in an Order entered December 29, 2014. Petitioner filed a Motion for Reconsideration

with the Michigan Court of Appeals. The Motion for Reconsideration was denied on February 17, 2015. Petitioner filed an Application for Leave to Appeal with the Michigan Supreme Court, Michigan Supreme Court No. 151406, on April 13, 2015. The Application for Leave to Appeal was denied in an Order entered by the Michigan Supreme Court on December 22, 2015.

Petitioner filed a timely Application for a Writ of Habeas Corpus in the United States District Court for the Eastern District of Michigan on March 8, 2016. On February 8, 2021, the Honorable Linda V. Parker entered an Opinion and Order Denying Petition for Writ of Habeas Corpus, Denying Request for an Evidentiary Hearing, Denying Certificate of Appealability, and Denying Leave to Appeal *In Forma Pauperis* (Case No.16-10874, ECF No. 55, Pages 1-23, Page ID Nos. 1360-1382). Petitioner filed a Motion for Reconsideration and Amendment of Judgment on February 22, 2021 (Case No.16-10874, ECF No. 58, Pages 1-7, Page ID Nos. 1392-1398) requesting that the Court grant Petitioner leave to proceed *in forma pauperis* on appeal and hold the habeas corpus petition in abeyance while Petitioner seeks permission from the state court to file a successive post-conviction motion raising the issue of ineffective assistance of appellate counsel. The Opinion and Order was amended on April 16, 2021to allow Petitioner to proceed *in forma pauperis* on appeal, but the request to hold the habeas corpus petition in abeyance pending the filing of a state post-conviction motion was denied (Opinion and Order Granting in Part and Denying in Part Motion for Reconsideration, Case No.16-10874, ECF No. 62, Pages 1-5, Page ID Nos. 1420-1424). A timely Notice of Appeal had been filed on March 10, 2021

(Notice of Appeal, Case No.16-10874, ECF No. 60, Pages 1-3, Page ID Nos. 1416-1418).

BASIS FOR JURISDICTION IN THIS COURT

A timely Application for a Writ of Habeas Corpus was filed pursuant to 28 U.S.C. § 2254 with the United States District Court for the Eastern District of Michigan. The district court entered an Order and Opinion denying Petitioner a Writ of Habeas Corpus and a Certificate of Appealability. A timely Notice of Appeal was filed, and a Motion for Issuance of a Certificate of Appealability was filed with the United States Court of Appeals for the Sixth Circuit. On November 29, 2021, the United States Court of Appeals for the Sixth Circuit entered an order denying Petitioner a Certificate of Appealability. This Court has jurisdiction to review the Order of the United States Court of Appeals Denying a Certificate of Appealability. *Hahn v. United States*, 524 U.S. 236 (1998); 28 U.S.C. §2254(a); 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS, RULES, AND STATUTES INVOLVED IN THE CASE SET OUT VERBATIM

UNITED STATES CONSTITUTION

Fourth Amendment

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Sixth Amendment

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Fourteenth Amendment

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

FEDERAL STATUTES AND COURT RULES

28 U.S.C. §2254

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.
(b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that--
(A) the applicant has exhausted the remedies available in the courts of the State; or
(B)(i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.
(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.
(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.
(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.
(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--
(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.
(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.
(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that--
(A) the claim relies on--
(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and
(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.
(f) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State

cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.
(g) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.
(h) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel for an applicant who is or becomes financially unable to afford counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.
(i) The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.

Rule 11 of the Rules Governing Section 2254 Cases in United States District Courts

Rule 11. Certificate of Appealability; Time to Appeal

(a) Certificate of Appealability. The district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant. Before entering the final order, the court may direct the parties to submit arguments on whether a certificate should issue. If the court issues a certificate, the court must state the specific issue or issues that satisfy the showing required by 28 U.S.C. § 2253(c)(2). If the court denies a certificate, the parties may not appeal the denial but may seek a certificate from the court of appeals under Federal Rule of Appellate Procedure 22. A motion to reconsider a denial does not extend the time to appeal.
(b) Time to Appeal. Federal Rule of Appellate Procedure 4(a) governs the time to appeal an order entered under these rules. A timely notice of appeal must be filed even if the district court issues a certificate of appealability.

MICHIGAN STATUES AND COURT RULES

M.C.L. § 750.520b

Sec. 520b. (1) A person is guilty of criminal sexual conduct in the first degree if he or she engages in sexual penetration with another person and if any of the following circumstances exists:
(a) That other person is under 13 years of age.
(b) That other person is at least 13 but less than 16 years of age and any of the following:

(i) The actor is a member of the same household as the victim.
(ii) The actor is related to the victim by blood or affinity to the fourth degree.
(iii) The actor is in a position of authority over the victim and used this authority to coerce the victim to submit.
(iv) The actor is a teacher, substitute teacher, or administrator of the public school, nonpublic school, school district, or intermediate school district in which that other person is enrolled.
(v) The actor is an employee or a contractual service provider of the public school, nonpublic school, school district, or intermediate school district in which that other person is enrolled, or is a volunteer who is not a student in any public school or nonpublic school, or is an employee of this state or of a local unit of government of this state or of the United States assigned to provide any service to that public school, nonpublic school, school district, or intermediate school district, and the actor uses his or her employee, contractual, or volunteer status to gain access to, or to establish a relationship with, that other person.
(vi) The actor is an employee, contractual service provider, or volunteer of a child care organization, or a person licensed to operate a foster family home or a foster family group home in which that other person is a resident, and the sexual penetration occurs during the period of that other person's residency. As used in this subparagraph, "child care organization", "foster family home", and "foster family group home" mean those terms as defined in section 1 of 1973 PA 116, MCL 722.111.
(c) Sexual penetration occurs under circumstances involving the commission of any other felony.
(d) The actor is aided or abetted by 1 or more other persons and either of the following circumstances exists:
(i) The actor knows or has reason to know that the victim is mentally incapable, mentally incapacitated, or physically helpless.
(ii) The actor uses force or coercion to accomplish the sexual penetration. Force or coercion includes, but is not limited to, any of the circumstances listed in subdivision (f).
(e) The actor is armed with a weapon or any article used or fashioned in a manner to lead the victim to reasonably believe it to be a weapon.
(f) The actor causes personal injury to the victim and force or coercion is used to accomplish sexual penetration. Force or coercion includes, but is not limited to, any of the following circumstances:
(i) When the actor overcomes the victim through the actual application of physical force or physical violence.
(ii) When the actor coerces the victim to submit by threatening to use force or violence on the victim, and the victim believes that the actor has the present ability to execute these threats.
(iii) When the actor coerces the victim to submit by threatening to retaliate in the future against the victim, or any other person, and the victim believes that the actor

has the ability to execute this threat. As used in this subdivision, "to retaliate" includes threats of physical punishment, kidnapping, or extortion.
(iv) When the actor engages in the medical treatment or examination of the victim in a manner or for purposes that are medically recognized as unethical or unacceptable.
(v) When the actor, through concealment or by the element of surprise, is able to overcome the victim.
(g) The actor causes personal injury to the victim, and the actor knows or has reason to know that the victim is mentally incapable, mentally incapacitated, or physically helpless.
(h) That other person is mentally incapable, mentally disabled, mentally incapacitated, or physically helpless, and any of the following:
(i) The actor is related to the victim by blood or affinity to the fourth degree.
(ii) The actor is in a position of authority over the victim and used this authority to coerce the victim to submit.
(2) Criminal sexual conduct in the first degree is a felony punishable as follows:
(a) Except as provided in subdivisions (b) and (c), by imprisonment for life or for any term of years.
(b) For a violation that is committed by an individual 17 years of age or older against an individual less than 13 years of age by imprisonment for life or any term of years, but not less than 25 years.
(c) For a violation that is committed by an individual 18 years of age or older against an individual less than 13 years of age, by imprisonment for life without the possibility of parole if the person was previously convicted of a violation of this section or section 520c, 520d, 520e, or 520g1 committed against an individual less than 13 years of age or a violation of law of the United States, another state or political subdivision substantially corresponding to a violation of this section or section 520c, 520d, 520e, or 520g committed against an individual less than 13 years of age.
(d) In addition to any other penalty imposed under subdivision (a) or (b), the court shall sentence the defendant to lifetime electronic monitoring under section 520n.2
(3) The court may order a term of imprisonment imposed under this section to be served consecutively to any term of imprisonment imposed for any other criminal offense arising from the same transaction.

M.C.R. § 6.508

Rule 6.508. Procedure; Evidentiary Hearing; Determination

(A) Procedure Generally. If the rules in this subchapter do not prescribe the applicable procedure, the court may proceed in any lawful manner. The court may apply the rules applicable to civil or criminal proceedings, as it deems appropriate.
(B) Decision Without Evidentiary Hearing. After reviewing the motion and response, the record, and the expanded record, if any, the court shall determine whether an

evidentiary hearing is required. If the court decides that an evidentiary hearing is not required, it may rule on the motion or, in its discretion, afford the parties an opportunity for oral argument.
(C) Evidentiary Hearing. If the court decides that an evidentiary hearing is required, it shall schedule and conduct the hearing as promptly as practicable. At the hearing, the rules of evidence other than those with respect to privilege do not apply. The court shall assure that a verbatim record is made of the hearing.
(D) Entitlement to Relief. The defendant has the burden of establishing entitlement to the relief requested. The court may not grant relief to the defendant if the motion
(1) seeks relief from a judgment of conviction and sentence that still is subject to challenge on appeal pursuant to subchapter 7.200 or subchapter 7.300;
(2) alleges grounds for relief which were decided against the defendant in a prior appeal or proceeding under this subchapter, unless the defendant establishes that a retroactive change in the law has undermined the prior decision; for purposes of this provision, a court is not precluded from considering previously-decided claims in the context of a new claim for relief, such as in determining whether new evidence would make a different result probable on retrial, or if the previously-decided claims, when considered together with the new claim for relief, create a significant possibility of actual innocence;
(3) alleges grounds for relief, other than jurisdictional defects, which could have been raised on appeal from the conviction and sentence or in a prior motion under this subchapter, unless the defendant demonstrates
(a) good cause for failure to raise such grounds on appeal or in the prior motion, and
(b) actual prejudice from the alleged irregularities that support the claim for relief. As used in this subrule, "actual prejudice" means that,
(i) in a conviction following a trial,
(A) but for the alleged error, the defendant would have had a reasonably likely chance of acquittal; or
(B) where the defendant rejected a plea based on incorrect information from the trial court or ineffective assistance of counsel, it is reasonably likely that
(1) the prosecutor would not have withdrawn any plea offer;
(2) the defendant and the trial court would have accepted the plea but for the improper advice; and
(3) the conviction or sentence, or both, under the plea's terms would have been less severe than under the judgment and sentence that in fact were imposed.
(ii) in a conviction entered on a plea of guilty, guilty but mentally ill, or nolo contendere, the defect in the proceedings was such that it renders the plea an involuntary one to a degree that it would be manifestly unjust to allow the conviction to stand;
(iii) in any case, the irregularity was so offensive to the maintenance of a sound judicial process that the conviction should not be allowed to stand regardless of its effect on the outcome of the case;
(iv) in the case of a challenge to the sentence, the sentence is invalid.

The court may waive the "good cause" requirement of subrule (D)(3)(a) if it concludes that there is a significant possibility that the defendant is innocent of the crime.

(E) Ruling. The court, either orally or in writing, shall set forth in the record its findings of fact and its conclusions of law, and enter an appropriate order disposing of the motion.

STATEMENT OF THE CASE SETTING OUT THE FACTS MATERIAL TO CONSIDERATION OF THE QUESTIONS PRESENTED

THE BASIS FOR FEDERAL JURISDICTION IN THE COURT OF FIRST INSTANCE

The Michigan Supreme Court entered an Order denying Petitioner's Application for Leave to Appeal on December 22, 2015. Pursuant to 28 U.S.C. § 2254, Petitioner filed a timely Application for a Writ of Habeas Corpus in the United States District Court for the Eastern District of Michigan on March 8, 2016. The United States District Court for the Eastern District of Michigan entered an Order and Opinion Denying Petitioner a Writ of Habeas Corpus on February 8, 2021. Petitioner filed a Motion for Reconsideration on February 22, 2021, and an Amended Order and Opinion denying Petitioner a Writ of Habeas Corpus was entered on April 16, 2021. Petitioner had filed a timely Notice of Appeal on March 10, 2021. The United States Court of Appeals entered an Order denying Petitioner a Certificate of Appealability on November 29, 2021. Petitioner files this Petition for a Writ of Certiorari from the Order of the United States Court of Appeals for the Sixth Circuit denying him a Certificate of Appealability.

FACTS MATERIAL TO CONSIDERATION OF THE QUESTIONS PRESENTED

The criminal case against Petitioner that resulted in a prison sentence of 20 to 40 years was the product of a cascade of unconstitutional coercion and ineffective assistance of counsel pervading throughout the proceedings conducted in the Wayne County Juvenile Court, the Wayne County Circuit Court, and the Michigan Court of Appeals. The incident that gave rise to this series of unconstitutional circumstances was the accidental death of a four month old baby which initiated a protective services investigation. An autopsy performed by the Wayne County Medical Examiner concluded that the mother of the deceased infant, Telesha Monroe, who was 16 years old at the time of her baby's death, had accidentally rolled over him while they were sleeping together in her bed. Telesha Monroe had three children and was residing with her mother, Tara McGee, at the time of the accidental death. Tara McGee had five other children, ranging in age from 10 years to 3 years old, of whom Petitioner Matthew Moore, Sr., was the father. Petitioner loved his children and had a close and intimate relationship with all of them. All the children were removed from the home by the Department of Social Services and placed in temporary foster care. Both the mother, Tara McGee, and the father, Petitioner, were afforded supervised visitation with the children on a regular basis at the foster care agency.

At some point in time, the protective services social worker assigned to the case, Brandi Hampton, became suspicious that Petitioner may also be the father of Telesha Monroe's two surviving children. In June or July of 2011, she obtained an

order from the juvenile court requiring Petitioner to submit to a DNA test with respect to the surviving children of Telesha Monroe and suspending Petitioner's supervised visitation with his five children until he complied with the DNA testing order. Petitioner pleaded with the social worker to be allowed to visit with his five minor children but was repeatedly told that he would not be allowed to see his children until he submitted to DNA testing. On August 5, 2011, Attorney Ronald A. Fruitman was appointed by the juvenile court to represent Petitioner. Without ever having met his client, and without sufficiently investigating the circumstances of Petitioner's involvement in the case, Attorney Fruitman recommended in a telephone conversation with Petitioner that if he wants to see his five minor children again he should submit to the DNA testing with respect to the paternity of the two surviving children of Telesha Monroe.

How could an attorney advise a client to take a DNA test that could result in his imprisonment for life without first meeting with the client and attempting to ascertain as much as he could about the facts and circumstances underlying the juvenile court's order for genetic testing? How could an attorney make such a momentous recommendation without considering the option of having his client take a private and confidential polygraph examination prior to agreeing to submit to DNA testing? Such deficient and grossly negligent representation constitutes *per se* ineffective assistance of counsel. As a result of the agonizing emotional distress caused by the indefinite suspension of his visitation with his minor children, and the recommendation of his juvenile court attorney, Petitioner finally succumbed and submitted to the DNA

testing. As soon as Petitioner submitted to the DNA testing his visitation with his minor children resumed. On September 14, 2011, the results of the DNA testing established that Petitioner was the father of Telesha Monroe's two surviving children. Petitioner's buckling under the stress of not being able to see his children, and his reliance on his attorney's advice, set in motion the chain of events that eventually led to the imposition of a sentence of imprisonment of 20 to 40 years.

Based on the results of the DNA testing, Petitioner was arrested by Detroit Police Officer Tremayne Burton on November 19, 2011 and interrogated the same day. Petitioner was read his Miranda rights and admitted that he had fathered the two surviving children of Telesha Monroe and first had sexual intercourse with her when she was 12 years old. The arrest of Petitioner was invalid because it was based on the results of DNA testing that Petitioner was unconstitutionally coerced into taking by the suspension of his visitation with his minor children. Therefore, the statement Petitioner gave to Police Officer Burton was the product of an invalid arrest and should have been suppressed.

An information charging two counts of Criminal Sexual Conduct in the First Degree, M.C.L. § 750.520b, was filed in the Wayne County Circuit Court. Petitioner was appointed an attorney and pled guilty to one count of Criminal Sexual Conduct in the First Degree, agreeing to a sentence of 20 to 40 years in prison. The agreed upon sentence was imposed on March 16, 2012. Petitioner was denied effective assistance of counsel in Wayne County Circuit Court in connection with his plea to Criminal Sexual Conduct - First Degree, as his attorney, Jermaine A. Wyrick, failed

to investigate the circumstances that transpired in juvenile court which led to the criminal charges being brought against Petitioner. He filed no motions to suppress the coerced DNA testing results nor the statement obtained as a consequence of the coerced testing and invalid arrest. This wholesale abdication of professional responsibility constitutes ineffective assistance of counsel within the meaning of the Sixth Amendment to the United States Constitution. Petitioner was appointed an attorney to pursue an appeal of his plea based conviction in the Michigan Court of Appeals, Gerald Ferry. Petitioner's appellate attorney provided ineffective assistance of counsel by failing to raise any of the constitutional issues set forth above on appeal, instead predicating the appeal on unsupported competency and allocution grounds.

After exhausting his state court appellate rights, Petitioner filed an Application for a Writ of Habeas Corpus in the United States District Court for the Eastern District of Michigan raising several constitutional issues. The district court denied the Petition for a Writ of Habeas Corpus, and also denied Petitioner a Certificate of Appealability. A timely Notice of Appeal was filed with the United States Court of Appeals for the Sixth Circuit, which entered an Order denying Petitioner a Certificate of Appealability.

ARGUMENT AMPLIFYING THE REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

ARGUMENT I

DEFENDANT-PETITIONER WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL AND UNCONSTITUTIONALLY COERCED INTO TAKING A PATERNITY BLOOD TEST IN JUVENILE COURT THAT RESULTED IN HIS CONVICTION OF CRIMINAL SEXUAL CONDUCT IN THE FIRST DEGREE IN THE WAYNE COUNTY CIRCUIT COURT AND A SENTENCE OF IMPRISONMENT OF TWENTY TO FORTY YEARS, IN VIOLATION OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

REASON FOR GRANTING WRIT OF CERTIORARI

Defendant's Petition for a Writ of Certiorari should be granted with respect to this issue because the United States Court of Appeals for the Sixth Circuit has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power, and because the United States Court of Appeals for the Sixth Circuit, by not granting a Certificate of Appealability, implicitly decided an important question of federal law that has not been, but should be, settled by this Court. This case involves the interaction between the state juvenile court and the state criminal court that resulted in constitutional errors of such magnitude that they should be reviewed by this Court. The Order of the Court of Appeals denying a Certificate of Appealability precludes this Court from doing so.

ARGUMENT

The criminal case against Petitioner that resulted in a prison sentence of 20 to 40 years was the product of a cascade of unconstitutional coercion and ineffective assistance of counsel pervading throughout the proceedings conducted in the Wayne County Juvenile Court, the Wayne County Circuit Court, and the Michigan Court of Appeals. The incident that gave rise to this series of unconstitutional circumstances was the accidental death of a four month old baby which initiated a protective services investigation. An autopsy performed by the Wayne County Medical Examiner concluded that the mother of the deceased infant, Telesha Monroe, who was 16 years old at the time of her baby's death, had accidentally rolled over him while they were sleeping together in her bed. Telesha Monroe had three children and was residing with her mother, Tara McGee, at the time of the accidental death. Tara McGee had five other children, ranging in age from 10 years to 3 years old, of whom Petitioner Matthew Moore, Sr., was the father. Petitioner loved his children and had a close and intimate relationship with all of them. All the children were removed from the home by the Department of Social Services and placed in temporary foster care. Both the mother, Tara McGee, and the father, Petitioner, were afforded supervised visitation with the children on a regular basis at the foster care agency.

At some point in time, the protective services social worker assigned to the case, Brandi Hampton, became suspicious that Petitioner may also be the father of Telesha Monroe's two surviving children. In June or July of 2011, she obtained an order from the juvenile court requiring Petitioner to submit to a DNA test with respect

to the surviving children of Telesha Monroe and suspending Petitioner's supervised visitation with his five children until he complied with the DNA testing order. Petitioner pleaded with the social worker to be allowed to visit with his five minor children but was repeatedly told that he would not be allowed to see his children until he submitted to DNA testing. On August 5, 2011, Attorney Ronald A. Fruitman was appointed by the juvenile court to represent Petitioner. Without ever having met his client, and without sufficiently investigating the circumstances of Petitioner's involvement in the case, Attorney Fruitman recommended in a telephone conversation with Petitioner that if he wants to see his five minor children again he should submit to the DNA testing with respect to the paternity of the two surviving children of Telesha Monroe.

How could an attorney advise a client to take a DNA test that could result in his imprisonment for life without first meeting with the client and attempting to ascertain as much as he could about the facts and circumstances underlying the juvenile court's order for genetic testing? How could an attorney make such a momentous recommendation without considering the option of having his client take a private and confidential polygraph examination prior to agreeing to submit to DNA testing? Such deficient and grossly negligent representation constitutes *per se* ineffective assistance of counsel. As a result of the agonizing emotional distress caused by the indefinite suspension of his visitation with his minor children, and the recommendation of his juvenile court attorney, Petitioner finally succumbed and submitted to the DNA testing. As soon as Petitioner submitted to the DNA testing his visitation with his

minor children resumed. On September 14, 2011, the results of the DNA testing established that Petitioner was the father of Telesha Monroe's two surviving children. Petitioner's buckling under the stress of not being able to see his children, and his reliance on his attorney's advice, set in motion the chain of events that eventually led to the imposition of a sentence of imprisonment of 20 to 40 years.

Under the circumstances of this case, the court ordered DNA testing constituted a search within the meaning of the Fourth Amendment to the United States Constitution. When the Government relies upon consent to justify the lawfulness of a search, it bears the burden of proving by a preponderance of the evidence that the consent was freely and voluntarily given. This burden cannot be discharged by showing no more than acquiescence to a claim of authority. *Bumper v. North Carolina*, 391 U.S. 543, 548-549 (1968). Whether a consent to search was in fact voluntary, or was the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of the circumstances. The Government must prove consent by clear and positive testimony, and to be voluntary, it must be unequivocal, specific, and intelligently given, uncontaminated by any duress or coercion. *United States v. Erwin*, 155 F.3d 818, 823 (6th Cir. 1998). It is the subjective understanding of the seized person that determines whether the consent was or was not voluntary. *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973). If the Government fails to meet that burden, then the evidence obtained from the defendant's person must be suppressed. *Wong Sun v United States*, 371 U.S. 471 (1963).

Based on the results of the DNA testing, Petitioner was arrested by Detroit Police Officer Tremayne Burton on November 19, 2011 and interrogated the same day. Petitioner was read his Miranda rights and admitted that he had fathered the two surviving children of Telesha Monroe and first had sexual intercourse with her when she was 12 years old. The arrest of Petitioner was invalid because it was based on the results of DNA testing that Petitioner was unconstitutionally coerced into taking by the suspension of his visitation with his minor children. Therefore, the statement Petitioner gave to Police Officer Burton was the product of an invalid arrest and should have been suppressed. Any evidence or statement obtained from the defendant as a result of the invalid arrest and detention should be suppressed. *Dunaway v. New York*, 442 U.S. 200 (1979); *Wong Sun v. United States, supra*.

Moreover, the statement itself was unconstitutionally coerced, in contravention of the Fourteenth Amendment to the United States Constitution, because it was the direct result of the coercive actions of the Michigan Department of Social Services and the Wayne County Juvenile Court which forced Petitioner to submit to DNA testing by suspending his visitation with his children. An involuntary or coerced confession is inadmissible as direct evidence or for impeachment purposes. *Mincey v Arizona*, 437 U.S. 385; 98 S Ct 2408; 57 L Ed 2nd 290 (1978). Once the issue of voluntariness is raised, the burden is on the prosecution to show that the defendant's statement was voluntary. *United States v. Pancheco-Lopez*, 531 F.3d 420 (6th Cir. 2008). The test of voluntariness is whether, considering the totality of all the circumstances, the confession is the product of an essentially free and unconstrained

choice by its maker, or whether the accused's will has been overborne and his capacity for self-determination critically impaired. *Rogers v Richmond*, 365 U.S. 534 (1961); *Haynes v State of Washington*, 373 U.S. 503 (1963). In the case at bar, the coercive circumstances which led to Petitioner's statement being obtained by the police were of such a magnitude that his will was overborne, rendering his statement constitutionally involuntary.

ARGUMENT II

DEFENDANT-PETITIONER WAS DENIED HIS SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL DURING THE PLEA PROCEEDINGS IN THE WAYNE COUNTY CIRCUIT COURT AND ON APPEAL IN THE MICHIGAN COURT OF APPEALS.

REASON FOR GRANTING WRIT OF CERTIORARI

Defendant's Petition for a Writ of Certiorari should be granted with respect to this issue because the United States Court of Appeals for the Sixth Circuit has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power, and because the United States Court of Appeals for the Sixth Circuit, by not granting a Certificate of Appealability, implicitly decided an important question of federal law that has not been, but should be, settled by this Court. This case involves the interaction between the state juvenile court and the state criminal court that resulted in constitutional errors of such magnitude that they should be reviewed by

this Court. The Order of the Court of Appeals denying a Certificate of Appealability precludes this Court from doing so.

ARGUMENT

Petitioner was denied effective assistance of counsel in Wayne County Circuit Court in connection with his plea to Criminal Sexual Conduct - First Degree, MCL 750.520b. Petitioner's attorney, Jermaine A. Wyrick, failed to investigate the circumstances that transpired in juvenile court that led to the criminal charges being brought against Petitioner. He filed no motions to suppress the coerced DNA testing results nor the statement obtained as a consequence of the coerced testing and invalid arrest. This wholesale abdication of professional responsibility constitutes ineffective assistance of counsel within the meaning of the Sixth Amendment to the United States Constitution. The right to effective assistance of counsel extends to the plea proceeding. *Lafler v. Cooper*, 566 U.S. 156 (2012). *Jae Lee v. United States*, 582 U.S. ___, 137 S.Ct. 1958 (2017).

Without the benefit of effective assistance of counsel, Petitioner pled guilty to Criminal Sexual Conduct - First Degree, MCL 750.520b, in the Wayne County Circuit Court on February 16, 2012, based on his engaging in sexual intercourse with minor Telesha Monroe, and on March 16, 2012 was sentenced to 20 to 40 years in prison. Petitioner filed a Motion for Relief from Judgement in accordance with M.C.R. § 6.500 et seq. in the Wayne County Circuit Court, which was denied on May 23, 2014. Petitioner filed a timely Application for Leave to Appeal in the Michigan Court of Appeals, which was denied on December 29, 2014. Petitioner filed a timely Motion

for Reconsideration with the Michigan Court of Appeals that was denied on February 17, 2015. Petitioner filed a timely Application for Leave to Appeal with the Michigan Supreme Court which was denied on December 22, 2015.

"The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel playing a role that is critical to the ability of the adversarial system to produce just results. An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair. For that reason, The Court has recognized that the right to counsel is the right to effective assistance of counsel". *Strickland v. Washington*, 466 U.S. 668, 685-686 (1984).

In *Strickland*, The United States Supreme Court enunciated the two prong test for evaluating most claims of ineffective assistance of counsel. First, the defendant must show that counsel's performance was deficient. The proper standard for attorney performance is that of reasonably effective assistance. Second, the defendant must show that the deficient performance prejudiced the defense. *Id*. at 687; *Hughes v. United States*, 258 F.3d 453, 457 (6th Cir. 2001). In establishing prejudice, the defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case. The result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome. The defendant is required to show only that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A

reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.* at 693-694.

In some cases, the nature and severity of counsel's deficiencies is such that prejudice is presumed. In *United States v. Cronic*, 466 U.S. 648, 658-659 (1984), decided that same day as *Strickland*, the United States Supreme Court stated:

> There are, however, circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified. Most obvious, of course, is the complete denial of counsel. The presumption that counsel's assistance is essential requires us to conclude that a trial is unfair if the accused is denied counsel at a critical stage of his trial. Similarly, if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable. (Footnotes admitted).

In the case at bar, Petitioner's criminal court attorney, Jermaine A. Wyrick, denied him reasonably effective assistance of counsel by failing to investigate the coercive circumstances and ineffective assistance of counsel in juvenile court that resulted in the filing of criminal charges against Petitioner. He failed to file any motions to suppress the results of the coercive DNA testing nor any motions to suppress the statement Petitioner made to the police subsequent to his arrest on the basis that the arrest was invalid and the statement involuntary. The prejudice resulting from the grossly negligent representation of Attorney Jermaine A. Wyrick in the Wayne County Circuit Court is patent: Petitioner is serving a 20 to 40 year sentence of imprisonment, a sentence that probably would not have been imposed but for the manifestly ineffective assistance provided by his criminal court attorney. The nature

and severity of counsel's deficiencies in the case at bar are so egregious as to trigger the presumption of prejudice set forth in *Cronic, supra*.

Based on the same analysis, Petitioner's appellate attorney was also constitutionally ineffective. Petitioner was appointed an attorney, Gerald Ferry, to pursue an appeal of his plea based conviction in the Michigan Court of Appeals. Petitioner's appellate attorney provided ineffective assistance of counsel within the meaning of *Strickland* by failing to raise any of the constitutional issues set forth above in his Application for Leave to Appeal filed with the Michigan Court of Appeals, instead predicating the Application solely on anemic, unsupported competency and allocution grounds.

ARGUMENT III

THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT UNLAWFULLY DEPRIVED DEFENDANT-PETITIONER APPELLATE REVIEW OF THE DISTRICT COURT'S DENIAL OF HIS PETITION FOR A WRIT OF HABEAS CORPUS, FILED IN ACCORDANCE WITH 28 U.S.C. § 2254, BY ERRONEOUSLY DENYING HIS MOTION FOR A CERTIFICATE OF APPEALABILITY.

REASON FOR GRANTING WRIT OF CERTIORARI

Defendant's Petition for a Writ of Certiorari should be granted with respect to this issue because the United States Court of Appeals for the Sixth Circuit has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power, and because the United States Court of Appeals for the Sixth Circuit, by not

granting a Certificate of Appealability, implicitly decided an important question of federal law that has not been, but should be, settled by this Court. This case involves the interaction between the state juvenile court and the state criminal court that resulted in constitutional errors of such magnitude that they should be reviewed by this Court. The Order of the Court of Appeals denying a Certificate of Appealability precludes this Court from doing so.

ARGUMENT

Rule 11 of the Rules Governing Section 2254 Cases in the United States District Courts requires that the district court issue or deny a certificate of appealability whenever it rules against the petitioner on a motion to vacate sentence:

> The district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant. Before entering the final order, the court may direct the parties to submit arguments on whether a certificate should issue. If the court issues a certificate, the court must state the specific issue or issues that satisfy the showing required by 28 U.S.C. § 2253(c)(2). If the court denies a certificate, a party may not appeal the denial but may seek a certificate from the court of appeals under Federal Rule of Appellate Procedure 22.

A certificate of appealability 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). To receive a certificate of appealability, "a petitioner must show 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 v. Cockrell, 537 U.S. 322, 336 (2003) (internal quotes and citations omitted).

In *Slack v. McDaniel*, 529 U.S. 473, 478 (2000), the United States Supreme Court held that:

> [W]hen the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a COA should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.

In *Miller-El v. Cockrell*, 537 U.S. 322, 337 (2003), the United States Supreme Court went on to explain that the Certificate of Appealability determination under 28 U.S.C. § 2253(c) requires an overview of the claims in the habeas petition and a general assessment of their merits. However, the probability that a petitioner will ultimately prevail on appeal is irrelevant to the determination of whether or not a certificate of appealability should issue:

> The COA determination under § 2253(c) requires an overview of the claims in the habeas petition and a general assessment of their merits. We look to the District Court's application of AEDPA to petitioner's constitutional claims and ask whether that resolution was debatable amongst jurists of reason. This threshold inquiry does not require full consideration of the factual or legal bases adduced in support of the claims. In fact, the statute forbids it. When a court of appeals sidesteps this process by first deciding the merits of an appeal, and then justifying its denial of a COA based on its adjudication of the actual merits, it is in essence deciding an appeal without jurisdiction.

> To that end, our opinion in Slack held that a COA does not require a showing that the appeal will succeed. Accordingly, a court of appeals should not decline the application for a COA merely because it believes the applicant will not demonstrate an entitlement to relief. The holding in Slack would mean very little if appellate review were denied because the prisoner did not convince a judge, or, for that matter, three judges, that he or she would prevail. It is consistent with § 2253 that a COA will issue in some instances where there is no certainty of ultimate relief. After all, when a COA is sought, the whole premise is that the prisoner " 'has already failed in that endeavor.' " Barefoot, supra, at 893, n. 4, 103 S.Ct. 3383.

In the case at bar, it is clear that Defendant was denied effective assistance of counsel both at the trial level and at the appellate level. This case involves a cascade of egregious instances of ineffective assistance of counsel that cannot be ignored. Clearly, "the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(2). Applying the statutory requirement of 28 U.S.C. § 2254(b)(1)(A) that "an applicant has exhausted the remedies available in the Courts of the State", the district court found that Defendant had procedurally defaulted his ineffective assistance claim because although he adequately raised the issue of ineffective assistance of trial counsel in his state court Motion for Relief from Judgment, filed under MCR 6.500, he failed to allege that his appellate counsel was also ineffective for failing to raise the claim of ineffective assistance of trial counsel in his Application for Leave to Appeal filed in the Michigan Court of Appeals in connection with his plea based conviction.

A claim of ineffective assistance of counsel must be presented to the State courts as an independent claim before it may be used to establish cause for a

procedural default. *Edwards v. Carpenter*, 529 U.S. 446, 452 (2000). The analysis of this issue is governed by the four-part test described in *Maupin v. Smith*, 785 F.2d 135, 138 (6th Cir.1986). A federal habeas court must first determine whether there is a state procedural rule that is applicable to the petitioner's claim and whether the petitioner failed to comply with the state procedural rule. Second, the federal court must decide whether the state courts actually enforced the state procedural sanction. Third, the federal court must decide whether the state procedural default is an adequate and independent state ground upon which the state can rely to foreclose review of the federal habeas claim. Fourth, the habeas petitioner can excuse a procedural default by demonstrating cause for his failure to comply with the state procedural rule and prejudice from the alleged constitutional error.

In the case at bar, Defendant did raise the issue of ineffective assistance of *all* his attorneys, including his appellate counsel, which would obviate the need for such an analysis. Defendant filed a *pro se* Motion for Relief from Judgment pursuant to M.C.R. § 6.500 et seq. Although his handwritten motion and supplemental brief were somewhat inartfully written, Defendant stated as Issue One: *ineffectiveness of counsel during all court processing* (sic) [emphasis added], (Motion for Relief from Judgment, Case No. 16-10874, ECF 12-5, Pg. 2, Page ID No. 180). which by definition would include the appellate proceedings. In his summary, Defendant states that "The main reason we are here in this appeal is due to (1) ineffectiveness of lawyers" (Motion for Relief from Judgment, ECF No. 12-5, Page 36, Page ID No. 214). In his Supplemental Brief to the Motion for Relief from Judgment (Case No. 16-10874, ECF

No. 12-6, Pg. 13, Page ID No. 272), Defendant specifically avers that "These facts also substantiates how tremendously ineffective counsel was during *all* proceedings. Counsel did not investigate as to how Department of Human Services optained (sic) the defendant's DNA results nor *they're* job to inquire into further investigation regarding defendants mental health" (emphasis added). *All* proceedings, and *they're* job, in light of the natural meaning of those words, would refer to the appellate proceedings and attorneys as well as the proceedings and attorneys at the trial court level and those in juvenile court. Defendant's intent to raise the issue of ineffective assistance of appellate counsel in his Motion for Relief from Judgment is clearly evidenced by the fact that in his *pro se* Delayed Application for Leave to Appeal filed with the Michigan Court of Appeals in connection with the denial of his Motion for Relief from Judgment, he specifically describes the lead argument as being: "TRIAL COUNSEL PROVIDED INEFFECTIVE ASSISTANCE AT Plea and 1st Appeal" (Case No.16-10874, ECF No. 12-10, Page 5, Page ID No. 464). The fact that Judge Fresard of the Wayne County Circuit Court did not recognize that Petitioner had raised the issue of ineffective assistance of appellate counsel in his *pro se* pleadings, or otherwise negligently failed to address it, does not mean that the constitutional issue was not raised by Petitioner in his *pro se* Motion for Relief from Judgment.

It is manifest that Defendant's *pro se* pleadings were rambling and difficult to read, but "pleadings must be construed so as to do justice". Rule 8(e) of the Federal Rules of Civil Procedure. As stated by the United States Supreme Court in *Erickson v. Pardus*, 551 U.S. 89, 94 (2007):

> The Court of Appeals' departure from the liberal pleading standards set forth by Rule 8(a)(2) is even more pronounced in this particular case because petitioner has been proceeding, from the litigation's outset, without counsel. A document filed pro se is "to be liberally construed," Estelle, 429 U.S., at 106, 97 S.Ct. 285, and "a pro se complaint, however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers," ibid. (internal quotation marks omitted). Cf. Fed. Rule Civ. Proc. 8(f) ("All pleadings shall be so construed as to do substantial justice").

The district court's hyper-technical parsing of Defendant's *pro se* pleadings did not effectuate the justice mandated by Rule 8(e) of the Federal Rules of Civil Procedure. "[W]hen the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a COA should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel, supra* at 478. In the case at bar, Defendant explicitly raised the issue of ineffective assistance of trial counsel in his state court Motion for Relief from Judgment. That issue was not procedurally defaulted. Moreover, it is manifest that jurists of reason would find it debatable whether Defendant's *pro se* pleadings also raised the issue of ineffective assistance of appellate counsel, and a Certificate of Appealability should be granted so that critical issue could be considered fully on appeal.

WHEREFORE, Petitioner respectfully moves this Honorable Court to grant his Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit, issue a Certificate of Appealability, and remand this matter back to the United States Court of Appeals for the Sixth Circuit for plenary appellate review..

Dated: 02-28-22

Respectfully submitted,

Richard D. Korn P32958
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UNITED STATES

SUPREME COURT

MATTHEW MOORE,

DOCKET NO:

Defendant-Petitioner,

vs.

THOMAS MACKIE,

Respondent.

_____/

CERTIFICATE OF COMPLIANCE

RICHARD D. KORN, Attorney for Defendant-Petitioner, certifies and states that Defendant-Petitioner's Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit, excluding the sections set forth in Rule 33.1(d) of the Supreme Court Rules, contains 29 pages and, therefore, complies with the page limitation of Rule 33.2(b) of the Supreme Court Rules.

Dated: 02-28-22

Respectfully submitted,

_____
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SUPREME COURT

MATTHEW MOORE,

DOCKET NO:

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Respondent.

_____/

CERTIFICATE OF SERVICE

I hereby certify that on February 28, 2022, all parties required to be served under the Supreme Court Rules have been served, and that I served the foregoing document on the below listed person by sending said document through the United States Postal Service by first class mail, with postage prepaid.

SCOTT R. SHIMKUS
Assistant Attorney General
P.O. Box 30217
Lansing, MI 48909

Dated: 02-28-22

Respectfully submitted,

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