No. 03-407

In the
Supreme Court of the United States

JUDGE JOHN F. KOWALSKI,
JUDGE WILLIAM A CRANE,
AND JUDGE LYNDA L. HEATHSCOTT,

Petitioners,

JUDGE DENNIS C. KOLENDA,

Respondent

v

JOHN CLIFFORD TESMER, CHARLES CARTER,
ALOIS SCHNELL, ARTHUR M. FITZGERALD, AND
MICHAEL D. VOGLER,

Respondents.

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

BRIEF FOR THE PETITIONERS

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QUESTIONS PRESENTED

The Michigan Constitution, Mich Const 1963, art I, § 20, provides that a criminal defendant who pleads guilty shall not have an appeal of right and shall have a right to appointed appellate counsel "as provided by law." A Michigan statute, Michigan Compiled Law (MCL) 770.3a, provides, with significant listed exceptions, that a criminal defendant who pleads guilty shall not have appointed appellate counsel for discretionary appeals for review of the defendant's conviction or sentence.

I. Do attorneys have third-party standing on behalf of potential future indigent criminal defendants to make a constitutional challenge to a state statute prohibiting appointment of appellate counsel in discretionary first appeals following convictions by guilty pleas where the federal courts properly abstained from hearing the claims of indigent criminal defendants themselves?

II. Does the Fourteenth Amendment guarantee a right to an appointed appellate attorney in a discretionary first appeal of an indigent criminal defendant convicted by a guilty plea?

PARTIES TO THE PROCEEDING

In the courts below, the plaintiffs challenging the constitutionality of the Michigan statute were three indigent criminal defendants, Respondents John Tesmer, Charles Carter, and Alois Schnell, and two criminal defense attorneys, Respondents Arthur Fitzgerald and Michael D. Vogler.

The defendants below and the Petitioners here are three Michigan State Court Judges, John F. Kowalski, William A. Crane, and Lynda L. Heathscott.

The then Attorney General of Michigan, Jennifer M. Granholm, was initially named as a defendant but was dismissed by the District Court, was not a party to the appeal below, and pursuant to S Ct R 12.6 Petitioners believe she has no interest as a party in the outcome of this Petition.

The District Court entered an opinion and order on March 31, 2000, declaring the State statute unconstitutional.

On June 30, 2000, the District Court entered an injunction against Petitioner Heathscott; against another State Judge, Respondent Dennis C. Kolenda, who was not a party to the lawsuit; and purportedly against all other Michigan State Judges. The interests of Respondent Judge Kolenda are not adverse to the interests of Petitioners.

Petitioners Judges Kowalski, Crane, and Heathscott, appealed to the United States Court of Appeals for the Sixth Circuit in case No. 00-1824. Respondent Judge Kolenda filed a separate appeal in case No. 00-1845. The Court of Appeals issued a joint *en banc* opinion and judgment on rehearing in the two appeals on June 17, 2003.

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OPINIONS AND ORDERS BELOW

The opinion and order District Court for the Eastern District of Michigan on the issues of standing and the constitutionality of the statute is reported at *Tesmer v Granholm*, 114 F Supp 2d 603 (ED Mich, 2000). Pet. App. 87a. A subsequent opinion and order granting an injunction and denying class certification is reported at *Tesmer v Kowalski*, 114 F Supp 2d 622 (ED Mich, 2000). Pet. App. 125a.

The panel decision of the United States Court of Appeals for the Sixth Circuit is reported at *Tesmer v Kowalski*, 295 F 3d 536 (6th Cir, 2002). Pet. App. 63a. The order granting rehearing *en banc* and vacating the panel decision is reported at *Tesmer v Kowalski*, 307 F 3d 459 (6th Cir, 2002). Pet. App. 85a.

The en banc decision of the Court of Appeals is reported at *Tesmer v Kowalski* (*reh en banc*), 333 F 3d 683 (6th Cir, 2003). Pet. App. 1a.

JURISDICTION

The Court of Appeals *en banc* judgment on rehearing was entered June 17, 2003. No rehearing was sought from that judgment. This Court's jurisdiction is invoked under 28 USC § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND COURT RULES INVOLVED

The pertinent federal and Michigan constitutional provisions, statutes, and court rules involved are reproduced in the Appendix to the Petition, Pet. App. 137a.[1]

The challenged statute, MCL 770.3a, (Pet. App. 139a) provides:

> (1) Except as provided in subsections (2) and (3), a defendant who pleads guilty, guilty but mentally ill, or nolo contendere shall not have appellate counsel appointed for review of the defendant's conviction or sentence.
> (2) The trial court shall appoint appellate counsel for an indigent defendant who pleads guilty, guilty but mentally ill, or nolo contendere if any of the following apply:
>
> > (a) The prosecuting attorney seeks leave to appeal.
> > (b) The defendant's sentence exceeds the upper limit of the minimum sentence range of the applicable sentencing guidelines.[2]
> > (c) The court of appeals or the supreme court grants the defendant's application for leave to appeal.

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1 Current versions of the Michigan Court Rules can be found on the Michigan Courts Web site. See, http://courtofappeals.mijud.net/rules/public/default.asp.

2 Sentencing guidelines are governed by statute, MCL 777.1 *et seq*. The Michigan Supreme Court has promulgated a Michigan Sentencing Guidelines Manual that can be found on the Michigan Courts Web site. http://courts.michigan.gov/mji/resources/sentencing-guidelines/sg.htm.

(d) The defendant seeks leave to appeal a conditional plea under Michigan Court Rule 6.301(C)(2) or its successor rule.

(3) The trial court may appoint appellate counsel for an indigent defendant who pleads guilty, guilty but mentally ill, or nolo contendere if all of the following apply:

(a) The defendant seeks leave to appeal a sentence based upon an alleged improper scoring of an offense variable or a prior record variable.

(b) The defendant objected to the scoring or otherwise preserved the matter for appeal.

(c) The sentence imposed by the court constitutes an upward departure from the upper limit of the minimum sentence range that the defendant alleges should have been scored.

(4) While establishing that a plea of guilty, guilty but mentally ill, or nolo contendere was made understandingly and voluntarily under Michigan Court Rule 6.302 or its successor rule, and before accepting the plea, the court shall advise the defendant that, except as otherwise provided in this section, if the plea is accepted by the court, the defendant waives the right to have an attorney appointed at public expense to assist in filing an application for leave to appeal or to assist with other postconviction remedies, and shall determine whether the defendant understands the waiver. Upon sentencing, the court shall furnish the defendant with a form developed by the state court administrative office that is nontechnical and easily understood and

> that the defendant may complete and file as an application for leave to appeal.[3]

Michigan Court Rule (MCR) MCR 6.302(B)(5), (6).[4] (Pet. App. 146a):

> (B) An Understanding Plea. Speaking directly to the defendant, the court must advise the defendant and determine that the defendant understands:
>
> * * *
>
> (5) any appeal from the conviction and sentence pursuant to the plea will be by application for leave to appeal and not by right;
>
> (6) if the plea is accepted, the defendant is not entitled to have counsel appointed at public expense to assist in filing an application for leave to appeal or to assist with other postconviction remedies unless the defendant is financially unable to retain counsel and
>
> (a) the defendant's sentence exceeds the guidelines,

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[3] The form is reproduced at Pet. App. 160a and can be found on the State Court Administrative Office (SCAO) Web site. See, http://courts.michigan.gov/cao/courtforms/appeals/cc405.pdf.

[4] It should be noted that that in an order entered February 3, 2004, (ADM File No. 2003-04) the Michigan Supreme Court, in response to a Report issued by the Committee on the Rules of Criminal Procedure, published for comment proposed amendments to several court rules, including MCR 6.302. The Staff comment, which is not an authoritative construction by the Court, notes that the proposed amendment to MCR 6.302 would conflict with MCL 770.3a(4) concerning the language advising a defendant of the right to appointed counsel on appeal. The public comment period expires May 1, 2004. The proposed amendments can be found at: http://courts.michigan.gov/supremecourt/Resources/ Administrative/2003-04-2-3-04.pdf

(b) the plea is a conditional plea under MCR 6.301(C)(2),
(c) the prosecuting attorney seeks leave to appeal, or
(d) the Court of Appeals or the Supreme Court grants leave to appeal.

STATEMENT OF THE CASE

The Michigan Constitution provides that "an appeal by an accused who pleads guilty or nolo contendere shall be by leave of the court." Mich Const 1963, art I, § 20. (Pet. App. 138a). The Michigan statute challenged in this litigation, MCL 770.3a (Pet. App. 139a), provides, with significant listed exceptions, that criminal defendants who plead guilty, guilty but mentally ill, or nolo contendere shall not have appointed appellate counsel for these discretionary appeals of the convictions or sentences.[5] In addressing a challenge brought by attorneys and indigent criminal defendants to the State's refusal to appoint appellate counsel, a deeply divided United States Court of Appeals for the Sixth Circuit issued two rulings en banc that are now before this Court.

Respondents asserted that the practice of denying appointed appellate counsel to guilty-pleading defendants in discretionary first appeals violates their right to equal protection and due process under the United States Constitution and that MCL 770.3a will continue to violate their rights.[6] The Court of Appeals held that the Respondent Attorneys, whose only personal stake in the case is the speculative loss of potential future income, have third-party standing to assert constitutional claims on behalf of unknown potential future indigent criminal defendants. The Court reached this conclusion notwithstanding its separate, unanimous conclusion that the District Court should have abstained, under the doctrine embodied in *Younger v Harris*, 401 US 37 (1971), from hearing the claims of the indigent criminal defendants themselves. The Court of Appeals then held on the merits that Michigan's denial of

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[5] MCL 770.3a applies to appeals from convictions based on pleas of guilty, guilty but mentally ill, and nolo contendere. For convenience, this Brief uses the term "guilty plea" to apply to all three types of convictions.

[6] The basis of jurisdiction of this 42 USC § 1983 lawsuit in the District Court was 28 USC §§ 1331, 1343(a)(3), and 1343(a)(4).

appointed counsel violates the Due Process Clause. Both of these rulings are wrong as matters of law.

A. The Michigan Framework For Appeals From Guilty Pleas.

Michigan has a two-tier appellate court system consisting of the intermediate Court of Appeals and the Michigan Supreme Court. The Michigan Court of Appeals has jurisdiction of appeals of right from most final judgments or final orders of the circuit courts or the Court of Claims.[7] MCR 7.203(A); Pet. App. 151a. Other appeals, including criminal cases in which the conviction is based on a plea of guilty, are discretionary, by leave granted. Mich Const 1963, art 1, § 20; MCL 600.308(2)(d), 770.3(1)(d); MCR 7.203(B); Pet. App. 138a, 139a, 151a. All appeals to the Michigan Supreme Court are discretionary, by leave granted. MCL 770.3(6); MCR 7.301; Pet. App. 139a, 158a.

The requirements for filing an application for leave to appeal to the Michigan Court of Appeals are set forth in the court rules. MCR 7.205. Pet. App. 152a. That Court may grant or deny the application; enter a final decision; grant other relief; request additional material from the record; or require a certified concise statement of proceedings and facts from the court, tribunal, or agency whose order is being appealed.

Before 1994, Mich Const 1963, art 1, § 20, provided defendants an appeal of right from all criminal convictions and,

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[7] The circuit courts are the trial courts of general jurisdiction, including jurisdiction over felonies and appellate jurisdiction over lower courts. Mich Const 1963, art VI, § 13; MCL 600.601. The district courts have jurisdiction over misdemeanors, MCL 600.8311, and exclusive jurisdiction in civil actions when the amount in controversy does not exceed $25,000.00. MCL 600.8301. The Court of Claims is a special court established to hear claims against the State. MCL 600.6419.

"as provided by law, when the trial court so orders, . . . such reasonable assistance as may be necessary to perfect and prosecute an appeal." Case law provided that defendants could appeal by right from plea-based convictions and therefore there was a right to appointment of appellate counsel. In 1994, a proposal to amend the constitution was adopted by the people that made appeals from plea-based convictions discretionary. As amended, Const 1963, art 1, § 20 now states that an accused is entitled "to have an appeal as a matter of right, except as provided by law an appeal by an accused who pleads guilty or nolo contendere shall be by leave of the court . . . ."

The Michigan Supreme Court has described in detail the history of the framework for appeals from guilty pleas in Michigan. *People v Bulger*, 462 Mich 495, 503-506; 614 NW2d 103 (2000) *cert denied,* 531 US 994 (2000)(holding that neither the Michigan Constitution nor the United States Constitution requires the appointment of appellate counsel at public expense when a criminal defendant applies for leave to appeal a plea-based conviction). The Court also described the reasons for the constitutional amendment, 462 Mich at 504:

> Eliminating appeals as a matter of right from plea-based convictions was suggested as a way to help control the case load of the Michigan Court of Appeals. By 1992, the Court of Appeals had a backlog of more than 4,000 cases awaiting decision, and plea-based appeals constituted approximately thirty percent of all appeals facing the Michigan Court of Appeals. Eliminating appeals of right from plea-based convictions was one method proposed to reduce a crushing burden on our appellate courts. [Citations and internal quotation marks omitted.]

The challenged statute, MCL 770.3a, became effective April 1, 2000.[8] It provides that "a defendant who pleads guilty . . . shall not have appellate counsel appointed for review of the defendant's conviction or sentence." MCL 770.3a(1). Four exceptions specify that appellate counsel must be appointed when the prosecution seeks leave to appeal; when the defendant's sentence exceeds the upper limit of the minimum sentence range of the applicable sentencing guidelines; when the appellate court grants the defendant's application for leave; and when the defendant seeks leave to appeal a conditional plea. MCL 770.3a(2). Additionally, appellate counsel may be appointed in one other circumstance when three factors are present: the defendant seeks leave to appeal a sentence based upon allegedly improper scoring of offense or prior record variables; the defendant preserved an objection to the scoring; and the sentence constitutes an upward departure from the upper limit of the minimum sentence range. MCL 770.3a(3).[9]

B. The Present Lawsuit

A month before the statute's effective date, this lawsuit was filed by Respondents, who are three indigent criminal defendants and two criminal defense attorneys. The named defendants (current Petitioners) were three State Circuit Court Judges and the then Attorney General of Michigan, who was later dismissed by the District Court and is no longer a party.[10]

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[8] Because MCL 770.3a did not apply to the defendant in *Bulger*, the precise question of its constitutionality was not before the Michigan Supreme Court, but the Court explicitly upheld the constitutionality of the practice of denying appointed counsel.

[9] Assigned appellate counsel are paid by counties, not the State. *Frederick v Presque Isle County Circuit Judge*, 439 Mich 1; 476 NW 2d 142 (1991).

[10] Petitioner John F. Kowalski is a Judge of the 26th Judicial Circuit (Alcona, Alpena, and Montmorency Counties); Petitioners William A. Crane and Lynda L. Heathscott are Judges of the 10th Judicial Circuit (Saginaw County).

Respondent Tesmer is an indigent who pleaded guilty in 1999 to a charge of home invasion, MCL 750.110a, and was sentenced by Petitioner Kowalski to a term of 9 to 15 years imprisonment. Petitioner Kowalski denied Tesmer's request for appointed appellate counsel on September 7, 1999, before MCL 770.3a took effect. Tesmer appealed to the Michigan Court of Appeals and raised the issue of the denial of counsel, and his appeal was pending when the District Court complaint was filed. The Michigan Court of Appeals denied his delayed application for leave to appeal on March 28, 2001. He did not seek appeal to the Michigan Supreme Court.

Respondent Carter is an indigent who pleaded guilty in 1999 to a charge of attempted murder, MCL 750.91, and was sentenced by Petitioner Crane to a term of life imprisonment. Petitioner Crane denied Carter's request for appointed appellate counsel on May 12, 1999, before MCL 770.3a took effect. Carter did not appeal, although a delayed application would still have been timely when the District Court complaint was filed.

Respondent Schnell is an indigent who pleaded guilty in 1998 to a charge of operating a vehicle under the influence of liquor, third offense, MCL 257.625, 769.11, and was sentenced by Petitioner Heathscott to a term of 5 to 10 years imprisonment. Petitioner Heathscott denied Schnell's request for appointed appellate counsel on September 21, 1998, before MCL 770.3a took effect. Schnell appealed to the Michigan Court of Appeals, which denied his application on April 1, 1999. Rehearing was denied on May 25, 1999, and Schnell did not appeal to the Michigan Supreme Court.

Respondent Attorneys Fitzgerald and Vogler alleged that they are on lists of attorneys qualified to take assignments as appointed appellate counsel and that each of them "earns a portion of his income as an attorney taking assigned appeals

from trial and plea based convictions."[11] They alleged that the practice of denying appointed appellate counsel to indigent defendants convicted by guilty pleas had adversely affected their incomes and that MCL 770.3a "will adversely affect" their incomes because "it will reduce the number of cases in which they could be appointed and paid as assigned appellate counsel." Complaint, paragraphs 33-36; Joint App. 16a. Neither of them represented any of the indigent criminal defendant Respondents. They asserted third-party standing under the doctrine of *jus tertii* to assert the constitutional rights of future indigent criminal defendants.

C. Proceedings Below

On March 31, 2000, the District Court entered an opinion and order declaring that both MCL 770.3a and the practice of

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[11] The Brief In Opposition to the Petition, pp. 14-15, accurately describes the Michigan system for assigning appellate counsel:

> In 1978, the Michigan Legislature established an Appellate Defend[er] Commission. Mich. Comp. Laws §780.712. One of the functions of that Commission was to compile and maintain a statewide roster of attorneys eligible and willing to accept assigned criminal appeals. Mich. Comp. Laws §780.712(b) [*sic*, 780.712(6)]. Subsequently, by Administrative Order of the Michigan Supreme Court, the agency known as Michigan Assigned Appellate Counsel System (MAACS) was established to perform this function. Michigan Supreme Court Administrative Order 1981-7, 412 Mich. lxv (1981). MAACS maintains a statewide list of attorneys who are deemed qualified to accept assigned appeals. Administrative Order 1981-7, §2(1), 412 Mich. lxviii. After qualifying for the statewide list, the attorney selects the circuit courts he is willing to take appeals from by placing his name on a local list. Michigan circuit court judges appointing appellate counsel to an indigent defendant must appoint from this roster of approved lawyers. Moreover, in appointing appellate counsel in a particular case, the local circuit court or its designated representative rotates through the local list. Administrative Order 1989-3(4), (5), 432 Mich cxxii (1989).

denying appointed appellate counsel to indigent criminal defendants who have been convicted by guilty pleas unconstitutionally denied them equal protection and due process under the United States Constitution; declaring that Respondent Attorneys had third-party standing; abstaining from deciding Respondent Tesmer's claims, but not Respondent Carter's or Schnell's; and dismissing defendant Attorney General. The Court granted in part and denied in part Petitioners' motion to dismiss and denied Respondents' motion for a preliminary injunction. *Tesmer v Granholm*, 114 F Supp 2d 603 (ED Mich, 2000). Pet. App. 87a.

Respondents filed motions for class certification and for injunctive relief, contending that Petitioner Heathscott and Respondent Kolenda, a nonparty State Circuit Court Judge (17th Judicial Circuit, Kent County), were violating the District Court's opinion and order by refusing to appoint appellate counsel for non-party indigent criminal defendants who had been convicted by guilty pleas. On June 30, 2000, the District Court issued an opinion and order that enjoined Petitioner Heathscott and purported to bind Respondent Kolenda and all Michigan State Judges from denying appointed appellate counsel. The District Court declined to certify either a plaintiff or a defendant class. *Tesmer v Kowalski*, 114 F Supp 2d 622 (ED Mich, 2000). Pet. App. 125a.

Petitioner Judges appealed from the June 30, 2000 opinion and order. Respondent Kolenda fled a separate appeal. On July 2, 2002, a panel of the Court of Appeals entered a decision concluding that the District Court should have abstained from deciding the claims of all three Respondent criminal defendants; that the Respondent Attorneys had third-party standing; and that MCL 770.3a sufficiently protects an indigent defendant's constitutional rights. The Court dissolved the injunction issued by the District Court, reversed and vacated the grant of declaratory relief, and remanded the matter with instructions to enter judgment in favor of Petitioners. *Tesmer v*

Kowalski, 295 F 3d 536 (6th Cir, 2002). Pet. App. 63a. Respondents filed a motion for rehearing *en banc* that was granted on September 20, 2002, which had the effect of vacating the panel decision. *Tesmer v Kowalski*, 307 F 3d 459 (6th Cir, 2002). Pet. App. 85a.

On *en banc* rehearing, 333 F 3d 683; Pet App. 1a, the Court of Appeals entered a 7-5 decision on June 17, 2003, affirming the District Court in part and reversing in part. The Court unanimously held that abstention applies to all three indigent criminal defendants. Pet. App. 6a-10a. The majority then recognized the general principle that a party "must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties," quoting from *Warth v Seldin*, 422 US 490, 499 (1976). The majority concluded, however, that the Respondent Attorneys fell within an exception to that principle articulated in *Powers v Ohio*, 499 US 400, 410-411 (1991) that permits "a litigant to bring suit on behalf of a third party if 1) the litigant has stated an injury in fact, 2) the litigant has a close relation to the third party, and 3) the third party's ability to assert his own interests is hindered." Pet. App 10a-19a. On the merits of the constitutionality of the statute, the majority held that the statute "creates unequal access" and "a different opportunity for access to the appellate system based upon indigency," and therefore violates due process. Pet. App. 19a-29a. Finally, the majority reversed the District Court's injunction in part, holding that it was improper with respect to Judge Kolenda and all non-party Michigan State Judges. Pet. App. 29a-35a.

In separate opinions, four Judges dissented from the holding that the attorneys had third-party standing, Pet. App. 35a-50a, and a slightly different group of four Judges dissented on the merits of the constitutional issue, concluding that "the protections provided by the Michigan statute at issue are sufficient to provide indigent defendants with meaningful access to the appellate system." Pet. App. 50a-60a.

SUMMARY OF ARGUMENT

1. The Court of Appeals should have declined to adjudicate the claims of the Respondent Attorneys, because they have no standing to litigate the rights of potential future clients. Standing "involves both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise." *Warth v Seldin*, 422 US 490, 498 (1975). Under the constitutional limitation Respondent Attorneys must establish a "case or controversy" within the meaning of US Const, Art III. This requires the existence of "an 'injury in fact' -- an invasion of a legally protected interest which is (a) concrete and particularized, and (b) 'actual or imminent,' not 'conjectural' or 'hypothetical.'" *Lujan v Defenders of Wildlife*, 504 US 555, 560 (1992). The Respondent Attorneys do not allege violation of their own constitutional rights; they only assert potential loss of future income from potential future clients. This allegation does not establish an "injury in fact" giving them standing to litigate the question of whether a future guilty-pleading defendant has a constitutional right to appointed appellate counsel.

The error of the Court of Appeals' conclusion that the Respondent Attorneys have standing is highlighted by the Court's determination regarding the claims of the indigent criminal defendants themselves. They asserted that they have a constitutional right to appointed appellate counsel in their appeals from their guilty plea convictions, but the Court of Appeals correctly held that the federal courts should abstain from adjudicating their claims because they had an adequate opportunity to litigate them in the Michigan courts.

The general rule of standing is that a plaintiff must assert its own legal rights and interests, and cannot rest its claim to relief on the legal rights or interests of third parties. The Court of Appeals, however, has turned this general rule on its head by denying a federal forum to those whose interests have allegedly

been harmed while allowing third parties to assert those very claims in federal court. While this Court has permitted litigants to bring actions on behalf of third parties, it has only done so when three important criteria are satisfied: The litigant must have suffered an "injury in fact"; the litigant must have a close relation to the third party; and there must exist some hindrance to the third party's ability to protect his or her own interests. *Powers v Ohio*, 499 US 400, 410-411 (1991). None of those criteria is present in this case. The Respondent Attorneys have not demonstrated an "injury in fact" because they have no legally protected interest in potential fees from possible future appointments for unknown clients. They do not have a sufficiently "close relationship" with such potential future clients. And any such future clients will not be hindered from bringing their own claims in any future prosecutions and appeals. Expanding the concept of standing to permit these Attorneys to raise these claims raises the specter of giving unfettered authority to attorneys to litigate all manner of claims in the absence of actual clients whose interests might be at stake, even when those clients have adequate opportunity to litigate for themselves.

2. There is no constitutional right to appeal a criminal conviction, but if a State provides an appeal of right on the merits, it generally must provide appointed counsel for indigents. After a first appeal of right, however, appointed counsel is not required for a subsequent discretionary appeal, because of the different nature of discretionary review and because indigents can adequately present their claims themselves. Michigan provides that appeals following guilty plea convictions are discretionary, not by right, and, with significant specified exceptions, counsel is not appointed to indigents in such discretionary appeals. The difference Michigan recognizes between appeals from guilty plea convictions and appeals from convictions after trials is based on reasoned distinctions inherent in guilty plea convictions. Because of procedures used during guilty pleas and in the

appellate system, indigent appellants have an adequate opportunity to present their claims fairly.

Unlike appeals of right on the merits, appeals to the Michigan Court of Appeals from guilty plea convictions are discretionary and are not on the merits. Even without an attorney, an indigent appellant will have a transcript; any motions and briefs filed by a lawyer in the trial court that identify legal issues and outline the applicable law; and the trial court's opinion regarding motions, either in writing or in a transcript of an oral opinion. These, together with the "nontechnical and easily understood" form produced by the State Court Administrative Office, permit appellants without counsel to present their claims in a "lawyerlike fashion." Taken as a whole, the Michigan system of appeals from guilty plea convictions provides adequate and effective appellate review to indigent criminal defendants.

ARGUMENT

I. Attorneys Whose Only Personal Stake Is The Speculative Loss Of Potential Future Income Do Not Have Third-Party Standing To Allege Violation Of The Constitutional Rights Of Potential Future Clients

The Court of Appeals should not even have reached the issue of the constitutionality of MCL 770.3a because none of the Respondents is a proper party to bring the challenge. Relying on *Younger v Harris*, 401 US 37 (1971), the Court of Appeals correctly concluded that "the district court should have abstained from hearing the claims of all three indigent plaintiffs" because ongoing proceedings in Michigan State courts gave the indigent Respondents adequate opportunity to bring their constitutional claims. Pet. App. 6a-10a. Despite the fact that the indigent Respondents themselves were barred from bringing their claims in federal court, and despite the fact that the Respondent Attorneys did not represent any of the indigent Respondents, the Court of Appeals nevertheless erroneously concluded that the Respondent Attorneys had third-party standing to assert the rights of potential future indigent criminal defendants. Pet. App. 10a-19a.

Four Judges dissented, aptly noting the incongruity of permitting attorneys to argue in federal court on behalf of State-court defendants when the federal courts properly abstained from entertaining the claims of the defendants themselves, Pet. App. 35a:

> Permitting lawyers in their own right to raise the same claims that *Younger* teaches cannot be brought by their clients undermines the very deference to state court processes required by *Younger*. Time-honored prudential rules against third-party standing do not generally permit lawyers as parties to litigate the interests of their clients, and exceptions to the third-

party standing rule should not be expanded to provide a tool to circumvent the policies underlying *Younger*.

This Court has consistently held that "[w]hen a person or entity seeks standing to advance the constitutional right of others" the person or entity must make two showings: first, that "the litigant suffered some injury-in-fact, adequate to satisfy Article III's case-or-controversy requirement; and second, [that] prudential considerations . . . point to permitting the litigant to advance the claim." *Caplan & Drysdale, Chartered v United States*, 491 US 617, 623-24 n3 (1989) (citing *Singleton v Wulff*, 428 US 106, 112 (1976)). The Respondent Attorneys—who "seek[] standing to advance the constitutional right of" unknown potential indigent defendants who plead guilty—cannot make either showing.

A. To Have Third-Party Standing, (i) The Litigant Must Have Suffered An "Injury In Fact"; (ii) The Litigant Must Have A Close Relation To The Third Party; and (iii) There Must Exist Some Hindrance To The Third Party's Ability To Protect Its Own Interests

The jurisdiction of the federal courts is limited by US Const, Art III, § 2, to "Cases" or "Controversies." In *Lujan v Defenders of Wildlife*, 504 US 555, 560 (1992) this Court described standing as the "core component" and "an essential and unchanging part of the case-or-controversy requirement of Article III," and identified the three elements that make up the "irreducible constitutional minimum" of standing that the party invoking federal jurisdiction must establish: an "injury in fact"; a causal connection between the injury and the conduct complained of; and likelihood that the injury will be redressed by a favorable decision. The "injury in fact" must be "an invasion of a legally protected interest" that is (a) "concrete and particularized," meaning that it "must affect the plaintiff in

a personal and individual way," and (b) "actual or imminent, not 'conjectural' or 'hypothetical,'" *Id*., at 560, and n.1. (Citations omitted.)

In addition to the constitutional limitations on standing, this Court has noted a prudential limitation on the exercise of judicial power with respect to claims of third-party standing, *Warth v Seldin*, 422 US 490, 499 (1975): "the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." In *Powers v Ohio*, 499 US 400, 410-411 (1991), the Court described the limited circumstances in which the general prohibition against permitting a litigant to raise claims of third parties can be overcome: "The litigant must have suffered an 'injury in fact,' . . . ; the litigant must have a close relation to the third party; and there must exist some hindrance to the third party's ability to protect his or her own interests." (Citations omitted.)

The Respondent Attorneys have not suffered any "injury in fact" sufficient to establish a constitutional case or controversy, and as a prudential matter, they have no close relation to third parties who might be injured by operation of the Michigan statute; and any such third parties are not hindered from protecting their own interests.

1. Respondent Attorneys Have Not Suffered An "Injury In Fact."

In their complaint the Respondent Attorneys do not allege any violation of their own rights. Instead they only assert that the statute will cause an adverse impact on their income, and they claim third-party standing to assert the constitutional rights of unknown potential indigent criminal defendants. Complaint, paragraphs 33-37; Joint App. 16a. These claims of the Respondent Attorneys are neither sufficient to establish a "case or controversy" under US Const, Art III, § 2 to assert

their own rights, nor sufficient to permit the Attorneys to assert the rights of others. [12]

In *Caplin & Drysdale, Chartered v United States*, 491 US 617, 624 n.3 (1989), the Court emphasized that even when a litigant seeks to advance the constitutional rights of others, the "injury in fact" must be "adequate to satisfy Article III's case-or-controversy requirement." The burden of demonstrating standing is on the party invoking federal jurisdiction, *Lujan, supra*, 504 US at 561, and that burden is "'substantially more difficult' to establish" when, as here, "the plaintiff is not himself the object of the government action or inaction he challenges," but instead the "asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of *someone else*." *Id.*, at 562 (emphasis in original, citations omitted). The "injury in fact" test requires more than an injury to a cognizable interest of someone; "It requires that the party seeking review be himself among the injured." *Id.*, at 563, quoting *Sierra Club v Morton*, 405 US 727, 734-735 (1972).

Because the standing issue was raised in a motion to dismiss, the Attorneys' assertion that the statute will adversely affect their incomes must be taken as true, *Warth v Seldin*, 422 US at 501. Even so, their claims are speculative and uncertain since they merely allege an indirect potential consequence of the statute. The Court of Appeals concluded that the Respondent Attorneys had suffered an injury in fact because they "stand to lose income if the challenged statute remains if force." Pet. App. 12a. These claims, however, are not sufficient to allege "'such a personal stake in the outcome of the controversy' as to warrant [their] invocation of federal-

[12] This case does not involve any First Amendment claims, US Const, Amend I, that might trigger application of the "overbreadth" doctrine, where one as to whom a statute is constitutional may be permitted to challenge its constitutionality as to others. See, *Broadrick v Oklahoma*, 413 US 601 (1973.

court jurisdiction and to justify exercise of the court's remedial powers on [their] behalf." *Warth*, 422 US at 498-499, quoting *Baker v Carr*, 369 US 186, 204 (1962).

Respondent Attorneys' claim is simply that they are on rosters of attorneys who on occasion receive court appointments to represent criminal appellants and that the challenged statute "will reduce the number of cases in which they could be appointed and paid." Complaint, paragraphs 33-36; Joint App. 16a. They did not plead guilty to a criminal charge. They did not request the appointment of appellate counsel. They were not denied the appointment of appellate counsel. They do not allege that they have any contractual or other right to any particular appointment or any specific number of appointments. They do not allege any violation of any "personal right under the constitution," *Warth*, 422 US at 509. They cannot do so because attorneys have no constitutional or contractual right to receive court appointments to represent indigents on appeal.

Perhaps the failure to appoint appellate attorneys for criminal defendants who plead guilty will result in some loss of economic benefit Respondent Attorneys might otherwise have received. Mere potential economic injury is not enough to confer standing however; as noted above, there must be an injury to a legally protected interest. *Lujan, supra,* 504 US at 560. The fact that a new rule of law might have an adverse economic effect does not mean that those who benefited from the previous law have a legally protected interest in maintaining it. "No person has a vested interest in any rule of law entitling him insist that it shall remain unchanged for his benefit." *New York Central R.R. Co v White*, 243 US 188, 198 (1917)(holding that a State workers' compensation statutory system did not violate constitutional rights of an employer). The Constitution does not forbid the creation of new rights or the abolition of old ones, even if settled expectations might be upset. *Usery v Turner Elkhorn Mining Co.*, 428 US 1, 15-16

(1976)(federal statute requiring coal mine operators to provide medical benefits for former employees who terminated work before the act's passage, held not to violate the Due Process Clause). The Respondent Attorneys have suffered no "injury in fact" that is "concrete," "personal and individual," and "actual or imminent, not conjectural or hypothetical." *Lujan*, *supra*, 504 US at 560 (footnote and internal quotation marks omitted). They have no standing.

2. Respondent Attorneys Do Not Have A Sufficiently Close Relation To Unknown Potential Indigent Defendants Who Might Be Injured By Operation Of The Michigan Statute

The Court of Appeals held that "the relationship between indigent defendants who seek appointed appellate counsel and attorneys whose appellate representation is denied is a close one." Pet App. 12a. That determination disregards the fact that the Court correctly abstained from adjudicating the rights of the indigent criminal defendant Respondents who were before the Court, and it disregards the fact that the Respondent Attorneys have no present clients whose rights are at issue. The Respondent Attorneys do not have a sufficiently "close relation" to unknown future potential clients and, as a prudential matter, the federal courts should not have recognized third party standing.

Generally attorneys do not have standing to assert the rights of their clients. *Conn v Gabbert*, 526 US 286 (1999)(attorney who was prevented by prosecutor from being with client held not to have standing to assert a constitutional right of his client to have counsel available during a grand jury proceeding). In two cases, however, this Court recognized limited circumstances where attorneys had third-party standing. Both are distinguishable from the present case.

In *Caplin & Drysdale, supra*, 491 US 617, a law firm was given third-party standing to challenge a drug forfeiture statute on behalf of its existing client. The client's assets were subject to a restraining order preventing their transfer, but the client nevertheless transferred $25,000 to the law firm and later entered a guilty plea in which he forfeited the remaining assets. The law firm filed a petition asking the court to declare that the $25,000 and an additional $170,000 were either exempt from forfeiture as attorney fees or that the statute's failure to provide an exemption rendered it unconstitutional. This Court said that the law firm's stake in the forfeited assets "is adequate injury-in-fact to meet the constitutional minimum of Article III standing." 491 US at 624 n 3. The Court permitted the law firm to advance its client's constitutional rights, in part because it said that the attorney-client relationship "is one of special consequence."[13] *Id.* Here, however, there is no established attorney-client relationship. At most, Respondent Attorneys have some expectation that an attorney-client relationship will be created some time in the future with some unknown criminal defendant who might plead guilty and then desire appointed appellate counsel. Such speculation does not rise to the level of "special consequence."

In *United States Department of Labor v Triplett*, 494 US 715, 720 (1990) an attorney was permitted to litigate on behalf of existing clients. A federal statute and regulations[14] permitted successful litigants to received reasonable attorney fees from

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[13] The Court based this conclusion on an analogy to "the doctor-patient relationship in [*Eisenstadt v Baird*, 405 US 438, 443-446 (1972)]," a habeas corpus case. But in *Baird* the respondent merely lectured in his capacity as "an advocate of the rights of persons to obtain contraceptives," 405 US at 445, and then distributed prohibited contraceptives. He was neither a physician nor a pharmacist exempted from prosecution under the challenged statute. See *Baird v Eisenstadt*, 429 F 2d 1398, 1399 n. 1 (1st Cir 1970).

[14] The Black Lung Benefits Act of 1972, 83 Stat. 792, as amended, 30 USC § 901 *et seq*. (1982 ed. and Supp. V); and 20 CFR § 725.366(a) and (b) (1989).

the agency, if approved by the tribunal. The attorney violated these restrictions by receiving unapproved attorney fees under contracts with his clients, and the West Virginia State Bar Legal Ethics Committee imposed discipline against him. He defended by asserting the constitutional due process rights of his clients. The Court observed that a due process right to representation was placed at issue because at least one of the attorney's clients had property rights in previously awarded benefits that the government was seeking to recover as erroneously paid. 494 US at 720-721. The Court therefore concluded that the case fell within the principle that third-party standing can exist when "enforcement of a restriction against the litigant prevents a third party from entering into a relationship with the litigant (typically a contractual relationship), to which relationship the third party has a legal entitlement (typically a constitutional entitlement)." *Id.*, at 720. The facts of the present case do not bring it within that principle, however, because here the challenged statute is not enforced against Respondent Attorneys; there are no existing clients with constitutional entitlements; and there is nothing preventing the Attorneys from entering into relationships with other clients in the future, although the taxpayers will not pay for the attorneys fees in such a relationship.

Other cases in which the Court has found that litigants have third-party standing typically involve existing relationships with the third party or other special circumstances. In *Griswold v Connecticut*, 381 US 479, 481 (1965), for example, the court found that two physicians convicted as accessories of violating a criminal statute against the use of contraceptive devices had "standing to raise the constitutional rights of the married people with whom they had a professional relationship." In *Eisenstadt v Baird*, *supra,* 405 US 438, 443-446, there was no professional relationship but an advocate was permitted to assert the rights of unmarried persons denied access to contraceptives. Critical to the determination of standing, however, were the facts that the advocate had been

convicted of violating the criminal statute at issue, and that "unmarried persons denied access to contraceptives in Massachusetts . . . are not themselves subject to prosecution and, to that extent, are denied a forum in which to assert their own rights." *Id.*, at 446. The Court also analogized to the specialized area of "First Amendment cases we have relaxed our rules of standing without regard to the relationship between the litigant and those whose rights he seeks to assert precisely because application of those rules would have an intolerable, inhibitory effect on freedom of speech." *Id.*, at 445, n.5.

Similarly in *Barrows v Jackson*, 346 US 249, 256-257 (1953) the Court permitted a Caucasian who was sued for money damages to enforce a racially restrictive real estate covenant to assert the constitutional rights of non-Caucasians who were not before the Court. The threat of money damages against the litigant established the existence of a "case or controversy" and the Court noted that "it would be difficult if not impossible for the persons whose rights are asserted to present their grievance before any court."

Respondent Attorneys have cited two cases, *Craig v Boren*, 429 US 190, 192-197 (1974) and *Carey v Population Services International*, 431 US 678, 682-684 (1977), where vendors were found to have third-party standing to assert claims of customers, but they, too, are distinguishable from the present case. In *Craig*, a vendor of 3.2% beer was found to have third-party standing to assert the constitutional claims of male customers between 19 and 21 years of age. There, however, the challenged statute operated directly against the vendor who was threatened with "sanctions and perhaps loss of license," 429 US 195, so the constitutional requirement was satisfied. The government never challenged the federal courts' prudential exercise of third-party standing, and because of mootness considerations, concern for judicial economy, and the fact that the statute prohibited only distribution and not use, the vendor was "the obvious claimant" to bring the action. 429 US at 197.

In *Carey*, which the Court said was "settled" by *Craig*, 431 US at 683, a vendor of contraceptive devices who was directly subject to legal sanctions for violating a statute prohibiting sales to minors under the age of 16, was permitted to assert the claim of its customers. In both *Craig* and *Carey*, unlike the present case, the litigant satisfied the constitutional requirement for standing since it was directly subject to the challenged statute, and as a prudential matter it was permitted "to assert those concomitant rights of third parties that would be 'diluted or adversely affected' should [the litigant's] constitutional challenge fail." *Craig*, 429 US at 195, quoting *Griswold*, 381 US at 481.

In *Tileston v Ullman*, 318 US 44 (1943), on the other hand, a physician was held not to have standing to challenge a the statute that, if applicable to him, would prevent his giving professional advice concerning the use of contraceptives to his patients, who were not parties. The complaint alleged violations of his patients' rights, but no violation of his own rights. This Court in *Eisenstadt v Baird*, 405 US at 443, n. 4, distinguished *Tileston* as a situation where "[t]he patients were fully able to bring their own action." The present case more closely resembles *Tileston* than *Eisenstadt*.

3. Future Indigent Criminal Defendants Are Not Hindered From Protecting Their Own Interests.

Finally, in the present case there is no "hindrance to the [unknown potential indigent criminal defendants'] ability to protect [their] own interests." *Powers*, *supra*, 499 US at 411. The Court of Appeals' erroneous conclusion that indigent criminal defendants face "significant obstacles of indigency and procedural processes" is based on circular, self-fulfilling reasoning and on that Court's belief that indigent criminal defendants would not succeed in their own challenges. Pet. App. 12a-19a.

The Court of Appeals' statements that "almost every layperson would need the help of counsel to present an appeal" and "an indigent would have difficulty pursuing the right counsel as a *pro se* plaintiff" (Pet. App. 13a) show that the Court was prejudging the merits of the issue of entitlement to appointed counsel instead of properly determining standing. This Court cautioned against just such bootstrapping in *Warth*, 422 US at 500 ("standing in no way depends on the merits of the plaintiff's contention that particular conduct is illegal"). Ironically, although the Court of Appeals used this improper analysis in deciding the third-party standing issue, it correctly disavowed the same analysis when deciding whether to abstain from the indigent criminal defendants' claims, Pet. App. 9a: "Whether [Respondent Carter] had the legal sophistication to succeed in his application for leave to appeal or needed counsel to assist does not address the abstention issues, but instead addresses the merits of the constitutional claim."

Like the named indigent Respondents, future indigent criminal defendants can challenge the denial of appointed appellate counsel in direct appeals in the Michigan courts, in petitions for certiorari to this court (in which this Court has held that appointed counsel is not required by the Constitution, *Ross v Moffitt, supra*, 417 US at 616-618), and in petitions for writs of habeas corpus in federal court.[15] Even if the Court of Appeals is correct that an indigent defendant would be unlikely to prevail in a direct appeal in the Michigan courts, in a 42 USC § 1983 lawsuit, or in a federal habeas corpus lawsuit, that fact has no bearing on the issue of whether there are barriers to presenting the claims.

The present case is unlike decisions where this Court has recognized circumstances impairing the third parties' ability to protect their own rights. For example, in *Caplin & Drysdale,*

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[15] Such habeas corpus cases are already pending, see *Bulger v Curtis*, USDC, ED Mich No. 00-CV-10476-BC and *Ridley v Grayson*, USDC, ED Mich No. 00-CV-73580-DT.

supra, 491 US at 624 n.3, the statute materially impaired an existing client's ability to exercise his constitutional rights. The fact that the forfeiture of the funds was a condition of the plea bargain meant that the defendant had no incentive to challenge the forfeiture since he would lose the money either to the government or to his attorney, and a successful challenge would cast doubt on the validity of the entire bargain of the plea. Thus the attorney was in reality the only person with sufficient interest in challenging the forfeiture provision. Similarly in *Powers*, *supra*, 499 US at 414, the Court noted that the legal and practical "barriers to a suit by an excluded juror are daunting." In the present case none of these concerns is present. The very reason that it was appropriate for the federal courts to abstain from deciding the challenge brought by the indigent Respondents themselves is that they had adequate opportunity to bring their federal claims in the Michigan courts.

Physicians have been permitted to bring constitutional challenges on behalf of their patients seeking abortions where the physicians themselves were subject to criminal prosecution, *Doe v Bolton*, 410 US 179, 188-189 (1973)("The physician is the one against whom these criminal statutes directly operate in the event he procures an abortion that does not meet the statutory exceptions and conditions. The physician-appellants, therefore, assert a sufficiently direct threat of personal detriment."). In *Warth v Seldin, supra*, 422 US at 510, the Court cited *Bolton* and two other cases for the proposition that "this Court has allowed standing to litigate the rights of third parties when enforcement of the challenged restriction against the litigant would result indirectly in the violation of third parties' rights." Such decisions have no application to the present case, of course, because the Michigan statute applies only to indigent criminal defendants, not the Respondent Attorneys.

In *Singleton v Wulff*, 428 US 106, 112-113 (1976), the Court unanimously held that physicians challenging an abortion funding statute had sufficient personal stake in the controversy to give them standing to assert their own constitutional rights. Only four Justices, however, agreed that the physicians had standing to assert the constitutional rights of their patients, based on considerations of mootness and the chilling effect of publicity on the privacy of the abortion decision that limited the ability of the patients themselves to bring the challenge. *Id*., at 113-118.[16] The Court of Appeals referred to that portion of the *Singleton* opinion as a "plurality" and relied on it to find standing. Pet. App 11a-12a. In any event, these considerations are not present here, because indigent convicted defendants do not have similar privacy or mootness concerns. *Caplin & Drysdale, supra*, 491 US at 624 ("a criminal defendant suffers none of the obstacles discussed in [*Singleton v*] *Wulff, supra*, at 116-117, to advancing his own constitutional claim.").

B. The Court Of Appeals' Misapplication Of This Court's Criteria For Third-Party Standing Fundamentally Expands The Doctrine

The Court of Appeals held that attorneys who might receive fees in the future have standing in federal court to assert the constitutional rights of unknown potential clients, even though those clients have an adequate State court forum to litigate their own claims. Neither the Court of Appeals nor the Respondents have cited any decisions of this Court granting third-party standing to a litigant that was not directly subject to the challenged statute and had no existing relationship to a third party that might have been directly subject to statute in

[16] Another Justice declined to join that part of the opinion (Stevens, J., concurring in part, 428 US at 121-122) and four Justices dissented (Powell, J., with whom Burger, C.J., and Stewart and Rehnquist, JJ., joined, concurring in part and dissenting in part, 428 US at 122-131).

the future, where there was no impairment of potential third party's ability to protect its own interests.

The present case is more akin to the situation in *Tileston v Ullman, supra*, 318 US 44, where physicians were held not to have standing to seek declaratory relief on behalf of their patients, and *Warth v Seldin, supra*, 422 US at 509-510. In *Warth*, taxpayers of one jurisdiction were held not entitled to challenge another jurisdiction's zoning ordinance because they were not subject to it and there was no relationship existing between them and others whose rights were allegedly violated. The taxpayers were not themselves subject to the challenged practices and did not assert "any personal right under the Constitution or any statute" to be free from action that "may have some incidental adverse effect" on them. *Id*., at 509. Instead, like the Respondent Attorneys in the present case, they argued "that they are suffering economic injury consequent to" practices that "violate the constitutional and statutory rights of third parties." *Id*. Despite the conjectural nature of the asserted economic injury, the Court said that even assuming that the taxpayers could establish that the zoning practices harmed them, the complaint was properly dismissed. *Id*.

Reiterating that "pleadings must be something more than an ingenious academic exercise in the conceivable," *United States v SCRAP*, 412 US 669, 688 (1973), and that mere "incidental congruity of interest" is insufficient to permit third-party standing, this Court held that the claim "falls squarely within the prudential standing rule that normally bars litigants from asserting the rights or legal interests of others in order to obtain relief from injury to themselves." *Warth*, 422 US at 510, 509.

In the present case the Respondent Attorneys' claims are of the same character. They are not themselves subject to the statute, they do not assert any personal rights, and they assert only incidental economic injury consequent to violation of the rights of third parties (unknown potential clients). The

dissenting opinion below, Pet. App. 35a, correctly observed that the effect of the majority's decision is to "circumvent" and "undermine[] the very deference to state court processes required by *Younger* [*v Harris*, *supra*, 401 US 37]." The dissent also cogently noted, Pet. App. 45a-46a, that if the majority is correct that these Attorneys have third-party standing to assert the constitutional claims of unknown potential clients, it is difficult to perceive a principled reason to deny standing in other situations like workers' compensation, Social Security, and tort reform: "It would be a short step from the majority's grant of third-party standing in this case to a holding that lawyers generally have standing to bring in court the claims of future unascertained clients."

By permitting attorneys to assert the claims of potential future clients, the Court of Appeals has fundamentally expanded the doctrine of third-party standing beyond the limits previously recognized in this Court's jurisprudence. This is a case where the cautionary words of Justice Powell, writing for himself and three other Justices, concurring in part and dissenting in part in *Singleton v Wulff*, 428 US 106, 129 (1976), are particularly pertinent:

> It seems wholly inappropriate, as a matter of judicial self-governance, for a court to reach unnecessarily to decide a difficult constitutional issue in a case in which nothing more is at stake than remuneration for professional services.

The Respondent Attorneys have not demonstrated an "injury in fact" sufficient to establish a "case or controversy" in the constitutional sense, and have not shown, as a prudential matter, that they are proper parties to raise the issues sought to be litigated

II. There Is No Constitutional Right To Appointed Counsel In Discretionary Appeals From Guilty Plea Convictions.

Although there is no constitutional right to an appeal, *McKane v Durston*, 153 US 684 (1894), this Court has held that if a State grants a right to a first appeal on the merits, then it generally cannot deny appointed counsel to an indigent. *Douglas v California*, 372 US 353, 357 (1963)("where the merits of *the one and only appeal* an indigent has as of right are decided without benefit of counsel, we think an unconstitutional line has been drawn between rich and poor" (emphasis in original)).[17]

By contrast, this Court has also held that after an initial first appeal by right to an intermediate State court of appeals, the Constitution does not require appointment of appellate counsel for a subsequent discretionary appeal to a State supreme court. *Ross v Moffitt*, 417 US 600, 610, 612 (1974). A discretionary appeal from a guilty plea conviction, in all relevant respects, more closely resembles *Moffitt* than *Douglas*. Accordingly, MCL 770.3a is constitutional.

The Sixth Amendment right to counsel applies to criminal prosecutions, not appeals.[18] The right to an attorney on appeal

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[17] See, *Smith v Robbins*, 528 US 259, 278 (2000): "For although, under *Douglas*, indigents generally have a right to counsel on a first appeal as of right, it is equally true that this right does not include the right to bring a frivolous appeal and, concomitantly, does not include the right to counsel for bringing a frivolous appeal." (Footnote omitted.) (holding that States are free to adopt procedures for determining whether an indigent's direct appeal by right on the merits is frivolous, so long as the procedures adequately safeguard the right to counsel).

[18] US Const, Amend VI: "In all criminal prosecutions, the accused shall . . . have the assistance of counsel for his defence." See, *Evitts v Lucey*, 469 US 387, 408-409 (1985)("But the words 'prosecutions' and 'defense' plainly indicate that the Sixth Amendment right to counsel applies only to trial

has therefore been analyzed under the Due Process and Equal Protection Clauses of the Fourteenth Amendment and not the Sixth Amendment.[19] *Ross v Moffitt, supra*, 417 US at 608-609 ("The precise rationale for the *Griffin*[*v Illinois*, 351 US 12 (1956)] and *Douglas* lines of cases has never been explicitly stated, some support being derived from the Equal Protection Clause of the Fourteenth Amendment, and some from the Due Process Clause of that Amendment."); *Smith v Robbins, supra*, 528 US at 276 ("But our case law reveals that, as a practical matter, the two clauses largely converge to require that a State's procedure "afford adequate and effective appellate review to indigent defendants," *Griffin*, 351 US at 20 (plurality opinion).").

In *Ross v Moffitt* this Court described the framework for analyzing whether an indigent criminal defendant has a constitutional right to appellate counsel, 417 US at 612, 616:

> The Fourteenth Amendment does not require absolute equality or precisely equal advantages, nor does it require the State to equalize economic conditions. It does require that the state appellate system be free of unreasoned distinctions, and that indigents have an adequate opportunity to present their claims fairly within the adversary system.

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level proceedings. . . . An appeal by a convicted criminal is an entirely different matter.") (Rehnquist, J., dissenting, citation omitted); *Smith v Robbins, supra*, 528 US at 292("Although the Sixth Amendment guarantees trial counsel to a felony defendant, the Constitution contains no similarly freestanding, unconditional right to counsel on appeal, there being no obligation to provide appellate review at all")(Souter, J., dissenting, citations omitted).

[19] US Const, Amend XIV: "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."

* * *

> The duty of the State under our cases is not to duplicate the legal arsenal that may be privately retained by a criminal defendant in a continuing effort to reverse his conviction, but only to assure the indigent defendant an adequate opportunity to present his claims fairly in the context of the State's appellate process. [Citations and internal quotation marks omitted.]

The Michigan appellate system makes a distinction between appeals from convictions based on trials, which are by right, and appeals from convictions based on guilty pleas, which are discretionary.[20] Because this distinction is based on legitimate and permissible differences between trials and guilty pleas, the Michigan appellate system is "free of unreasoned distinctions." Furthermore, because of protections built into the guilty plea system, indigent guilty-pleading defendants "have an adequate opportunity to present their claims fairly" and receive a meaningful appeal without appointed appellate counsel.

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[20] Petitioner Judges use the word "discretionary" in this brief to describe appeals in which an appellate court has a choice whether to accept the appeal (initiated by an application for leave to appeal) and to differentiate them from appeals by right (initiated by a claim of appeal), which the appellate court must accept. Respondents dispute that a first appeal from a guilty plea in Michigan is "a 'discretionary' appeal in any sense of the word" since, they assert, it is "an appeal that the Michigan Court of Appeals actually decides on the merits." Brief in Opposition to Petition for Certiorari, p. 8. Petitioners deny the assertion that orders denying applications for leave to appeal are decisions on the merits of the issues presented. See *infra*, pp. 37-46.

A. There Are Reasoned Distinctions Between Appeals From Convictions After Trials And Appeals From Guilty Plea Convictions

Convictions by guilty pleas are advantageous to both defendants and the government, and are a major aspect of the criminal justice system. *Brady v United States*, 397 US 742, 752 (1970) (describing advantages and noting that "well over three-fourths of the criminal convictions in this country rest on pleas of guilty"). Recently the percentage of convictions by guilty pleas has been approximately 95% for both state and federal courts.[21]

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[21] In 2001, there were 40,930 felony convictions in Michigan Circuit Courts (including jury verdicts, non-jury verdicts, and guilty pleas in the "Criminal Capital" and "Criminal Non Capital" categories). Of these, 38,196 (93.32%) were by guilty pleas. Michigan Supreme Court 2001 Annual Report, Circuit Court Statistical Supplement, p. 1 (March 2002). http://courts.michigan.gov/scao/resources/publications/statistics/circuit-caseload-2001-april-29-02.pdf

In 2000, of the estimated 924,700 State court felony convictions nationwide 879,200 (95%) were by guilty pleas. Sourcebook of Criminal Justice Statistics 2002, Tables 5.44 and 5.46. "Felony convictions in State Courts," (adapted from U.S. Dep't of Justice, Bureau of Justice Statistics, Felony Sentences in State Courts, 2000, Bulletin NCJ 198821 (Washington, DC: U.S. Department of Justice, June 2003), p. 2, Table 1; p. 8, Table 9; p. 9, Table 10). http://www.albany.edu/sourcebook/1995/pdf/t544.pdf; http://www.albany.edu/sourcebook/1995/pdf/t546.pdf.

In FY 1999-2000, of 68,156 Federal criminal convictions 64,939 (95.28%) were by pleas of guilty or nolo contendere. U.S. Department of Justice, Office of Justice Programs Bulletin NCJ 189737: "Federal Justice Statistics: Reconciled Data, Federal Criminal Case Processing, 2000, With trends 1982-2000," (Washington, DC: U.S. Dep't of Justice, November 2001), p. 11, Table 5: "Disposition of defendants in cases terminated in U.S. district courts, by offense, October 1, 1999 - September 30, 2000." http://www.ojp.usdoj.gov/bjs/pub/pdf/fccp00.pdf.

In *Tollett v Henderson*, 411 US 258, 267 (1973) this Court discussed the *Brady* trilogy of guilty plea cases (*Brady*; *McMann v Richardson*, 397 US 759 (1970); and *Parker v North Carolina*, 397 US 790 (1970)), and recognized unique aspects of guilty pleas:

> [A] guilty plea represents a break in the chain of events which has preceded it in the criminal process. When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea.

In Michigan, extensive protections are in place to assure that guilty pleas are voluntary, intelligent, and accurate. MCR 6.302; Pet. App. 146a-149a. The purpose of these elaborate guilty plea procedures is to make sure the record reflects "'that the defendant was informed of such constitutional rights and incidents of a trial as reasonably to warrant the conclusion that he understood what a trial is and that by pleading guilty he was knowingly and voluntarily giving up his right to a trial and such rights and incidents.'" *People v Saffold*, 465 Mich 268, 271; 631 NW2d 320 (2001) quoting *In re Guilty Plea Cases*, 395 Mich 122; 235 NW2d 132 (Mich 1975). In reversing a lower court determination that a guilty plea was not voluntary, this Court recently said: "The law ordinarily considers a waiver knowing, intelligent, and sufficiently aware if the defendant fully understands the nature of the right and how it would likely apply *in general* in the circumstances -- even though the defendant may not know the *specific detailed* consequences of invoking it." *United States v Ruiz*, 536 US 622, 629 (2002) (emphasis in original).

The Michigan court rule specifically requires that the trial court "speak[] directly to the defendant," the prosecutor, and the defendant's attorney to assure that the defendant is fully informed and fully understands that by pleading guilty he is giving up many rights, specifically including the right to appeal and the right to appointed counsel on any discretionary appeal. MCR 6.302(B)(5), (6); Pet. App. 147a. See *Iowa v Tovar*, 541 US ___; 124 S Ct 1379; Slip Opinion p 2 (2004)(holding that the Sixth Amendment "is satisfied when the trial court informs the accused of the nature of the charges against him, of his right to be counseled regarding his plea, and of the range of allowable punishments attendant upon the entry of a guilty plea.")

In *People v Bulger*, *supra*, 462 Mich at 517, which upheld the constitutionality of the practice of denying counsel in discretionary first appeals from guilty pleas, the Michigan Supreme Court quoted from *Tollett v Henderson*, noted the State's "fundamental interest in the finality of guilty pleas," *Hill v Lockhart*, 474 US 52, 58 (1985), and then listed many rights that a guilty-pleading defendant gives up:

> Plea proceedings are also shorter, simpler, and more routine than trials; the record most often consists of the "factual basis" for the plea that is provided to the trial court. In contrast with trials, less danger exists in plea cases that the record will be so unclear, or the errors so hidden, that the defendant's appeal will be reduced to a meaningless ritual. Also, a concession of guilt limits considerably the potential issues that can be raised on appeal. See 1A Gillespie, Michigan Criminal Law and Procedure (2d ed), § 16:30, pp 94-104 (discussing the effect of a plea on the availability of various appellate claims).[7] These are all reasoned distinctions that are relevant to determining whether Michigan provides "meaningful access" to the appellate courts.

[7] By pleading guilty or nolo contendere, a defendant waives the following issues: search and seizure claims, defective complaint and warrant claims, claims of error as to the preliminary examination (including sufficiency of the proofs to bind over), Fifth Amendment claims, nonjurisdictional evidentiary issues, challenges to operating a vehicle while under influence of alcohol predicate offenses, claims (including constitutional claims) relating to the defendant's factual guilt and the prosecution's ability to prove the case, claims of error in juvenile waiver proceedings, speedy trial claims (if the plea is unconditional), claims of violation of the statutory 180-day rule, claims of speedy trial under MCL 768.1; MSA 28.1024, claims of failure to timely file the habitual [offender] information, statute of limitations claims, unpreserved entrapment claims, double jeopardy claims that are unpreserved so that the necessary facts to support the claim are missing, and ineffective assistance of counsel claims in which the underlying issues are waived by a guilty plea. Gillespie, Michigan Criminal Law & Procedure, Practice Deskbook (2d ed), § 10:50, pp 10-15 to 10-17.

Michigan's prohibition against the appointment of appellate attorneys for indigent criminal defendants is not absolute and many issues not waived by the plea will fall within one of the exceptions. The statute provides that appellate counsel shall be appointed whenever the prosecutor initiates an appeal, whenever the defendant's application for leave to appeal is granted, whenever the trial court exceeds the upper limit of the minimum sentence range of the applicable sentencing guidelines, and whenever a defendant seeks leave to appeal a

conditional plea.[22] MCL 770.3a(2); Pet. App. 140a. The statute further provides that appellate counsel may be appointed for an appeal of a sentence based on an alleged improper scoring of an offense variable or a prior record variable, when an objection has preserved the issue and the trial court has departed from the upper limit of the minimum sentence range that the defendant alleges should have been scored. MCL 770.3a(3); Pet. App. 140a.

These distinctions between trials and guilty pleas are legitimate and permissible, and support Michigan's decision to treat the respective appeals differently. The Court of Appeals made little attempt to evaluate these distinctions, merely noting that guilty pleas are not "infallible." Pet. App. 27a. This is an improper basis on which to base a determination of unconstitutionality. *Smith v Robbins*, *supra*, 528 US at 277, fn 8 ("Of course, no procedure can eliminate all risk of error"). Instead of relying on the Michigan Supreme Court's statement of issues that are waived by a guilty plea, the Court of Appeals incorrectly relied upon the dissenting opinion in *Bulger* for the proposition that some "legally complex" issues can still be appealed. Pet. App. 27a. This too is not a sufficient basis to hold the statute unconstitutional. *Ross v Moffitt*, *supra*, 417 US at 616:

> The duty of the State under our cases is not to duplicate the legal arsenal that may be privately retained by a criminal defendant in a continuing effort to reverse his conviction, but only to assure the indigent defendant an adequate opportunity to present his claims fairly in the context of the State's appellate process.

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[22] A conditional plea is allowed by MCR 6.301(C)(2) and preserves for appeal pretrial rulings specified by the defendant at the time of the plea.

B. Defendants Who Plead Guilty Have An Adequate Opportunity To Present Their Claims Fairly And Receive A Meaningful Appeal.

In reaching the conclusion that a defendant is not entitled to appointed counsel in a discretionary appeal to the State Supreme Court after an appeal of right to the State intermediate appellate court, this Court in *Ross v Moffitt, supra*, 417 US at 615, noted the nature of the materials the defendant would typically have available:

> At that stage he will have, at the very least, a transcript or other record of trial proceedings, a brief on his behalf in the Court of Appeals setting forth his claims of error, and in many cases an opinion by the Court of Appeals disposing of his case. These materials, supplemented by whatever submission respondent may make *pro se*, would appear to provide the Supreme Court of North Carolina with an adequate basis for its decision to grant or deny review.

In discretionary first appeals from guilty plea convictions in Michigan, unless there has been an interlocutory appeal the defendant will not have an appellate brief written by a lawyer or an appellate opinion. However, the defendant will have substantial materials available that are sufficient to permit him to present his claims fairly and thus receive a meaningful appeal.

It is the responsibility of appointed trial counsel to file appropriate interlocutory appeals and to respond to any preconviction appeals by the prosecutor. MCR 6.005(H)(2)-(3); Pet. App. 144a. As noted by the Michigan Supreme Court in *Bulger*, 462 Mich at 518-519, Michigan law requires that to preserve an issue for appeal, the defendant must move to

withdraw the plea before the trial court, and trial counsel is required to file such motions: "Thus, our court rules require trial counsel to assist the defendant in organizing and presenting to the trial court any potential appellate issues that warrant preservation." Furthermore, it is the responsibility of trial counsel to file any appropriate postconviction motions. Unless made in open court during a hearing or trial, a motion filed in Michigan courts must be in writing, and if it raises an issue of law it must be accompanied by a brief. MCR 2.119(A)(1), (2).[23] An indigent criminal defendant is entitled to free copies of court documents, including transcripts. MCR 6.433. The District Court also noted that Respondents Tesmer and Schnell both had the benefit of a detailed 38-page "lawyerly" appellate brief--obviously prepared by an attorney and circulated to "many indigent defendants"--addressing the constitutionality of the practice of denying appointed appellate counsel. Pet. App. 105a.

Thus, an indigent criminal defendant who has entered a plea and wishes to appeal will not approach the Michigan Court of Appeals empty-handed. Similarly to the indigent appellant in *Ross v Moffitt, supra*, he will have a transcript; any motions and briefs filed by a lawyer in the trial court that

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[23] MCR 2.119(A)(1), (2) provides, in pertinent part:

> (A) Form of Motions.
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> (1) An application to the court for an order in a pending action must be by motion. Unless made during a hearing or trial, a motion must
>
> (a) be in writing,
>
> (b) state with particularity the grounds and authority on which it is based,
>
> (c) state the relief or order sought, and
>
> (d) be signed by the party or attorney as provided in MCR 2.114.
>
> (2) A motion or response to a motion that presents an issue of law must be accompanied by a brief citing the authority on which it is based.

MCR 2.119 is a civil rule, but it also applies in criminal proceedings. See MCR 6.001(D).

identify alleged legal issues and outline the applicable law; and any trial court opinion regarding that motion, either in writing or in a transcript of an oral opinion. These, together with the "nontechnical and easily understood" form produced by the State Court Administrative Office (Pet. App. 160a-170a) as required by the statute, permit appellants without counsel to present their claims in a "lawyerlike fashion" as contemplated by *Ross v Moffitt*, 417 US at 615.

Contrary to the express language of these court rules and the opinion of the Michigan Supreme Court, the Court of Appeals below erroneously relied on statements by Respondents and disparaged these requirements. Pet. App. 28a.

C. Orders Of The Michigan Court Of Appeals Denying Applications For Leave To Appeal Are Discretionary And Are Not Decisions On The Merits Of The Legal Issues.

Beginning at least with *Griffin v Illinois*, 351 US 12 (1956) (holding that when a transcript of trial court proceedings is necessary for full direct appellate court review of the merits, the Constitution requires a State to provide the transcript to an indigent), and continuing through *Douglas v California*, *supra*, 372 US 353, and *Ross v Moffitt*, *supra*, 417 US 600, this Court has recognized a distinction between direct appellate review by right of the merits of legal issues, and discretionary appellate review, which involves evaluation of other factors. An indigent defendant is generally entitled to counsel in a first appeal by right on the merits because such an appeal is important to "a correct adjudication of guilt or innocence," and is "an integral part of the . . . trial system for finally adjudicating the guilt or innocence of a defendant," *Griffin*, *supra*, 351 US at 18. Counsel is required "where the rich man can require the court to listen to argument of counsel before deciding on the merits, but a poor man cannot," *Douglas*,

supra, 372 US at 357, and where the appeal on the merits is "the final step in the adjudication of guilt or innocence of the individual," *Evitts v Lucey*, 469 US 387, 404 (1985) (holding that in a first appeal of right on the merits, defendants are entitled not just to counsel, but to the effective assistance of counsel).

In *Ross v Moffitt*, *supra*, 417 US at 615, this Court recognized that "the function served by discretionary review" is different from direct review of the merits, and involves different constitutional considerations. Counsel was not constitutionally required, in part because that discretionary appeal did not depend on whether a correct adjudication of guilt had been reached below. Rather, it was based on other factors like "whether 'the subject matter of the appeal has significant public interest,' whether 'the cause involves legal principles of major significance to the jurisprudence of the State,' or whether the decision below is in probable conflict with a decision of the [State] Supreme Court." 417 US at 615. The exercise of discretion by the Michigan Court of Appeals in deciding whether to grant leave to appeal is similar, even though the court rules do not explicitly provide such criteria (unlike the criteria specified for applications to the Michigan Supreme Court, see MCR 7.302(B)[24]).

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[24] MCR 7.302(B) provides:

> (B) Grounds. The application must show that
> (1) the issue involves a substantial question as to the validity of a legislative act;
> (2) the issue has significant public interest and the case is one by or against the state or one of its agencies or subdivisions or by or against an officer of the state or one of its agencies or subdivisions in the officer's official capacity;
> (3) the issue involves legal principles of major significance to the state's jurisprudence;
> (4) in an appeal before decision by the Court of Appeals,
> (a) delay in final adjudication is likely to cause substantial harm, or
> (b) the appeal is from a ruling that a provision of the Michigan Constitution, a Michigan Statute, a rule or regulation included in

Convictions on guilty pleas in Michigan are, in a very real sense, "the final step in the adjudication of guilt or innocence of the individual," *Evitts v Lucey*, 469 US at 404. Appeals from guilty pleas in Michigan—whether with or without counsel—are discretionary. In ruling on applications for leave to appeal, the Michigan Court of Appeals is typically not deciding the merits of the legal issues presented; it is only deciding whether the issues have sufficient merit to deserve substantive consideration. The Michigan Court of Appeals may grant or deny the application for leave to appeal; enter a final decision; grant other relief; request additional material from the record; or require a certified statement of proceedings and facts from the lower court. If an application is granted, counsel is appointed and the case proceeds as an appeal of right. MCR 7.205(D)(2), (3), Pet. App 154a; MCL 770.3a(2)(c), Pet. App. 139a.[25] In *People v Tooson*, (*In re Withdrawal of Attorney)*, 231 Mich App 504, 505-506; 231 NW 2d 504 (1998), an appeal from a guilty plea, the Michigan

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the Michigan Administrative Code, or any other action of the legislative or executive branch of state government is invalid;

(5) in an appeal from a decision of the Court of Appeals, the decision is clearly erroneous and will cause material injustice or the decision conflicts with a Supreme Court decision or another decision of the Court of Appeals; or

(6) in an appeal from the Attorney Discipline Board, the decision is erroneous and will cause material injustice.

[25] In 2001, the Michigan Court of Appeals disposed of 7,606 cases. Of the dispositions, 4,468 (59%) were by order and 3,138 (41%) were by opinion. Michigan Supreme Court Annual Report 2001 Judicial Activity And Caseload, p. 14. (March 2002). http://courts.michigan.gov/scao/resources/publications/statistics/msc-coacaseloadreport2001.pdf

In 2001, approximately 40% of these appeals were from criminal convictions (14% from guilty pleas ("Proposal B Appeals") and 26% from jury and non-jury trials). Approximately 2% of the total opinions were in guilty plea appeals, and approximately 23% of the total orders were in guilty plea appeals. Michigan Court of Appeals, "Preliminary Report And Recommendations Of The Delay Reduction Work Group," p. 22, Graphs 5, 6, 7 (March 1 2002). http://courtofappeals.mijud.net/pdf/Delay_Reduction_Report_030102.pdf

Court of Appeals held that only the trial court, and not the Court of Appeals, had jurisdiction over an appointed appellate attorney's motion to withdraw based on lack of meritorious issues on appeal:

> When an application for leave to appeal is filed, this Court's jurisdiction is limited to granting an application, denying it, or awarding peremptory relief. MCR 7.205(D)(2), 7.215(A). Plenary jurisdiction attaches only after leave is granted. MCR 7.205(D)(3). Only if and when leave is granted does this Court actually possess plenary power over this class of cases.

When the Michigan Court of Appeals enters an order denying leave to appeal it often uses the following boilerplate language: "The Court orders that the application for leave to appeal is DENIED for lack of merit in the grounds presented." Respondents, like the dissenting opinion in *Bulger, supra*, incorrectly contend that this boilerplate language means that the Michigan Court of Appeals is deciding the substantive merits of legal claims. The Michigan Supreme Court in *Bulger*, however, did not accept this argument. This boilerplate language means no more than that the reasons presented to justify the grant of leave to appeal were insufficient to persuade the Court to exercise its discretion and accept the appeal. Well-established Michigan case law demonstrates that this language does not mean that the Michigan Court of Appeals reviewed the substantive merits of any particular issue.

Orders by both the Michigan Supreme Court and the Michigan Court of Appeals denying discretionary applications for leave to appeal are not decisions on the merits. In *Great Lakes Realty Corp v Peters*, 336 Mich 325, 328-329; 57 NW 2d 901 (1953), the Michigan Supreme Court quoted from *Malooly v York Heating & Ventilating Corp.*, 270 Mich 240,

247; 258 NW 622 (1935) and said: "The denial of an application for leave to appeal is ordinarily an act of judicial discretion equivalent to the denial of certiorari. It is held that the denial of the writ of certiorari is not equivalent of an affirmation of the decree sought to be reviewed. [Citations omitted]."

In *People v Berry*, 10 Mich App 469, 473-474; 157 NW 2d 310 (1968) the Michigan Court of Appeals cited and quoted *Peters*, *Malooly*, and another case, and held that it was not barred from reviewing the merits of an issue even though an application for leave to appeal had previously been denied:

> All three cases involved denials of applications for leave to appeal from interlocutory orders. However, the principle . . . is equally applicable to denials of applications for leave to appeal from final judgments. Such denials are acts of judicial discretion and do not constitute affirmances on the merits.
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> * * *
>
> [D]enials of applications for leave to appeal do not import an expression of opinion on the merits of a cause, but rather are acts of judicial discretion. For this reason such denials cannot be afforded res judicata treatment. This Court is not barred from looking into the merits of the present cause. [Citations omitted.]

Even more conclusively, in *State ex rel Saginaw Prosecuting Attorney v Bobenal Invest, Inc*, 111 Mich App 16, 22 n 2; 314 NW 2d 512 (1981), *lv den* 414 Mich 951 (1982), the Michigan Court of Appeals held that two previous orders that denied applications for leave to appeal "for lack of merit in the grounds presented" were not adjudications on the merits.[26]

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[26] Defaults had been entered against two parties, and the trial court denied motions to set them aside. The parties appealed separately, and the

Therefore the doctrines of res judicata and law of the case did not apply: "By denying the interlocutory applications for leave to appeal neither this Court, nor the Supreme Court, ruled on the merits of the challenges to the legal sufficiency of plaintiff's complaint."

In their brief in opposition to the petition in this case, at p. 7, Respondents cite three Michigan Court of Appeals decisions for the proposition that "an order denying leave to appeal for 'lack of merit' in the grounds presented *is* a conclusive determination of the merits of the case, thus precluding further review under the law of the case doctrine." [27] (Emphasis in original.) None of those cases involved decisions on applications for leave to appeal, however. They all involved only the preclusive effect of orders denying defendants' motions to remand in the context of subsequent attempts to relitigate the same issues in the appeals on the merits. Those cases do not contradict the holdings of *Bobenal*, *supra*, and *Peters*, *supra*.[28]

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applications for leave to appeal were denied by the Michigan Court of Appeals on April 4, 1980 (Mich App Docket No. 50540) and April 8, 1980 (Mich App Docket No. 50736). Both orders contained the form language: "IT IS FURTHER ORDERED that the application for leave appeal be, and the same is hereby DENIED for lack of merit in the grounds presented."

[27] *People v Hayden*, 132 Mich App 273; 348 NW 2d 672 (1984); *People v Douglas*, 122 Mich App 526; 332 NW 2d 521 (1983); and *People v Wiley*, 112 Mich App 344; 315 NW 2d 540 (1981).

[28] See, *Beulah Missionary Baptist Church v Spann*, 132 Mich App 118, 126-127; 346 NW 2d 911 (1984)(Gage, J., concurring in part, dissenting in part):

> In other contexts, the phrase "lack of merit in the grounds presented" has been held to constitute a resolution of legal questions binding on a subsequent panel under the doctrine of "law of the case." *People v Wiley*, 112 Mich App 344, 346; 315 NW2d 540 (1981); *People v Douglas*, 122 Mich App 526, 530; 332 NW2d 521 (1983). However, denial of leave to appeal an

Similarly, under the Michigan Court Rules, orders of the Michigan Court of Appeals denying leave to appeal doe not fall within the criteria for publication, MCR 7.215(B); are not precedentially binding under the rule of *stare decisis*, MCR 7.215(C); are not even within the definition of "judgments" of the Court; and are "not deemed to dispose of an appeal" for purposes of execution, enforcement, and timing of subsequent events. MCR 7.215(E)(1).[29]

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interlocutory order is not the equivalent of affirmance of the order and does not preclude appellate review of the order in a subsequent appeal. *Great Lakes Realty Corp v Peters*, 336 Mich 325, 328-329; 57 NW2d 901 (1953). In the context of the order at issue here, the phrase "lack of merit in the grounds presented" refers merely to the grounds presented for immediate appellate review of the interlocutory order; no resolution of the substantive issue presented is expressed.

[29] MCR 7.215:
* * *

(B) Standards for Publication. A court opinion must be published if it:

(1) establishes a new rule of law;

(2) construes a provision of a constitution, statute, ordinance, or court rule;

(3) alters or modifies an existing rule of law or extends it to a new factual context;

(4) reaffirms a principle of law not applied in a recently reported decision;

(5) involves a legal issue of continuing public interest;

(6) criticizes existing law; or

(7) creates or resolves an apparent conflict of authority, whether or not the earlier opinion was reported; or

(8) decides an appeal from a lower court order ruling that a provision of the Michigan Constitution, a Michigan Statute, a rule or regulation included in the Michigan Administrative Code, or any other action of the legislative or executive branch of state government is invalid.

(C) Precedent of Opinions.

(1) An unpublished opinion is not precedentially binding under the rule of stare decisis. * * *

(2) A published opinion of the Court of Appeals has precedential effect under the rule of stare decisis. * * *

* * *

Respondents' analogy to habeas corpus law is similarly misplaced. In their brief in opposition to the petition, at pp. 8-9, they cite *Harris v Stoval*, 212 F 3d 940 (6th Cir., 2000) and other cases for the proposition that the federal courts treat a Michigan Court of Appeals order denying an application for leave to appeal "for lack of merit in the ground presented" as a decision on the merits for purposes of habeas corpus review. *Harris* does not say that, however. Moreover, the recent decision in *McKenzie v Smith*, 326 F 3d 721, 726-727 (6th Cir., 2003), *cert denied*, 540 US ___; 124 S Ct 1145 (2004) makes it clear that the Sixth Circuit does not consider such orders to be decisions on the merits entitled to deference.

Federal habeas review of a State court's decision is governed by the standards established by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub L No 104-132, 110 Stat 1214 (1996). Under the AEDPA, an application for writ of habeas corpus on behalf of a person who is incarcerated pursuant to a state conviction cannot be granted with respect to any claim that was "adjudicated on the merits in State court proceedings" unless the adjudication: "(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 upon an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 USC § 2254(d).

In *Harris* the Michigan Court of Appeals had granted a prosecutor's motion to affirm in a summary order that did not

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(E) Judgment.

(1) When the Court of Appeals disposes of an original action or an appeal, whether taken as of right, by leave granted, or by order in lieu of leave being granted, its opinion or order is its judgment. An order denying leave to appeal is not deemed to dispose of an appeal.

articulate its reasoning. The Sixth Circuit held that a federal habeas corpus court was nevertheless required to apply the deferential § 2254(d) standard to the *result* of the decision, 212 F 3d at 943, n.1 and accompanying text:

> Where a state court decides a constitutional issue by form order or without extended discussion, a habeas court should then focus on the result of the state court's decision, applying the standard articulated above.

In *McKenzie*, on direct appeal the Michigan Court of Appeals had issued a published opinion on the merits of several issues, including the admissibility of certain evidence. In a post-judgment motion the defendant raised several additional issues, including the sufficiency of the evidence. Relief was denied in the trial court and the Michigan Court of Appeals denied an application for leave to appeal in the form language, "for lack of merit in the grounds presented." In a subsequent habeas corpus petition in the Federal court challenging the sufficiency of the evidence, the Sixth Circuit distinguished *Harris*, which involved an order granting a motion to affirm, by saying, 326 F 3d at 727, "we can safely assume that the state court considered the merits of Harris's claim." The *McKenzie* Court distinguished between the first *opinion* involving admissibility and the subsequent form *order* denying leave on the sufficiency issue, 326 F 3d at 727:

> However, as noted above, the Michigan appellate court addressed only the admissibility of the evidence, but never directly addressed the specific issue of whether the evidence was sufficient to support McKenzie's conviction. Accordingly, there are simply no results, let alone reasoning, to which this court can defer. Without such results or reasoning, any attempt to determine whether the state court decision "was contrary to, or involved an

> unreasonable application of clearly established Federal law," 28 USC § 2254(d)(1), would be futile.

The Court therefore declined to apply any deference under § 2254(d) to the State court order and instead applied de novo review and granted relief, thus demonstrating that it did not consider the Michigan Court of Appeals form order to be a disposition on the merits.

Michigan has chosen to address the burdens on its appellate court system, in part, by imposing limits on appeals from guilty pleas. It may constitutionally do so since its process provides "adequate and effective appellate review to indigent defendants." *Griffin v Illinois*, 351 US at 20. A State "may protect itself so that frivolous appeals are not subsidized and public moneys not needlessly spent." *Griffin*, 351 US at 24 (opinion of Justice Frankfurter, concurring in judgment). States are laboratories of federalism that are free, within the limits of the Constitution, to experiment with procedures for handling criminal appeals, *Smith v Robbins*, *supra*, 528 US at 276 ("We will not cavalierly 'impede the States' ability to serve as laboratories for testing solutions to novel legal problems'" (citation omitted.)).

The system Michigan has chosen for appeals from guilty pleas complies with the Constitution.

CONCLUSION

For these reasons, Petitioner State Court Judges ask this Court to reverse the judgment of the Court of Appeals and hold that the Respondent Attorneys do not have third-party standing, that indigent criminal defendants convicted by guilty pleas do not have a constitutional right to appointed appellate counsel in a discretionary first appeal, and that MCL 770.3a is constitutional.

Respectfully submitted,

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