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 OF RESPONDENT JUDGE DENNIS C. KOLENDA IN SUPPORT OF PETITIONERS

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SUMMARY OF ARGUMENT

Judge Kolenda's position is that the United States District Court for the Eastern District of Michigan and the Sixth Circuit Court of Appeal should have abstained from hearing this case. They should have determined that the Co-Respondent Attorneys lacked *jus tertii* standing to assert that MCL 770.3a violated an indigent criminal defendant's right to appointed counsel for a discretionary appeal. His position is broader than just the doctrine expressed in *Younger v. Harris,* 401 U.S. 37 (1971). It is based on serious concerns about the federal courts' preempting the ability of the Michigan state courts to first consider any legal challenges to P.A. 1999, No. 200, MCL 770.3a.

Judge Kolenda supports the Petitioners' position that MCL 770.3a is constitutional for several reasons. First, the States are not required to provide for any appeal at all from a judgment of conviction. Therefore, Michigan is well within its rights to eliminate appeals as of right from guilty plea convictions; making them discretionary instead. Second, this Court has long held that a State does not have to provide indigent criminal defendants with the entire legal arsenal of tools available to a defendant with financial means. Third, the Michigan system of criminal justice provides indigent defendants with "meaningful access" to the appellate courts within the requirements of *Ross v. Moffitt*, 417 U.S. 600 (1974). And fourth, a criminal defendant who pleads guilty knowingly, voluntarily and intelligently waives both his right to appeal his conviction and his ability to have counsel to assist with any application for leave to appeal.

I. THE RESPONDENT ATTORNEYS LACK STANDING TO CHALLENGE THE MICHIGAN STATUTE

In complete reliance on *Younger v. Harris,* 401 U.S. 37 (1971) and for all the reasons stated in the Defendant Judges' original briefs, both the original Sixth Circuit panel and the *en banc* Court correctly concluded that the District Court erred in failing to abstain from deciding this constitutional challenge on behalf of the criminal defendants themselves. The panel concluded that the indigent Respondents had failed to exhaust their state remedies. *Tesmer v. Granholm*, 295 F. 3d 536, 542 (6th Circ. 2002); 333 F. 3d 683, 691 (6th Cir. *en banc* 2003). Yet, both the panel and the *en banc* Court allowed a complete end run around the principles of *Younger* by allowing the Attorney Respondents *jus tertii* standing to assert the rights of criminal defendants who pled guilty.

This was error which this Court must correct.

A. The Respondent Attorneys Do Not Have Third Party Standing To Present A Constitutional Challenge On Behalf of the Indigent Criminal Respondents Who Themselves Lack Standing Due to the Principles Expressed in *Younger*

Neither the original panel nor the *en banc* Court even attempted to find that the Respondent Attorneys had standing on their own to challenge MCL 770.3a. Instead, they jumped directly to the question of the attorneys' third party standing to raise the constitutional issue applicable only to the indigent criminal Respondents.

By now, the criteria for asserting the constitutional

rights of third parties are well-established. The litigant must have: 1) 'suffered an injury in fact'; giving him or her a 'sufficiently concrete interest' in the outcome of the litigation; 2) a "close relation to the third party'; and 3) there must be some hindrance to the third party's ability to protect his or her own interests. *Powers v Ohio,* 499 U.S. 400, 410-411 (1991). Glossing over the first two criteria, (and often blurring the distinction between all three criteria) the *en banc* majority and dissenting opinions in the Sixth Circuit disagreed only as to the third. The majority was clearly wrong.

It is seriously questionable whether the Co-Respondent Attorneys in this case are able to meet the first and second prongs of the test for *jus tertii* standing. According to the Affidavit contained in the Joint Appendix, attorneys appointed to represent indigent criminal defendants on appeal are paid a flat fee of $350.00. None of the attorney Respondents claim to personally represent any of the three named indigent Respondents. The Attorney Respondents base their standing on their past and potential future representation of indigent criminal defendants in general. *see Tesmer v. Granholm*, 295 F. 3d at 544. However, there is no guarantee that they will receive any appointments. Even if they do, there is no guarantee that these cases will involve criminal defendants who have pled guilty. In addition, none of the indigent Respondents actually pled guilty after the challenged statute was to become effective. They have no right to present a constitutional challenge to MCL 770.3a because they all failed to exhaust their state remedies. Considering these factors, the Respondent Attorneys are unable to satisfy the first and second prongs of the third party standing test.

The third prong of the *jus tertii* standing test - - a

hindrance to the third party's ability to protect his or her own interests - - was the primary reason the *en banc* Sixth Circuit found that the Respondent Attorneys could assert the rights of the Respondent Indigents. The majority's rationale is found at 333 F. 3d at 692-693. First, it concludes that the indigents are hindered by their inability to obtain appointed counsel for their constitutional challenge. This approach bootstraps the merits of the constitutional argument onto the standing issue. Second, it concludes that the indigents will face the issues of federal court abstention which have already prevented them from obtaining standing on their own. Third, the majority concludes that the indigent defendants will have no chance of succeeding within the Michigan system because of the Michigan Supreme Court's decision in *People v. Bulger*, 462 Mich 495, 517-518 (2000); *cert. denied* 531 U.S. 994 (2000). However, as the dissenting opinion so aptly points out, the only obstacle the potential future clients may face relates to any attempt to bring their challenge in federal court. 333 F. 3d at 712 (Rogers, J. dissenting). There would be no obstacles to raising their constitutional challenge in state court after they plead guilty; or later, in federal court, upon a request for habeas corpus. Considering the relationship between *jus tertii* standing and *Younger*, this rationale demonstrates the result-oriented approach of the Sixth Circuit.

The concept of *jus tertii* standing is intertwined with *Younger* in the sense that the issue of *jus tertii* standing is a prudential one; one of "judicial self-governance". *See Singleton v. Wulff,* 428 U. S. 106, 123, 124 (1976) (Powell, J. concurring) And in the case of a suit seeking a declaratory judgment (as this case was) this Court has also held that the "requirements of standing should be strict". *Griswold v. Connecticut*, 381 U.S. 479, 481(1965).

Both opinions from the Sixth Circuit rely strongly on this Court's analysis in *Singleton*, 295 F. 3d at 544; 333 F. 3d at 691, applying it to the facts of this case. In reality, there are very material differences. There is a major distinction between the obstacles facing the indigent women in *Singleton* who wished to have Medicaid-funded abortions and criminal defendants who plead guilty or no lo contendre to felonies. Pregnant women seeking abortions are unlikely to have their cases decided in time to obtain a legal abortion. Unable to achieve their own goal, these women are not likely to pursue the issue on behalf of others.

In contrast, there are no obstacles to a criminal defendant challenging MCL 770.3a within his own criminal case - - in state court. Surely, the ACLU involved in this case would take up the cause of at least one of those potential clients. It did in *Bulger*. Allowing the Attorneys *jus tertii* standing to assert the rights of future indigent criminal defendants virtually guarantees that the Michigan appellate courts will never have the opportunity to examine the state statute. This directly contradicts our system of federalism.

Even before *Younger* this Court recognized the important reasons why "deeply rooted and long-settled principals of equity have narrowly restricted the scope for federal intervention" in the business of the states. *Fenner v. Boykin,* 271 U.S. 240, 243 (1926). *Younger's* companion case, *Samuels v. Mackell,* 410 U. S. 66 (1971) applied the same rationale to a request for a federal declaratory judgment.

> The principle underlying *Younger* and *Samuels* is that state courts are fully competent to adjudicate constitutional claims, and therefore a federal court should, and in all but the most

> exceptional circumstances, refuse to interfere with an ongoing state criminal proceeding. *Doran v. Salem Inn, Inc.,* 422 U.S. 922, 930 (1975)

In his concurring opinion in *Steffel v. United States,* 415 U.S. 452 at 481-482 (1974), Justice Rehnquist warned against the interference with our system of federalism created by the rationale of the lower federal courts here. He explained "the reasons which animate the rule":

> If the rationale of cases such as *Younger* and *Samuels* turned in any way upon the relative ease with which a federal district court could reach a conclusion about the constitutionality of a challenged state statute, a preexisting judgment declaring the statute unconstitutional as applied to a particular plaintiff would, of course, be a factor favoring the issuance of an injunction as 'further relief' under the Declaratory Judgment Act. But, except for statutes that are "flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph . . .," *Younger v. Harris*, supra, at 53, 91 S.Ct., at 755, the rationale of those cases has no such basis. Their direction that federal courts not interfere with state prosecutions does not vary depending on the closeness of the constitutional issue or on the degree of confidence which the federal court possesses in the correctness of its conclusions on the constitutional point. Those decisions instead depend upon considerations relevant to the harmonious operation of separate federal and

> state court systems, with a special regard for the State's interest in enforcing its own criminal laws, considerations which are as relevant in guiding the action of a federal court which has previously issued a declaratory judgment as they are in guiding the action of one which has not. While the result may be that injunctive relief is not available as 'further relief' under the Declaratory Judgment Act in this particular class of cases whereas it would be in similar cases not involving considerations of federalism. . .

Even the Sixth Circuit has held that there is an adequate opportunity to raise constitutional claims in state court "unless state law clearly bars the interposition of the constitutional claims." *Traughber v. Beauchane,* 760 F.2d 673, 679-680 (6th Cir. 1985). There is no such bar in Michigan. The state judges who would decide those issues "are not inferior to federal judges". They have equal ability to decide constitutional issues and even to interpret federal statutes. *Sun Refining & Marketing Co. v. Brennan*, 921 F. 2d 635, 641 (6th Cir. 1991). That proposition is well-demonstrated by the Michigan Supreme Court's decision in *Bulger*. The real reason for finding indigent criminal defendants would face future obstacles in raising their claims must admit that the result-oriented Sixth Circuit, *en banc*, did not like the outcome of *Bulger*. Neither did it respect this Court's denial of the Petition for Writ of Certiorari to that decision. Instead, the Sixth Circuit opted to create havoc by ignoring the prudential aspects of third party standing which intersect with the principles of *Younger*.

This case was deliberately engineered to avoid the prohibitions of *Younger*. Suit was filed before the effective

date of MCL 770.3a. It was filed, in part, by criminal defendants who were not subject to the statute and who still had state remedies available to them. Before the statute's effective date, the district court commanded all state court judges to automatically appoint counsel for indigent defendants seeking leave to appeal their guilty pleas. Assuming all state circuit judges followed this command, the issue of the statute's constitutionality could and would not be presented to the Michigan appellate courts. Indeed, the federalism issue in this case is highlighted by relevant events surrounding decision on the issue in this case.

Shortly after the United States District Court for the Eastern District of Michigan held the statute unconstitutional and later affirmatively enjoined all state judges to follow its decision, the Michigan Supreme Court, decided *Bulger.* It held that the practice of not appointing counsel for criminal defendants who plead guilty and waive their right to appeal does not violate the Equal Protection or Due Process Clause because "Michigan's scheme gives guilty-pleading defendants a fair opportunity to have their claims heard in our appellate courts." 462 Mich at p. 511. This decision put Michigan's highest court in direct conflict with the lowest federal court. Conflicting decisions within the Sixth Circuit led to confusion among the Michigan trial courts and its Court of Appeals. In fact, even Justices on the Michigan Supreme Court opined they should refrain from deciding a case challenging the constitutionality of MCL 770.3a pending the Sixth Circuit *en banc* decision. *People v. DeLoach,* 468 Mich. 864 (2003). More recently, and despite the *en banc* Sixth Circuit's holding that its decision applies only to the parties in this case, 333 F. 3d at 701-704 but specifically not Judge Kolenda, the Michigan Court of Appeals has remanded cases to him, ordering that he appoint counsel.

Given the "special status of criminal prosecutions in our system", it is crucial to preserve the focus on the direct connection between the vindication of a litigant's interest and enforcement of the state's criminal laws. *Linda R.S. v. Richard D.,* 410 U.S. 614, 619 (1973). Departure from the stricter nexus test in cases involving challenges to a state's criminal laws threatens to grossly undermine the established rules of federalism on which the structure of our country depends. To allow the Attorney Respondents standing in this case to assert the rights of their unknown, but potential clients is to open the floodgates to attorney standing in any situation where future clients may wish to avoid state court review of statute.

For these reasons, both the District Court and the Sixth Circuit should have exercised "judicial self-governance" and held that none of the named Respondents had standing to bring this case.

II. P.A. 1999 NO. 200 IS CONSTITUTIONAL

The Michigan statute, MCL 770.3a, 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.

(c) The court of appeals or the supreme court grants the defendant's application for leave to appeal.

(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 post-conviction 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.

Co-Respondents' facially attacked the statute as unconstitutional as to indigent criminal defendants who cannot afford an attorney to assist with their applications to appeal after a guilty plea. However, their challenge, whether analyzed under due process or equal protection, should not survive under the rationale established in *Ross v. Moffitt*, 417 U.S. 600, 611-612 (1974).

Initially, this Court must consider whether the State must appoint counsel for indigent criminal defendants in all first appeals, even if that appeal is discretionary.

A. The Michigan Statute Provides Only for a Discretionary Appeal Where the Defendant has Pled Guilty or No Lo Contendre

The Michigan statute does not concern a "*first appeal*, granted as a matter of right," as was at issue in *Douglas v. California,* 372 U.S. 353 (1963) (emphasis in original). In *Douglas*, this Court repeatedly used the phrase "first appeal as of right" to describe the circumstances under which counsel must be appointed on appeal for an indigent criminal defendant. This phrase was deliberately chosen. It distinguished the majority's view from that of the dissenting Justices. The dissenting Justices readily recognized the circumstances under which courts are not required to appoint appellate counsel before determining the merits of the appeal, such as petitions for leave to appeal to a state's highest court after an intermediary appeal as of right and a writ of certiorari to this Court, *see Ross v. Moffitt*, 417 U.S. 600, 617 (1974); Sup. Ct. R. 39 (7) and the screening of federal criminal cases that is prescribed by 28 U.S.C.§1915.

Since *Douglas,* this Court has repeatedly rejected opportunities to extend its holding. In *Pennsylvania v. Finley,* 481 U.S. 551 (1987), it repeatedly stated that a criminal defendant has no right to appointed counsel "on discretionary appeals," including those "on direct appeal of his conviction." 481 U.S. at 555. The Sixth Circuit, *en banc*, gave "little weight" to *Finley* because, in its words, "it addresses the right to appointed counsel only by repeating the principles stated in *Douglas* and *Ross.*" *Tesmer v. Granholm,* 333 F.3d 683, 699 (*en banc* 2003). It utterly ignored the

Chief Justice's admonition that "it is the source of [the right to counsel], combined with the nature of the proceedings, that controls the constitutional question." 481 U.S. at 556. In the case of the Michigan statute, the "nature of the proceedings" is an application for leave to appeal from a criminal conviction based on a guilty plea during which the criminal defendant has voluntarily and knowingly waived his right to counsel to assist with his leave application.

Co-Respondents are unable to avoid the reality that Michigan criminal defendants who plead guilty or no lo contendre, are not entitled to a "first appeal as of right", as that phrase is commonly understood. Instead, they have constructed a rather convoluted argument about why the phrase used in *Douglas* really means "any first appeal" (See Co-Respondents' Supplemental Brief on Rehearing En Banc p. 4-7) and why Michigan's constitutional amendment allowing only an application for leave to appeal in guilty plea cases is not a "discretionary appeal", but rather one of right. (Id. at p. 8-10)

Granted, this Court has not more specifically defined terms like "appeal as of right" and "discretionary appeal", but those terms seem obvious. Indeed, despite its holding that MCL 770.3a is unconstitutional, even the *en banc* Sixth Circuit referred to the only appeal available to one who pleads guilty of a felony in Michigan as "a discretionary appeal", not "an appeal of right". *Tesmer v. Granholm,* 333 F.3d at 696 (*en banc* 2003). The common sense point is that when the State provides an automatic opportunity to challenge the legality of the defendant's conviction, then the appeal is one of right. The appeal available in Michigan is not automatic. The Michigan Legislature has provided that any appeal from a guilty plea is by leave only. The Michigan Court of Appeals must grant permission before a defendant who pleads guilty

can challenge either his conviction or his sentence. This is epitome of the concept of discretion.

B. This Court has More Recently Eroded the Underpinnings for an Equal Protection Challenge to the Michigan Statute

Co-Respondents' challenge to the Michigan statute, if it is to succeed at all, must likely depend on a claim under the Equal Protection Clause. None of the decisions in *Ross, Griffin v. Illinois,* 351 U.S. 12 (1956)*, or Douglas* depended on the Due Process Clause for their result. As Justice Thomas more recently noted, "it is difficult to see how due process could be implicated in these cases, given our consistent reaffirmation that the States can abolish criminal appeals altogether consistently with due process." *Lewis v. Casey*, 518 U.S. 343, 372 (1996). Indeed, the Court clearly focused the analysis in *Ross* on the Equal Protection Clause, *see* 417 U.S. at 611, applying what appears to be a strict scrutiny analysis to a statute which was facially neutral but had a disparate impact on the indigent criminal defendant. The Co-Respondents' statutory challenge depends on the continued viability of this approach; one that this Court has clearly moved away from.

As Justice Thomas extensively discusses in *Lewis*, this Court's decision in *San Antonio Independent School Dist. v. Rodriguez,* 411 U.S. 1 (1973) heralded an end to the strict scrutiny analysis in disparate impact cases under the Equal Protection Clause based on wealth. In his view, *Lewis* and the later decision in *Washington v. Davis,* 426 U.S. 229 (1976) negated "the idea that 'a law, neutral on its face and serving ends otherwise within the power of government to pursue, is invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than of

another." 426 U.S. at 375 (Thomas, J. concurring). As both he and Justice Harlan, in *Douglas*, pointed out, the implications of extending a strict scrutiny analysis to cases presenting challenges based on wealth is to open the door to invalidating every law and regulation which adversely affects or burdens the poor. *Id.* at p 376. Justice Frankfurter expressed concerns, even while concurring in *Griffin,* that if absolute equality was required, a State would no longer be able to "protect itself" from "frivolous appeals" being subsidized by public money, needlessly spent. 351 U. S. at 24. And Justice Blackmun, concurring in *United States v. MacCollom,* 426 U.S. 317 (1976) warned that:

> [t]he Constitution does not require that an indigent be furnished every possible legal tool, no matter how devoid of assistance it may be, merely because a person of unlimited means might choose to waste his resources in a quest of that kind.
> 426 U.S. at 330.

The Michigan voters passed a constitutional amendment in 1994 which eliminated an automatic right of appeal in guilty plea cases. Their purpose was to relieve an extraordinary burden on Michigan's court system, created in part by never-ending criminal cases. Obviously, the goal of finality is defeated when there is an appeal. Yet, in some situations, an appeal, even after a guilty plea, may be justified. In many of these situations the Michigan statute, either requires or allows appointment of counsel (e.g. the prosecutor appeals, the judge improperly sentences). MCL 770.3a (2) (3). But the vast majority of appeals from guilty pleas do not fall into this category. They are instead focused on criminal defendants attempting to get out of the bargain they made; hoping for some better result the second time around.

Indeed, in *Douglas*, dissenting Justice Clark plainly stated what everyone knows: "the overwhelming percentage of *in forma pauperis* appeals are frivolous." 372 U.S. at p. 358. Imagine what that percentage might be in cases where the defendant has pled guilty, thereby automatically negating an appeal as to pretrial issues not conditionally reserved for appeal.

What do indigent criminal defendants in this category lose that criminal defendants with money do not? The answer is nothing. Neither has any real chance of overturning his conviction. Both may have the "right" to waste time and money, but the criminal defendant with money wastes only his own. *Cf Mayer v. City of Chicago,* 404 U.S.189, 195 (1971) (appellant with money may choose to waste his own resources on a complete transcript even where one is unnecessary, but the State need not do so in providing an adequate alternative to the indigent defendant).

Several years after the constitutional amendment, the Michigan Legislature took the logical next step of eliminating the right to appointed counsel for defendants who had pled guilty but continued to burden the Michigan Courts with applications for leave to appeal. After all, it cost them nothing, no matter what the risk of loss. Just as there was nothing unconstitutional about Michigan's elimination of the right to appeal a criminal conviction in the case of a guilty plea[1], there was nothing unconstitutional about its elimination of counsel for the purpose of preparing mostly frivolous applications for leave to appeal.

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[1]Indeed, the State could have constitutionally eliminated all rights to appeal, whether from a guilty plea or conviction after trial. See discussion, post.

C. All Michigan Defendants Who Plead Guilty Specifically Waive Their Right to Appeal.

It is well-established that a criminal defendant has no federal or state right to plead guilty or to have his guilty plea accepted by the court. *Santobello v. New York*, 404 U.S. 257, 262 (1971); *People v. Grove*, 455 Mich 439, 461(1997). Necessarily, neither does he have any right to a plea bargain. However, plea bargaining has become an "essential component of the administration of justice" and, "properly administered, it is to be encouraged". 404 U. S. at 260. This Court has recognized its specific benefits to the prosecution and defendants alike, noting that these advantages can only be secured if "dispositions by guilty plea are accorded a great measure of finality." *Blackledge v. Allison,* 431 U.S. 63, 71 (1977). The ultimate goal is the prompt and final disposition of criminal cases.

As part of the plea bargaining process, the defendant is called upon to waive a host of constitutional rights. Since the criminal defendant has no constitutional right to an appeal of right, even from a conviction after trial, *McKane v. Durston,* 153 U.S. 684 (1894), the states are certainly free to eliminate appeals as of right as a condition of the guilty plea process. It is part of what the defendant gives up in exchange for whatever consideration he has been afforded in the bargain.

The Sixth Amendment guarantee of the right to counsel is to protect the criminal defendant "from conviction resulting from his own ignorance of legal and constitutional rights". *Johnson v. Zerbst*, 304 U.S. 458, 465 (1938). Consistent with Michigan's Constitutional amendment, MCR 6.302, the rule governing the acceptance of guilty pleas in Michigan has included a waiver of the right to appeal since

1994. A defendant pleading guilty is informed that he may seek leave to appeal. After the enactment of MCL 770.3a, the court rule was also conformed to the statute. Defendants pleading guilty are now advised that they are not entitled to the appointment of counsel to assist with their applications for leave. The defendant is also advised that there are certain conditions under which the court must appoint counsel for an appeal and other conditions under which the court may appoint counsel in case he seeks leave to appeal. MCR 6.302(B)(6) & (7).

Waivers in the context of guilty pleas have uniformly been held valid and binding, so long as they are knowingly, voluntarily and intelligently made. A guilty plea entered after a knowing, voluntary and intelligent waiver is considered in itself a conviction. *Boykin v. Alabama,* 395 U.S. 238 (1969). It waives the right to jury trial, the right to confront one's accusers and the right not to incriminate oneself. *Parke v. Raley,* 506 U.S. 20, 29 (1992). There is no valid reason why it may not also waive "the right"[2] to seek leave to appeal the conviction which has been established by the plea itself. Indeed, a criminal defendant can legally waive the right to counsel even without having pled guilty. *see Godinez v. Moran*, 509 U.S. 389, 400 (1993).

Every criminal defendant, those with financial means and those without, makes a personal choice whether to give up the right to trial (and, potentially, appeal) in favor of a plea bargain. He need not make this choice. Any criminal

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[2]Meaning only the ability, under Michigan law, to seek leave to appeal as opposed to a constitutional right which the defendant does not have since there is no constitutional right to appeal at all.

defendant, solvent or not, may insist on the right to trial, thereby preserving his later right to appeal his conviction. In the case of the indigent criminal defendant, this strategy will also preserve inviolate his right to appointed counsel on appeal.[3] This Court has previously held that indigent criminal defendants may be charged with the responsibility for their choices and waivers. see *United States v. MacCollom,* 426 U.S. 317, 324-325 (1976) (the equal protection clause does not require a criminal defendant who has waived his right to direct appeal automatically be furnished with a free transcript for his collateral attack under 28 U.S.C. 770 § 2255). Noteworthy also was the Court's rationale that a contrary holding would actually put the indigent criminal defendant in a position superior to "a similarly situated prisoner of some, but not unlimited, means, who presumably would make an evaluation [of his likelihood of success] before he spent his own funds for a transcript." 426 U. S. at 328.

Ultimately, the decision in *Douglas*, that an indigent criminal defendant was entitled to appointed counsel "on his first appeal as of right" turned on the conclusion that, without counsel, such a defendant was provided only a "meaningless ritual" rather than a "meaningful appeal" "where the record is unclear" or "errors [in the record] are hidden". 372 U.S. at 358. These circumstances are far less likely in a guilty plea case. And, in considering *Ross'* admonition that the question of the constitutionality of eliminating appointed counsel in the case of discretionary appeals "is not one of absolutes, but one of degrees", 417 U.S. at 612, it is also

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[3]Similarly, a defendant of limited means, but not indigent, will have to decide whether it is wise to spend his resources on a trial or accept the likely advantages of a plea bargain.

necessary to consider the statute in the context of Michigan's other relevant criminal procedures.

D. The Michigan Statute is a Legitimate Way for the State to Manage Its Criminal Justice System and Indigent Criminal Defendants Have Meaningful Access to the Appellate Process

As previously discussed, a State need not provide any appeal as of right from a criminal conviction, much less from a guilty plea. This Court has also recognized that states may choose how to provide indigent criminal defendants with "meaningful access" to the whatever court procedures may be available. *Murray v. Giarratano*, 492 U.S. 1, 14 (1989) (Kennedy, J. concurring). However, within this framework, "the intricacies and range of options are of sufficient complexity that state legislatures. . . must be given 'wide discretion' to select appropriate solutions. *Id.*

The Michigan statute, unlike the rule of criminal procedure at issue in *Douglas v. California,* 372 U.S. 353 (1963), does not put the Michigan Court of Appeals in the position of acting as an indigent defendant's appellate advocate, trying to ferret out meritorious issues for a ppeal. Rather, it specifically defines the circumstances under which counsel must or may be appointed on appeal to represent an indigent criminal defendant.

There is no claim in this case that Michigan has violated any of its obligations to indigent prisoners other than the alleged right to counsel to assist with applications for

leave to appeal guilty pleas.[4] A review of its various criminal procedures, even those specifically applicable to guilty plea cases, demonstrates that the State has amply complied with *Ross'* mandate that indigent criminal defendants have "meaningful access" to the appellate system.

Obviously, the issues available for appeal after a guilty plea are severely limited. That is because the ensuing conviction comprehends all the factual and legal elements necessary to sustain a binding, final judgment of guilt and a lawful sentence". *United States v. Broce,* 488 U.S. 563, 568 (1989). Most appeals will pertain to sentencing, which MCL 770.3a specifically addresses. The trial court is required to appoint counsel for an indigent criminal defendant if the defendant's sentence exceeds the upper limit of the minimum sentence range of the applicable sentencing guidelines. It may appoint counsel if the defendant seeks leave to appeal a sentence based upon an alleged improper scoring of an offense variable or a prior record variable, but only if: 1) the defendant objected to the scoring or otherwise preserved the matter for appeal and 2) 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.

In addition, Michigan follows some specific rules and procedures which may eliminate the need for appeals related

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[4]For example, there is no claim that Michigan fails to "assist inmates in the preparation and filing of meaningful papers [including applications for leave to appeal] by providing them with adequate law libraries or adequate assistance from persons trained in the law", *Bounds v. Smith,* 430 U.S. 817, 828 (1977).

to sentencing. In *People v. Killebrew,* 439 Mich. 1000 (1992), the Michigan Supreme Court first established that a defendant who pleads guilty has the right to withdraw his plea if the trial judge declines to follow a plea bargain, either for a specific sentence or for a prosecutor's sentencing recommendation. Later, in *People v. Cobbs,* 443 Mich. 276 (1993), the Michigan Supreme Court expanded the extent to which the trial judge may become involved in "sentencing discussions". Either the prosecutor or the defendant may ask the court, at the time of plea-taking, for a preliminary evaluation as to the defendant's expected sentence. If the court later determines that the evaluated sentence is inappropriately light, the defendant has the absolute right to withdraw his plea. 443 Mich. at 283. Additionally, a defendant who claims that the prosecutor breached a plea bargain is entitled to specific performance. *People v. Nixten,* 183 Mich. App. 95, 99 (1990). He must be re-sentenced to obtain the benefit of his bargain. *People v. Swirles,* 206 Mich App 416, 419 (1994). Clearly, these rules and procedures eliminate a large portion of the potential appeals associated with guilty plea cases - - i.e. the defendant does not like his sentence.

The Michigan statute also addresses the right to the appointment of counsel in the event that: (1) the prosecutor seeks leave to appeal; 2) the Court of Appeals or the Supreme Court grants the defendant's application for leave to appeal; or 3) the defendant seeks leave to appeal a conditional plea under Michigan Court Rule 6.301(C)(2) or its successor rule.

Otherwise, the most likely remaining issues after a guilty plea concern the voluntariness of the plea itself and whether the defendant received the effective assistance of counsel during the trial court procedures. Michigan rules and procedures specifically deal with these situations and give the

guilty-pleading defendant additional options.

According to Michigan procedure, a criminal defendant convicted by his own plea must first move the trial court to set the plea aside after sentencing but before he or she can appeal the issue of its voluntariness. MCR 6.311(C). According to MCR 6.005(H)(4), trial counsel appointed for a criminal defendant is responsible for any post-conviction motions unless an appellate attorney has been appointed. In order to seek leave to appeal, a person must provide a transcript with the application. MCR 7.205. Therefore, as the Michigan Supreme Court pointed out in *People v. Bulger*, 462 Mich 495, 517-518 (2000), a criminal defendant seeking leave to appeal without counsel has all these tools available in preparing his or her application for leave to appeal. Certainly, this is an important component in considering his or her "meaningful access" to the appellate system.

If the criminal defendant claims the issue is ineffective assistance of counsel, another remedy is mandatory which will also provide him with appointed counsel. MCR 6.501 governs the defendant's right to post-appeal or post-conviction relief. If the question of ineffective assistance depends on factual questions (as most do), the defendant is required to bring a motion to set aside his conviction under MCR 6.502. He may apply for appointment of counsel and the court may grant that request at any time during the proceedings. MCR 6.505. It is required to appoint counsel if it directs that oral argument or an evidentiary hearing be held. *Id.* If a later appeal is desired, the indigent defendant has all the transcripts and the attorney's work product from these proceedings on which to rely in formulating his application for leave to appeal.

In addition to all these procedures and protections,

Michigan also provides defendants seeking leave to appeal with a user-friendly form, complete with detailed instructions regarding its use and all related procedures. A copy of the form is attached in the Appendix to this Brief.

In *Ross,* this Court recognized that the requirements of equal protection do not require exact equality. An appellate system must be 'free of unreasoned distinctions'. Indigent criminal defendants must have an adequate opportunity to present their claims fairly within the adversary system. But the Fourteenth Amendment 'does not require absolute equality or precisely equal advantages." 417 U.S. at 612. "And the fact that a particular service might be of benefit to an indigent defendant does not mean that the service is constitutionally required." *Id* at p. 616. Specifically, in *Ross* this Court held that "the defendant's access to the trial record and the appellate briefs and opinions provided sufficient tools for the pro se litigant to gain meaningful access to courts that possess a discretionary power of review." 417 U.S. at 614-615; *Pennsylvania v. Finley,* 481 U.S. 551 (1987). Considering that there is no "trial record" in the case of a guilty plea[5], the Michigan appellate system for a discretionary first appeal amply comports with the requirements established in *Ross.*

Considering the overall structure of Michigan's criminal justice system, it is difficult, if not impossible, to conclude that indigent defendants are denied any more "meaningful access" to the appellate courts than defendants with financial means.

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[5]But the defendant will have free copies of any relevant transcripts, such as the plea and sentencing proceedings.

RELIEF REQUESTED

Wherefore, Appellant, Judge Dennis Kolenda, respectfully requests that this Court reverse the decision of the *en banc* Sixth Circuit.

Respectfully submitted:

Dated: March 31, 2004

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Judy E. Bregman