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

REPLY BRIEF OF RESPONDENT JUDGE DENNIS C. KOLENDA IN SUPPORT OF PETITIONERS

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

A. This Court Strictly Adheres to the Requirements for Prudential Standing.

Just most recently, this Court affirmed its commitment to the "strictest adherence" to standing requirements when matters of great national significance are at stake. *Elk Grove Unified School Dist. v. Newdow,* 542 U.S. _____(Slip Opinion at § III; June 14, 2004). The plurality opinion emphasized the need to balance:

> "the heavy obligation to exercise jurisdiction against the deeply rooted commitment not to pass on questions of constitutionality unless adjudication of the constitutional issue is necessary."
> 542 U.S. at ____; Slip Op at p. 8) (citations omitted)

Indeed, the issue of prudential standing is so important that this Court has even declined to exercise jurisdiction in a death penalty case where: 1) the plaintiff was the convict's mother; and 2) there were serious, but unresolved constitutional questions surrounding the Utah death penalty statute which was to be imposed on her son. *Gilmore v. Utah,* 429 U.S. 1012 (1976).[1]

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[1]The *Gilmore* case also suggests a response to the Respondents' and their *amici's* position that appointed appellate

Part of the inquiry necessary to determine whether this Court should exercise the self-restraint related to the issue of prudential standing is whether plaintiff's complaint comes within "the zone of interests protected by the law invoked." *Id.* Slip Op at p. 8. And regardless of whether the plaintiff can establish grounds for Article III standing, this Court must still address the prudential concerns related to standing, *Id.* at p. 14, which cannot be waived.

B. The Issue of *Jus Tertii* Standing Was Not Waived By Failure to Raise it Below.

For years, this Court has recognized that standing is a fundamental constitutional issue, entwined with its jurisdiction over cases. In other words, the issue of standing in this Court is jurisdictional. Contrary to the Respondent Attorneys' claim, it cannot be waived. *United States v. Hays,* 515 U.S. 737, 742 (1995); *Lewis v. Casey*, 518 U.S. 343, 349 n.1 (1996); *see also City of Edmond v. Robinson,* 517 U.S. 1201 (1996), (Rehnquist, J. dissenting from the denial of certiorari, stating that the writ should be entered and the parties should address the issue of standing which no one challenged below.)

Jurisprudential considerations of *jus tertii* standing are part of this Court's fundamental philosophy of avoiding involvement in state cases, especially those involving state criminal statutes, until the state's highest court has ruled on

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counsel is necessary to ferret out those meritorious cases where appeal is desirable. Gilmore's appointed counsel constantly appealed against his wishes to have the death penalty imposed promptly. 429 U.S. at 1015. It is likely no secret that appointed counsel are faced with more malpractice cases and grievances than retained attorneys.

the issue. As part of its "judicial self-governance", this Court may raise the issue of standing on its own. *Craig v. Boren,* 429 U.S. 190, 192 (1976).

Regardless of this Court's repeated declaration that the issue of standing cannot be waived, the fact is that the parties to this case did raise the issue. Contrary to Respondent's claim that Petitioners never challenged the second and third prongs of the *jus tertii* test for standing, the briefs submitted to the Sixth Circuit demonstrate otherwise. Judge Kolenda's opening brief discussed, at length, the adequate opportunity guilty-pleading defendants would have within the state system to raise their constitutional claims related to the appointment (or lack thereof) of counsel. One point of the third prong of the *jus tertii* test for standing[2] is to protect federalism concerns; an issue in this case which Judge Kolenda has emphasized from the beginning of his involvement.[3]

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[2]That 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).

[3]Judge Kolenda was never a party at the District Court level of this case. After the District Court for the Eastern District of Michigan declared MCL 770.3a unconstitutional, the named Defendant Judges appealed to the Sixth Circuit. While that appeal was pending, the Plaintiffs moved for an injunction against the named Defendant Judges and Judge Kolenda. Judge Kolenda is a Michigan Circuit Court Judge who sits in Kent County, within the Western District of Michigan. Plaintiffs claimed that Judge Heathscott had continued to deny appointed appellate counsel to indigents who pled guilty or no lo contendre despite the District Court's Declaratory Judgment. They also targeted Judge Kolenda for the injunction because he insisted that, under the rules of

federalism, the Eastern District Court's opinion was not binding on him, a position which was ultimately vindicated.

Judge Kolenda was never served with any process nor given any opportunity to be heard before the district court also enjoined him from failing to appoint appellate counsel for guilty-pleading defendants. On June 30, 2000 the Eastern District Court granted the injunction, applying it to "all other similarly situated non-party judicial officers" In summary, the district court's June 30th Opinion and Order concluded:

> Therefore, for all of the reasons stated above, and under the authority of 42 U.S.C. § 1983, 28 U.S.C. § 2202 and Fed. R. Civ. P. 65, this Court enjoins Judge Lynda L. Heathscott and Judge Dennis C. Kolenda from violating this Court's Order of March 31, 2000; clarifies that such order pertains to all court rules, regulations or procedures designed to implement the Act declared to be unconstitutional; clarifies that such order prohibits all state court judicial officers from taking any action whatsoever to enforce or implement the Act, and states that this Order shall have a binding effect upon such other non-party judicial officers who participate in the practice declared unconstitutional and who receive notice of this Order, including Judge Kolenda.

The named Defendants and Judge Kolenda then appealed. Judge Kolenda requested a stay of the injunction against him, which was granted by the Sixth Circuit. Ultimately, he prevailed on his claim that he could not be enjoined in this case to which he had not been named as a party.

C. 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*

None of the cases cited by the Respondents or their *amici* involve standing issues like the ones present here. None present the issue of how *jus tertii* standing can be granted when the directly interested parties themselves are precluded from seeking relief based on principles of federalism. None of the Respondents' and their *amici's* supporting cases address this paradox. In addition, their cases involve persons asserting *jus tertii* standing with a much greater direct interest in the statute they challenge. Those plaintiffs either faced the possibility of serious personal consequences for their own conduct (e.g. doctors who would face criminal penalties for performing them, *Singleton v. Wulff,* 428 U. S. 106 (1976); attorneys who would lose a concrete fee in a case involving an existing client, *Caplin & Drysdale,* 491 U.S. 617 (1989); or risk possible professional sanctions, *United States Dept. of Labor v. Triplett,* 494 U.S. 715 (1990); vendors who would face penalties including possible loss of state-granted license for statutory violation; *Craig v. Boren,* 429 U.S. 190 (1976); or loss of sales of their product; *Cary v. Population Services,* 431 U. S. 678 (1977). In short, no case Respondents and their *amici* cite demonstrates the end run around the principle of federalism so apparent here.

D. Recent Events Continue to Demonstrate the Likelihood That There Will Be a Proper Party With Direct Standing to Raise the Issue Regarding the Constitutionality of MCL 770.3a

Even since Judge Kolenda's Brief on the Merits filed here, there have been new developments in the federalism issue involved in this case. Despite the Sixth Circuit's decision on which it relied, the Michigan Court of Appeals ignored that decision as to Judge Kolenda. It again ordered him to appoint counsel for an indigent, guilty-pleading defendant. *People v. Harris,* Mich. Ct. App. No. 253152 (2/23/04)[4]. After the Court of Appeals issued this order, the Kent County prosecutor sought leave to appeal to the Michigan Supreme Court. At that point Judge Kolenda appointed counsel for Ms. Harris under MCL 770.3a (2)(a).[5] Instead of granting leave to appeal, the Michigan Supreme Court summarily reversed. *People v. Harris,* 2004 Mich Lexis 1210 (6/25/04). (Copy of Order Attached as App 1-3)

The Michigan Supreme Court's Order finally directed Michigan's lower courts, including its Court of Appeals to follow its decisions over those of lower federal courts. Only

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[4]It is interesting to note that Harris challenged her sentence even though it was within the Michigan Sentencing Guidelines both: 1) as scored by the probation department; and 2) as scored by Harris' defense counsel who disagreed with and challenged probation's scoring. One can therefore only wonder what will be the basis of her appeal for which she wants an attorney.

[5] The portion of the challenged statute requiring the appointment of counsel where the prosecutor seeks leave to appeal. Ironically, appointed counsel for Ms. Harris did not file any opposition to the prosecutor's leave application.

this Court can overrule the state's highest court's decision on a federal constitutional issue. Accordingly, the Michigan Supreme Court directed all the lower courts to follow its decision in *People v. Bulger,* 462 Mich. 495 (2000) *cert. denied* 531 U.S. 994 (2000). Harris is now positioned to file a Petition for Writ of Certiorari to this Court if she wants to. We do not have to await the long parade of horribles that Respondents and their *amici* predict if this Court decides, as it should, that the Attorney Respondents have no standing to litigate this issue. The obstacles the Respondents and their *amici* foresee for future guilty-pleading defendants interested in this issue clearly did not materialize. Indeed, if Harris files a petition for writ of certiorari on her own[6], this Court can even appoint counsel for her if it decides to grant the writ and decide the issue raised here.

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 *amicus,* National Legal Aid and Defender Association ("NLADA"), totally mis-perceives Judge Kolenda's position regarding the waiver required of guilty-pleading defendants. There is no argument that the statute should be broken down to analyze its constitutionality. Section 1 survives constitutional muster because the waiver provision in MCL 770.3a (4) puts the analysis in context. The statute must be read as a whole. Obviously, the purpose of subsection 4 is to define what must be included in the waiver

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[6]As this Court well knows that prisoners do every day.

that is accepted with a guilty plea. The constitutionality of the statute must be understood by recognizing the waiver provision as an integral part of the statute, not a piece to be analyzed separately.

The statute is designed to honor the waiver as part of the consideration the defendant brings to the plea bargaining process, just like giving up the right to trial, confrontation, etc. It is the defendant's choice in exchange for whatever concessions the state provides in the process. Respondents and their *amici* apparently believe that every indigent criminal defendant ought to be entitled to all the benefits of a good deal (i.e. the plea bargain) and yet retain, despite his waiver to the contrary, the right to upset it by appealing.

Undermining its own position, *Amicus*, American Bar Ass'n ("ABA") even quotes its own Criminal Justice Standard 21–3.2(a) regarding counsel on appeal. Despite its extreme position[7], the ABA's Standard even specifically recognizes the validity of the waiver of counsel on appeal, even for indigent defendants.

Just as the NLADA attempts to argue the constitutionality of the statute by breaking it into pieces, so too do all the Respondents and their *amici* fail to consider all the component rules of the Michigan criminal justice system and how they interconnect to protect the rights of defendants who wish to raise post-conviction issues related to their cases.

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[7]That all states should include an appeal of right from a criminal conviction under all circumstances. ABA's Brief p. 3) This, of course, is contrary to this Court's position that the states do not have to provide any right to appeal. *McKane v. Durston,* 153 U.S. 684 (1894).

RELIEF REQUESTED

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

Respectfully submitted:

Dated: July 9, 2004

_____
Judy E. Bregman

Order

Entered: June 25, 2004

125762

Michigan Supreme Court
Lansing, Michigan

Maura D. Corrigan,
Chief Justice
Michael F. Cavanagh
Elizabeth A. Weaver
Marilyn Kelly
Clifford W. Taylor
Robert P. Young, Jr.,
Stephen J. Markman,
Justices

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v.

MELODY HARRIS,

Defendant-Appellee /

SC: 125762
COA: 253152
Kent CC: 03-004744-FC

On order of the Court, the application for leave to appeal the February 23, 2004 order of the Court of Appeals is considered and, pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we REVERSE the order of the Court of Appeals and REINSTATE the Kent Circuit Court's November 24, 2003 order denying appointment of appellate counsel. This Court held in *People v Bulger*, 462 Mich 495 (2000), that the federal Constitution does not require the appointment of counsel at public expense when an indigent defendant applies for leave to appeal a plea-based conviction. Pursuant to the analysis provided by this Court in *Bulger*, MCL 770.3a is constitutional. The courts of this state are obligated to apply that statute, any lower federal court opinions to the contrary notwithstanding.

Abela v General Motors Corp, 469 Mich 603 (2004). The time for defendant to file an application for leave to appeal under MCR 7.205 runs from the date of this order.

Cavanagh, J., would hold this case in abeyance for *Kowalski v Tesmer*, cert gtd ___ US ___; 124 S Ct 1144; 157 L Ed 2d 1041 (2004).

Kelly, J., dissents and states as follows:

I would hold this case in abeyance until the United State Supreme Court decides *Kowalski v Tesmer*, cert gtd ___ US ___; 124 S Ct 1144; 157 L Ed 2d 1041 (2004).

I acknowledge that we are not bound by the Sixth Circuit's holding in *Tesmer v Granholm*, 333 F3d 683 (CA 6, 2003). However, we will be bound by the United States Supreme Court's decision.

The majority's ruling that reverses and remands this case promotes judicial inefficiency. This case and others like it will come back to the Court of Appeals for a second review if the Sixth Circuit's decision is upheld.

Instead of denying defendant's application, the Court should issue an order explaining that trial courts should appoint appellate counsel pending the *Tesmer* decision. This would avoid numerous repeat applications to the Court of Appeals should the Supreme Court affirm the Sixth Circuit's holding that it is unconstitutional to deny appointment of counsel to criminal defendants who plead guilty.

[SEAL] I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

_____ 200__ _____

Clerk