

**PETITION FOR REHEARING AND SUGGESTION
FOR REHEARING EN BANC**

INTRODUCTION

Plaintiffs-Appellees ask this Court to rehear this case en banc for two reasons.

First, the panel, relying on *Ross v. Moffitt*, 417 U.S. 600 (1974), reversed the district court and upheld a Michigan statute that denies indigent criminal defendants who plead guilty the assistance of counsel during their initial appeals to the Michigan Court of Appeals, *Tesmer v. Granholm*, ___ F.3d ___ (6th Cir. July 2, 2002) (slip op. at 16-20), but that holding conflicts with *Ross*, where the Court held only that a state could refuse to appoint counsel for second-tier appeals to a state supreme court, and with numerous other United States Supreme Court's decisions, including *Douglas v. California*, 372 U.S. 353 355-356 (1963) (indigent has right to attorney for "first appeal"); *Evitts v. Lucey*, 469 U.S. 387, 402 (1985) (explaining that *Douglas*, not *Ross*, applies to all first appeals decided on the merits); and *Roe v. Flores-Ortega*, 528 U.S. 470, 486 (2000) (holding, in a guilty plea case, that "It is unfair to require an indigent, perhaps pro se, defendant to demonstrate that his hypothetical appeal might have had merit before any advocate has ever reviewed the record in his case in search of potentially meritorious grounds for appeal.").

Second, this case involves a question of exceptional importance: whether Michigan will become the only State to deny appellate counsel to the majority of indigent criminal defendants during their first direct appeals. More than 90% of indigent felony defendants in Michigan plead guilty, and the panel's holding means that almost all such indigents will be denied the assistance of appellate counsel to raise such issues as the voluntariness of their pleas, breaches of their plea bargains, the improper imposition of consecutive sentences, double jeopardy, and the erroneous scoring of their sentencing guidelines. To allow this statute to take effect would deny a fundamental constitutional right to thousands of indigents every year.

The panel's decision is also exceptionally important because it conflicts with *Bundy v. Wilson*, 815 F.2d 125, 136-142 (1st Cir. 1987), in which the First Circuit flatly rejected New Hampshire's attempt to apply *Ross* to an initial direct appeal by leave of the appellate court.

STATEMENT OF FACTS

In 1994, the Michigan Constitution was amended to provide that defendants who plead guilty or nolo contendere may appeal their convictions and sentences to the Michigan Court of Appeals only by filing an application for leave to appeal to that court. Mich. Const. 1963, Art. 1, § 20. Since the Michigan Court of Appeals' decision to grant or deny a properly-filed application depends solely on whether the issues

presented are meritorious, the court's orders "denying leave uniformly state that leave is denied `for lack of merit in the grounds presented.'" *People v. Bulger*, 614 N.W.2d 103, 124 (Mich. 2000) (Cavanagh, J., dissenting).

After the amendment was adopted, a few Michigan trial judges, including the named defendant judges in this case, stopped appointing appellate counsel for indigent defendants who wished to appeal from their plea-based convictions and sentences.¹ In 1999, the Michigan Legislature enacted Mich. Comp. Laws § 770.3a (2000) ("the statute"), which provides that Michigan trial judges "shall not" appoint appellate counsel to assist indigent defendants who wish to file an application for leave to appeal from a plea-based conviction and sentence unless the indigent received an upward departure from the sentencing guidelines or entered a conditional plea. A trial judge "may" appoint appellate counsel for an indigent defendant if he or she has preserved an outcome-determinative challenge to the judge's scoring of the sentencing guidelines. For all other types of issues an indigent may raise on appeal, such as the voluntariness of the plea, the adequacy of the factual basis, whether consecutive or concurrent sentencing should have been imposed, whether the conviction violates double jeopardy,

¹ A sharply-divided Michigan Supreme Court upheld that practice in *People v. Bulger*, 614 N.W.2d 103 (Mich. 2000).

and whether restitution was properly ordered, the judge cannot appoint appellate counsel to assist the indigent prepare an application for leave to appeal.

The statute has never taken effect because the district court issued an injunction after concluding that it violates the Fourteenth Amendment rights of indigent criminal defendants. *Tesmer v. Granholm*, 114 F.Supp.2d 603 (E.D. Mich. 2000). On July 2, 2002, however, the panel held that, although it is “a close question,” the statute is constitutional. *Tesmer*, slip op. at 14-20. Accordingly, the panel vacated the injunction. *Id.* at 20.

ARGUMENT

I. The panel’s holding misreads *Ross* and conflicts with other United States Supreme Court decisions holding that an indigent is entitled to counsel for an initial appeal on the merits from a conviction and sentence.

Relying entirely on *Ross v. Moffitt*, 417 U.S. 600 (1974), the panel reversed the district court’s conclusion that the Fourteenth Amendment requires Michigan to appoint appellate counsel for indigents who wish to appeal their plea-based convictions and sentences to the Michigan Court of Appeals. The panel acknowledged that, unlike the second-tier appeal to the state supreme court at issue in *Ross*, the appeal at issue in this litigation is a first appeal. *Tesmer*, slip op. at 20. Nonetheless, the panel held the

statute is constitutional because the right to appellate counsel is a matter of “degrees,” because a defendant reduces the number of potential appellate issues by pleading guilty, and because counsel is appointed for those allowed to enter conditional pleas.²

The panel’s holding flows from a fundamental misreading of *Ross* and is directly contrary to several other United States Supreme Court decisions, most of which the panel ignored. Unless it is vacated, the panel’s decision means that Michigan will become the only State to deny thousands of indigent criminal defendants the assistance of counsel on their first direct appeals.

In *Douglas v. California*, 372 U.S. 353 (1963), the Court held that the Fourteenth Amendment right to appellate counsel attaches to “the *first appeal*.” *Id.* at 356 (emphasis in original). The Court explained:

We are not here concerned with problems that might arise from the denial of counsel for the preparation of a petition for discretionary or mandatory review *beyond the stage in the appellate process at which the claims have once been presented by a lawyer and passed upon by an appellate court*. We are dealing only with the *first appeal*, granted as a matter of right to rich and poor alike from a criminal conviction. We need not decide whether California would have to provide counsel for an indigent seeking a discretionary hearing from the California Supreme Court *after the District Court of Appeal had sustained his conviction*[.]

² The panel apparently believed that a Michigan defendant has the right to enter a conditional plea. In fact, conditional pleas are exceedingly rare in Michigan because the trial court and the prosecutor must each agree to allow the defendant to enter a conditional plea. Mich. Ct. Rules 6.301(C)(2).

Id. (emphasis added and in original; citations omitted). In contrast to second-tier appeals, *Douglas* concluded that “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.” *Id.* at 357 (emphasis in original). An indigent who must represent himself on a first appeal has “only the right to a meaningless ritual, while the rich man has a meaningful appeal.” *Id.* at 358.

Although *Douglas* used the phrase “of right,” it is clear that the phrase was meant to distinguish a first direct appeal from all subsequent appeals. The Court had no need to elaborate because, like the California system at issue in *Douglas*, almost all first appeals from criminal convictions in the U.S. are labeled “of right.” As of 1987, 47 states and the federal government provided automatic appeals of right from felony convictions, and the only three states with first appeals by leave, New Hampshire, Virginia, and West Virginia, automatically provided counsel to indigent appellants. *See Bundy v. Wilson*, 815 F.2d 125, 136-142 (1st Cir. 1987).

This reading of *Douglas* was confirmed in *Anders v. California*, 368 U.S. 738, 744 (1967), where the Court held that a lawyer appointed to handle a “first appeal” must act as an active advocate. *See also Entsminger v. Iowa*, 386 U.S. 748, 751 (1967) (referring to right to counsel for “first appeal”).

In *Ross*, the Court answered the question it had left open in *Douglas*: whether counsel had to be appointed for a *second-tier*, discretionary appeal to a state supreme court in a multi-tiered appellate system. In holding that the Fourteenth Amendment did not require the appointment of counsel for this second-tier appeal, *Ross* relied on two factors. First, unlike the Michigan indigents at issue in this litigation, the defendant in *Ross* had already received the benefit of appellate counsel in his first appeal to the state court of appeals:

Thus, *prior to his seeking discretionary review in the State Supreme Court, his claims had “once been presented by a lawyer and passed upon by an appellate court.”* We do not believe it can be said, therefore, that a defendant in respondent’s circumstances is denied meaningful access to the North Carolina Supreme Court simply because the State does not appoint counsel to aid him in seeking review in that court.

Ross, 417 U.S. at 614-615 (emphasis added; quoting *Douglas* at 356).

Second, *Ross* heavily relied on the fact that the North Carolina Supreme Court’s decision to grant review was truly discretionary and, therefore, did not depend on “whether there has been a correct adjudication of guilt in every individual case.” *Id.* at 615 (internal quotation marks and citation omitted). Since second-tier discretionary review is designed only to identify important cases, “Once a defendant’s claims of errors are organized and presented in a lawyer like fashion to the Court of Appeals, the justices of the Supreme Court of North Carolina who make the decision to grant or

deny discretionary review should be able to ascertain whether his case satisfies the standards established by the legislature for such review.” *Id.* The Court concluded that “both the opportunity to have counsel prepare an initial brief in the Court of Appeals and the nature of discretionary review in the Supreme Court of North Carolina make this relative handicap far less than the handicap borne by the indigent defendant denied counsel on his initial appeal as of right in *Douglas*.” *Id.* at 616.

The entire rationale of *Ross*, that the defendant who has already had appellate counsel through one appeal does not need counsel to help him file a petition for second-tier discretionary review, necessarily collapses when applied to a *first* direct appeal on the *merits*, regardless of whether the state calls that first appeal “of right” or “by leave.” Therefore, federal and state courts in other jurisdictions have uniformly held that the *Douglas* right to counsel applies to first appeals by leave. *See, e.g., Bundy v. Wilson*, 815 F.2d 125, 130 (1st Cir. 1987) (rejecting New Hampshire’s argument that *Ross* governs first appeal by leave to New Hampshire Supreme Court, observing that provision of counsel on first-tier appeal was “vital” to result in *Ross*); *Cabaniss v. Cunningham*, 143 S.E.2d 911, 913-914 (Va. 1965) (*Douglas* right to counsel requires appointment of counsel for first-tier petition to appeal to Virginia Supreme Court).

The panel in this case ignored the fact that the Supreme Court has repeatedly explained since *Ross* that its holding is limited to second-tier appeals. Justice

Rehnquist, the author of *Ross*, wrote two years later in *United States v. MacCollom*, 426 U.S. 317, 324 (1976), that “we declined to extend [*Douglas*] to a discretionary second appeal from an intermediate appellate court to the Supreme Court of North Carolina.” Even more recently, Chief Justice Rehnquist, writing for the Court in *Murray v. Giarratano*, 492 U.S. 1, 9 (1989), explained that *Douglas* held that an indigent is “entitled as a matter of right to counsel for an *initial appeal* from the judgment and sentence of the trial court,” while *Ross* held that this right “did not carry over to a discretionary appeal provided by North Carolina law from the intermediate appellate court to the Supreme Court of North Carolina.”

Eleven years after *Ross*, the Court made it perfectly clear in *Evitts v. Lucey*, 469 U.S. 387 (1985), that the *Ross* holding could not be applied to any first appeal on the merits:

Unlike the appellant in the discretionary appeal in *Ross*, *a criminal appellant in the Kentucky Court of Appeals typically has not had the benefit of a previously prepared trial transcript, a brief on the merits of the appeal, or a previous written opinion.* In addition, petitioners fail to point to any source of Kentucky law indicating that a decision on the merits in an appeal like that of respondent—unlike the discretionary appeal in *Ross*—is contingent on a discretionary finding by the Court of Appeals that the case involves significant public or jurisprudential issues; the purpose of a first appeal in the Kentucky court system appears to be precisely to determine whether the individual defendant has been lawfully convicted. *In short, a criminal defendant bringing an appeal to the Kentucky Court of Appeals has not previously had an adequate opportunity to present his claims fairly in the context of the State’s*

appellate process. It follows that for purposes of analysis under the Due Process Clause, respondent's appeal was an appeal as of right, thus triggering the right to counsel recognized in [Douglas].

Evitts, 469 U.S. at 402 (emphasis added; citations and quotation marks omitted).

These decisions of the United States Supreme Court compel the conclusion that an appeal from a plea conviction and sentence to the Michigan Court of Appeals is an appeal for which counsel must be provided. First, an application to the Michigan Court of Appeals is a *first appeal*; that is, the defendant does not already have “a brief on the merits of the appeal, or a previous written opinion” and “has not previously had an adequate opportunity to present his claims fairly in the context of the State’s appellate process.” *Evitts*, 469 U.S. at 402.

Second, the Michigan Court of Appeals, unlike the North Carolina Supreme Court at issue in *Ross*, decides the *merits* of an application for leave to appeal. Since an indigent’s application for leave to appeal from a plea-based conviction and sentence will be his or her first and only appeal on the merits, “[i]t follows that for purposes of analysis under the Due Process Clause,” that this appeal will be “an appeal as of right, thus triggering the right to counsel recognized in [*Douglas*].” *Evitts* at 402.

The panel’s decision thus conflicts with decisions of the United States Supreme Court by treating as a matter of “degree” what is an established constitutional right. The fact that the statute provides appellate counsel for those few indigent appellants

who were permitted to enter conditional pleas or who received an upward departure from the guidelines is no answer to those indigents who were not permitted to enter conditional pleas and who wish to raise all other types of issues on appeal.

Finally, the panel's conclusion that it is constitutional to deny counsel to appellants from plea-based convictions because "the number of issues for appeal has been greatly reduced[,]” *Tesmer*, slip op. at 20, directly conflicts with the Supreme Court's decision in *Roe v. Flores-Ortega*, 528 U.S. 470 (2000). In *Roe*, an appeal from a guilty plea, the Court held that it "is unfair to require an indigent, perhaps pro se, defendant to demonstrate that his hypothetical appeal might have had merit before any advocate has ever reviewed the record in his case in search of potentially meritorious grounds for appeal.” *Id.*, 528 U.S. at 486. See also *State v. Trowell*, 739 So.2d 77, 80-81 (Fla. 1999) (rejecting claim that State may deny appellate counsel to guilty-pleading indigent filing first petition for leave to appeal).

II. This case is of exceptional importance as the panel's holding would result in denial of counsel to thousands of indigents and create a conflict with another federal circuit.

As demonstrated above, the panel's opinion conflicts with numerous United States Supreme Court decisions and is, therefore, appropriate for en banc review. This

case is also appropriate for en banc review because the panel's decision would create a circuit split with the First Circuit. *See Bundy v. Wilson, supra*.

Even more importantly, however, the panel's decision would have a devastating impact on the criminal justice system in Michigan. The statute at issue in this litigation has never gone into effect because the district court issued an injunction before its effective date. More than ninety percent of all felony convictions in Michigan are obtained by plea. *See People v. Bulger*, 614 N.W.2d 103, 126 n. 22 (Mich. 2000) (Cavanagh, J., dissenting) (citing statistics compiled by Michigan Assigned Appellate Counsel System). The vast majority of these criminal defendants are indigent and very few fall within the narrow exceptions set forth in the statute. Even if an indigent criminal defendant has fully preserved a challenge to the judge's scoring of his or her sentencing guidelines, the trial judge "may" appoint appellate counsel but is under no obligation to do so.

In short, if the panel's opinion is allowed to take effect, vast numbers of Michigan indigents will be completely denied the assistance of appellate counsel even though they may wish to raise complex appellate issues such as double jeopardy, breach of the plea bargain, improper consecutive sentencing, erroneous denial of jail credit, and misscoring of their sentencing guidelines. These indigents will be forced to represent themselves on their first appeals and will, therefore, enjoy "only the right to a

meaningless ritual, while the rich man has a meaningful appeal.” *Douglas*, 372 U.S. at 358. Of course, as the Supreme Court has specifically recognized in the context of an appeal from a guilty plea, most such indigents will be completely incapable of even identifying their appellate issues at all. *See Flores-Ortega*, 528 U.S. at 486.

Therefore, this case is of utmost importance because the panel’s decision will result in the immediate denial of a most fundamental constitutional right to the majority of Michigan criminal defendants, those who are both indigent and plead guilty or nolo contendere. To effectively remedy this deprivation after the fact would be impossible. Thousands of appeals that will be litigated *pro se* will have to be completely relitigated with counsel years later, *see Penson v. Ohio*, 488 U.S. 75, 88 (1988) (remedy for erroneous denial of appellate counsel is new appeal with counsel), and many indigents will be unable to receive the relief to which they would have been entitled because they will have completely served their sentences.

This case is, therefore, especially appropriate for en banc review.

Conclusion

For the reasons stated above, Plaintiffs-Appellees respectfully requests that this Court grant en banc review.

Respectfully submitted,

DAVID A. MORAN
Cooperating Attorney for
ACLU Fund of Michigan
Wayne State Law School
471 W. Palmer Street
Detroit, Michigan 48202
(313) 577-4829

KARY L. MOSS
American Civil Liberties Union
Fund of Michigan
60 West Hancock Street
Detroit, Michigan 48201
(313) 578-6800

MARK GRANZOTTO
Cooperating Attorney for
ACLU Fund of Michigan
535 Griswold Street, Suite 1500
Detroit, Michigan 48226
(313) 964-4720

JEANICE DAGHER-MARGOSIAN
Cooperating Attorney for
ACLU Fund of Michigan
3300 Washtenaw Ave., Suite 290
Ann Arbor, Michigan 48106
(734) 761-5516

Dated: July 10, 2002