

SUPPLEMENTAL STATEMENT OF FACTS

The Plaintiffs rely on the Statement of Facts found in their initial briefs. The Plaintiffs include this Supplemental Statement of Facts to briefly summarize the facts and to update the procedural history of this litigation.

Since 1994, the Michigan Constitution has required a criminal defendant who wishes to appeal his or her conviction and sentence after a plea of guilty or nolo contendere to file an application for leave to appeal to the Michigan Court of Appeals. Mich. Const. 1963, Art. 1, § 20. The Michigan Court of Appeals' decision to grant or deny a properly-filed application depends solely on whether the issues presented are meritorious, and 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); *see also* (R.2: Motion for Preliminary Injunction, Exhibit B; Apx. pp. 64-69) (examples of form orders denying leave to appeal to indigents).

In 1995, a few Michigan trial judges, including the 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 or sentence unless the indigent received an upward departure from the sentencing guidelines or was permitted to enter 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, but the judge is under no obligation to do so. 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, and whether restitution was properly ordered, the statute flatly bars a trial judge from appointing appellate counsel to assist the indigent who wishes to file an application for leave to appeal.

The statute has never taken effect because the district court declared 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, the panel reversed

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

that decision and ordered the district court to enter judgment in favor of the Defendants.

On September 20, 2002, this Court granted the Plaintiffs' motion to rehear these cases en banc and vacated the panel's decision. Oral argument is scheduled for December 11, 2002.

SUPPLEMENTAL ARGUMENT

I. The District Court properly concluded that the denial of appointed counsel to indigent defendants filing their initial direct appeals after pleading guilty or nolo contendere violates the United States Constitution.

The Plaintiffs rely entirely on their initial briefs as to the various procedural and jurisdictional arguments raised by the Defendants in these cases. Both the district court and the original panel correctly rejected these arguments and reached the merits.

As to the merits, the Plaintiffs rely on their argument found on pages 36-60 of their initial brief filed in No. 00-1824. In this Supplemental Argument, the Plaintiffs shall briefly summarize that argument and then address in more detail several points raised by the Defendants in their most recent pleadings.

Introduction—A Brief Summary of the Constitutional Argument

From the time the Supreme Court issued its decision in *Douglas v. California*, 372 U.S. 353 (1963), until the passage of the Michigan statute at issue in this litigation, no state had ever attempted to routinely deny the appointment of appellate counsel to indigents filing their first direct appeals from felony convictions and sentences because such a scheme so obviously violates *Douglas* and its progeny. Every case to consider

the issue had concluded that *Douglas* guarantees an indigent defendant the assistance of appellate counsel for a first appeal, whether that first appeal is automatic or by leave of the court. *See, e.g., Bundy v. Wilson*, 815 F.2d 125, 130 (1st Cir. 1987) (concluding that *Douglas* governs first-tier appeal by leave to New Hampshire Supreme Court); *Cabaniss v. Cunningham*, 143 S.E.2d 911, 913-914 (Va. 1965) (*Douglas* guarantees right to counsel for first-tier appeal by leave to Virginia Court of Appeals); *Mata v. Egeler*, 383 F.Supp. 1091, 1092-1094 (E.D. Mich. 1974) (*Douglas* guarantees appointment of counsel for indigent pursuing first-tier delayed appeal by leave of court). No court had ever held that the protections of *Douglas* were inapplicable to indigents who pleaded guilty or nolo contendere. *Cf. State v. Trowell*, 739 So.2d 77, 80-81 (Fla. 1999); *Perez v. State*, 4 S.W.2d 305, 307 (Tex. Ct. App. 1999).

According to the Defendants, however, Michigan may constitutionally deny the appointment of appellate counsel to indigents filing applications for leave to appeal to the Michigan Court of Appeals. According to the Defendants, the appointment of counsel is not constitutionally mandated because such an appeal is a “discretionary” appeal within the meaning of *Ross v. Moffitt*, 417 U.S. 600 (1974).

As documented in extensive detail in pages 36-60 of the Plaintiffs’ initial brief in No. 00-1824, the Defendants are wrong. The Defendants’ argument seriously misreads *Ross*, which held only that the Fourteenth Amendment does not require the appointment

of appellate counsel for a purely discretionary appeal to a state supreme court *after* the indigent had already been provided counsel for an initial appeal to an intermediate appellate court. *Id.* at 614-616. The Court stressed in *Ross* that both the fact that counsel had been provided for an initial appeal and the fact that the second-tier appeal was discretionary were vital to the result. The 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, falls apart when applied to a *first-tier* appeal regardless of whether the state calls that appeal “of right” or “by leave.”

The Defendants’ argument that *Ross*, and not *Douglas*, applies to the appeal at issue in this litigation also completely ignores the Court’s post-*Ross* cases. The Court has repeatedly explained that the holding in *Ross* was limited to discretionary second-tier appeals. *See United States v. MacCollom*, 426 U.S. 317, 324 (1976) (plurality); *Murray v. Giarratano*, 492 U.S. 1, 9 (1989) (explaining *Douglas* guaranteed counsel for “initial appeal,” while *Ross* declined to extend “to a discretionary appeal . . . from the intermediate appellate court to the Supreme Court of North Carolina”); *Coleman v. Thompson*, 501 U.S. 722, 756 (1991) (*Ross* “declined to extend the right to counsel beyond the first appeal of a criminal conviction”), *see also id.* at 742 (approvingly citing and discussing Virginia Supreme Court’s holding that *Douglas* required

appointment of counsel for first appeal by leave of court); *Smith v. Robbins*, 528 U.S. 259, 279 & n. 10 (2000) (concluding that *Douglas* and *Ellis v. United States*, 356 U.S. 674 (1958), require that indigent receive appellate counsel “in all cases” to evaluate case for possible appellate arguments). In particular, the Defendants ignore the Court’s crystal-clear explanation of the difference between *Douglas* and *Ross* in *Evitts v. Lucey*, 469 U.S. 387, 402 (1985), in which the Court held that *Ross* could not be applied to any first appeal on the merits because such an appellant “has not had the benefit of a previously prepared trial transcript, 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.”

It follows immediately from *Douglas*, *Ross*, *Evitts*, and the other post-*Ross* cases that the appeal at issue in this litigation is an appeal of right within the meaning of *Douglas* and *Evitts* for which counsel must be provided. A defendant who pleads guilty or nolo contendere has a right to challenge his or her sentence and/or conviction by filing an application to the Michigan Court of Appeals. That application is a *first appeal* because 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. As discussed below in Part A of this argument, 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 Plaintiffs now address some of the specific arguments raised by the Defendants in their most recent pleadings.

A. Contrary to the Defendants’ claims, an application for leave to appeal to the Michigan Court of Appeals is not a “discretionary appeal.”

Despite the clear language in *Evitts* defining a “discretionary appeal” within the meaning of *Ross* as a second-tier appeal that an appellate court is free to reject on grounds other than the merits, the Defendants persist in repeatedly labeling a first-tier application for leave to appeal to the Michigan Court of Appeals as “discretionary” without ever analyzing that term or discussing *Evitts*. *See, e.g.*, Defendants’ Brief in Response to Petition for Rehearing at 2, 3, 4, 5, 6, 8, 9.

As the Defendants acknowledge, the Michigan Court of Appeals standard order denying a properly-filed application for leave to appeal states that “The Court orders

that the application for leave to appeal is DENIED *for lack of merit in the grounds presented.*” Defendants’ Brief in Response to Petition for Rehearing at 9 (emphasis added); *see also* (R. 2: Motion for Preliminary Injunction, Exhibit B; Apx. pp. 64-69). The Defendants claim, however, “The language gives no reason to believe that the Court of Appeals reviewed the merits of any particular issue and found that the issue was correctly determined below.” Defendants’ Brief in Response to Petition for Rehearing at 8-9.

Despite the Defendants’ protests to the contrary, the Michigan Court of Appeals has itself held many times 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. In *People v. Hayden*, 348 N.W.2d 672, 684 (Mich. Ct. App. 1984), for example, the Michigan Court of Appeals explained, “In an order dated February 1, 1983, another panel of this Court denied defendant’s motion to remand on this same issue `for lack of merit in the grounds presented.’ Therefore, we are precluded from reaching the merits of this issue by the law of the case doctrine.” *See also People v. Douglas*, 332 N.W.2d 521, 523 (Mich. Ct. App. 1983) (same); *People v. Wiley*, 315 N.W.2d 540, 541 (Mich. Ct. App. 1981) (same).

Similarly, the federal courts, including this Court, treat a Michigan Court of Appeals order denying leave to appeal “for lack of merits in the grounds presented” as a decision on the merits for purposes of habeas corpus review. *See, e.g., Harris v. Stovall*, 212 F.3d 940, 943 (6th Cir. 2000) (summary order upholding conviction treated as decision on the merits for habeas review); *Myers v. Straub*, 159 F.Supp.2d 621, 626 (E.D. Mich. 2001) (applying *Harris* to form order denying Michigan plea defendant’s application for “lack of merit in the grounds presented”); *Miller-Bey v. Stine*, 159 F.Supp.2d 657, 663, 667, 671 (E.D. Mich. 2001) (same); *Onifer v. Tyskiewicz*, 255 F.3d 313, 315-316 (6th Cir. 2001) (applying *Harris* where Michigan Court of Appeals summarily denied criminal defendant’s appeal for “lack of merit”); *King v. Trippett*, 192 F.3d 517, 521 (6th Cir. 1999) (observing that district court held that Michigan Court of Appeals’ decision denying petitioner’s application for “lack of merit” was reasonable application of federal law).

As discussed above and in more detail in the Plaintiffs’ initial brief, even if a first direct application for leave to appeal to the Michigan Court of Appeals were truly “discretionary,” *Douglas*, not *Ross*, would still apply because such an appeal is a first appeal. *See Bundy*, 815 F.2d at 830 (rejecting claim that *Ross* governs first-tier discretionary appeal to New Hampshire Supreme Court because provision of counsel on first-tier appeal was “vital” to the result in *Ross*); *Evitts*, 469 U.S. at 402 (stressing

that *Ross* applies where appellant has previously had assistance of appellate counsel). It is clear, however, that a first application to the Michigan Court of Appeals is not a “discretionary” appeal in any sense of the word since it is both a first appeal and an appeal that the Michigan Court of Appeals decides on the merits.

B. *Douglas* fully applies to appeals following guilty and nolo contendere pleas.

The Defendants consistently maintain that *Douglas* should not be read to apply to appeals after guilty or nolo contendere pleas because such pleas limit the number of potential appellate issues. The most obvious objection to this argument is that it finds absolutely no support in *Douglas* or in any of the Court’s other cases.

On the contrary, the Court has consistently recognized that a typical indigent is completely incapable of identifying and raising any kind of issue in a first direct appeal without the assistance of counsel. As the Court put it in *Evitts*, “To prosecute the appeal, a criminal appellant must face an adversary proceeding that—like a trial—is governed by intricate rules that to a layperson would be hopelessly forbidding. An unrepresented appellant—like an unrepresented defendant at trial—is unable to protect the vital interests at stake.” 469 U.S. at 636. In *Roe v. Flores-Ortega*, 528 U.S. 470, 486 (2000), the Court specifically recognized, *in an appeal from a guilty plea*, “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.”

While a guilty or nolo plea unquestionably does limit the number of potential appellate issues, many potential appellate issues of all levels of complexity remain, as this Court certainly knows from deciding federal criminal appeals. Michigan defendants have the right to challenge, after pleading guilty or nolo contendere, dozens of different types of sentencing errors, including Double Jeopardy Clause violations, improper imposition of consecutive sentences, excessive restitution orders, erroneous denials of credit for prior incarceration, breaches of plea bargains at sentencing, denials of allocution, and violations of *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

In 1999, the Michigan Legislature enacted a sentencing guideline scheme that rivals its federal counterpart in complexity. *See Mich. Comp. Laws § 777.1, et seq.* Yet the statute at issue in this litigation provides that a trial judge “may,” but does not have to, appoint appellate counsel for an indigent who has preserved an outcome-determinative challenge to the judge’s own scoring of the sentencing guidelines. In other words, the statute would require most indigents to litigate complex sentencing guidelines questions, many of which would be questions of first impression, without the assistance of appellate counsel.

As the Court has recognized, *see Flores-Ortega*, 528 U.S. at 486, a typical indigent plea defendant will be completely incapable of even identifying his or her meritorious appellate issues. Nor will he or she be capable of navigating the minefield of appellate procedure in order to file a coherent application for leave to appeal raising the issue. *See Evitts*, 469 U.S. at 636; *see also Martinez v. Court of Appeal of California*, 528 U.S. 152, 161 (2000) (recognizing that even if counsel is ineffective, “it is reasonable to assume that counsel’s performance is more effective than what the unskilled appellant could have provided for himself”).

The Defendants’ argument that an indigent should be able to make do with trial counsel’s work product is both highly misleading and directly contrary to *Douglas* and *Evitts*. In almost all cases, *there is no written work product of trial counsel for the indigent to use*. The overwhelming majority of plea appeals involve issues that arise at the sentencing hearing. There is absolutely no requirement in Michigan law that trial counsel’s objections to guidelines scoring, jail credit, consecutive sentencing, consideration of prior convictions, restitution orders or any other issue be in writing. Such objections, if trial counsel makes them at all, are almost invariably made orally at the sentencing hearing.

However, even if trial counsel has put something in writing, there is not the slightest suggestion in any of the Court’s cases that trial counsel’s work product is

sufficient to dispense with the appointment of appellate counsel. Indeed, *Douglas* would make no sense if the Defendants' argument was correct because the appellants in *Douglas* presumably could have used their trial attorneys' work product. On the contrary, as *Ross* and *Evitts* makes clear, appellate counsel need not be provided for a second-tier appeal only because the indigent has already received *appellate* counsel's work product. *Ross* at 614-615; *Evitts* at 402.

Even in those rare cases where trial counsel has produced a work product that could help an indigent file an application for leave to appeal, an indigent left to his or her own devices has virtually no chance of successfully overcoming the *procedural* hurdles that stand in the way of having that appeal heard. The Supreme Court has specifically recognized that those procedural hurdles are "hopelessly forbidding" to any layperson filing a first appeal. *Evitts*, 469 U.S. at 636. The Michigan Supreme Court has provided a very good example of this problem in *People v. Plaza*, 617 N.W.2d 687 (Mich. 2000). In *Plaza*, the court held that an indigent plea defendant who was forced to file an application for leave to appeal without the assistance of counsel forfeited his right to have his sentencing appeal heard by the Michigan Court of Appeals because he failed to obtain his sentencing transcript.

In short, there is no support for the Defendants' argument that *Douglas* should be limited to appeals from trials.

C. The narrow exceptions contained in the statute do not render it constitutional.

The Defendants contend that the statute is constitutional because it does require the appointment of counsel in four circumstances: (1) to defend a prosecutor's appeal; (2) if the Michigan Court of Appeals grants the indigent's application for leave to appeal; (3) if the plea was conditional; or (4) if the sentence exceeded the guidelines range.

The first two exceptions, by definition, do not apply to the indigent defendant who needs the assistance of appellate counsel to file an application for leave to appeal to the Michigan Court of Appeals. The second exception simply means that if the indigent is somehow able to file an application for leave to appeal on his or her own that miraculously identifies and coherently argues a potential meritorious issue, the Michigan Court of Appeals will then provide counsel. In other words, the vast majority of indigents who cannot identify and raise their own issues in a meaningful way will never get to the point where the second exception could apply.

The third exception, for conditional pleas, is also completely useless to the vast majority of indigents who need the assistance of counsel for two reasons. First, *there is no right in Michigan to enter a conditional plea*. Michigan Court Rule 6.301(C) provides that “A defendant may enter the following pleas only with the consent of the court and the prosecutor: (2) A defendant may enter a conditional plea of guilty, nolo contendere, guilty but mentally ill, or not guilty by reason of insanity.” Since a defendant can only enter a conditional plea with the consent of both the judge and the prosecutor, conditional pleas are exceedingly rare in Michigan.²

Second, a defendant can enter a conditional plea only to challenge “*pretrial rulings*”. Mich. Ct. Rules 6.301(C)(2) (emphasis added). But the vast majority of appeals after guilty and nolo contendere pleas concern *sentencing* issues. In other words, the possibility of a conditional plea is of absolutely no use to a typical indigent plea defendant whose complaint arises not from a pretrial ruling but from the sentence he or she received after the plea has already been entered and accepted.

The statute’s final exception is for defendants who receive an upward departure from the sentencing guidelines. While such defendants undoubtedly need the assistance

² A Westlaw search of Michigan appellate decisions from 2001 and 2002 for appeals from conditional pleas turned up only two published cases and two unpublished cases. *See People v. Rutledge*, 645

of appellate counsel, the problem is that they are not the only ones who may have meritorious appellate issues. Indeed, as discussed above, indigents who receive sentences that would have been outside the guidelines range if the trial judge had scored the guidelines correctly are not guaranteed the assistance of appellate counsel even when the indigent has preserved his or her challenge to trial judge's scoring.

For all other types of appellate issues, no matter how meritorious, the statute flatly forbids the judge from appointing appellate counsel. The vast majority of indigent defendants who wish to appeal from their sentences or pleas, therefore, receive only a "meaningless ritual," while moneyed defendants receive "a meaningful appeal." *See Douglas*, 372 U.S. at 358. The narrow exceptions in this statute cannot save it.

D. An indigent Michigan plea defendant does not waive his or her Equal Protection and Due Process right to an appeal as meaningful as a moneyed defendant receives.

To their credit, the principal Defendants have not specifically argued in this litigation that an indigent defendant somehow waives his or her constitutional right to appointed counsel by pleading guilty or nolo contendere. The Defendants do, however, stress that the statute requires the trial court to advise the defendant before accepting the plea that appellate counsel will be appointed only if the case falls within the narrow

N.W.2d 333 (Mich. Ct. App. 2002); *People v. Oliver*, 627 N.W.2d 297 (Mich. 2001).

statutory exceptions. *See* Defendants’ Brief in Response to Petition for Rehearing En Banc at 7 (citing Mich. Comp. Laws § 770.3a(4)).

This provision cannot operate as an effective waiver of an indigent’s constitutional right to appellate counsel. Such a waiver would itself violate the Fourteenth Amendment *because it applies only to the indigent*. The statute does not require a moneyed criminal defendant to give up his or her constitutional right to the assistance of appellate counsel by pleading guilty or nolo contendere; only the poor lose their right to a meaningful appeal.

Michigan could not constitutionally enforce a law that would require only black and female defendants to give up their right to appellate counsel in order to plead guilty because such a discriminatory “waiver” requirement would plainly violate the Fourteenth Amendment. For the same reason, it cannot constitutionally enforce a statute that forces only indigent defendants to give up their right to the assistance of appellate counsel in order to enter a plea because the Fourteenth Amendment also protects indigents from discrimination in the criminal justice system. As the Court explained in *Douglas*:

In *Griffin v. Illinois*, [351 U.S. 12 (1956)], we held that a State may not grant appellate review in such a way as to discriminate against some convicted defendants on account of their poverty. There, as in *Draper v. Washington*, [372 U.S. 487 (1963)], the right to a free transcript on appeal was in issue. Here the issue is whether or not an indigent shall be

denied the assistance of counsel on appeal. In either case the evil is the same: discrimination against the indigent. For there can be no equal justice where the kind of an appeal a man enjoys “depends on the amount of money he has.”

Douglas, 372 U.S. at 355 (quoting *Griffin*, 351 U.S. at 19).

If the procedure set forth in the statute really did amount to a constitutional way to abrogate an indigent’s Fourteenth Amendment right to the assistance of appellate counsel, Michigan could also presumably inform indigents, “If you plead guilty or nolo contendere, you can appeal but you waive your right to a set of free transcripts, and you will also have to pay the filing fee.” See *Griffin v. Illinois*, 351 U.S. 12 (1956) (Fourteenth Amendment guarantees indigent free transcripts for appeal); *Burns v. Ohio*, 360 U.S. 252 (1959) (Fourteenth Amendment prohibits state from requiring indigents to pay filing fee for appeal).

In other words, if Michigan could constitutionally require indigents to waive their right to appellate counsel in order to plead guilty or nolo contendere, Michigan could also constitutionally require them to waive their right to free transcripts and a filing fee. That is, Michigan could make it effectively impossible for indigents to appeal, while fully preserving the right of moneyed defendants to appeal.

But that, of course, is exactly what the statute does. As the Supreme Court explained in *Douglas*, an indigent appellant forced to proceed without the assistance of appellate counsel “has only the right to a meaningless ritual, while the rich man has a meaningful appeal.” 372 U.S. at 358. Therefore, the supposed “waiver” found in the statute is itself unconstitutional because it requires only the poor to give up their right to meaningful appeals, while those defendants with money waive nothing.

CONCLUSION

For the reasons stated above and in their initial briefs, Plaintiffs-Appellees respectfully request that this Court affirm the district court's decision.

Respectfully submitted,

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