

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

JOHN CLIFFORD TESMER, CHARLES
CARTER, and ALOIS SCHNELL, on behalf of
themselves and all similarly situated individuals,
and ARTHUR M. FITZGERALD and MICHAEL
D. VOGLER,

Plaintiffs,

v

Case No. _____

JENNIFER M. GRANHOLM, Attorney General
of the State of Michigan, in her official capacity;
and JUDGE JOHN F. KOWALSKI, JUDGE
WILLIAM A CRANE and JUDGE LYNDA L.
HEATHSCOTT, in their official capacity,
individually and as representative of a class of
similarly situated circuit court judges,

HON. _____

Defendants.

_____ /

COMPLAINT

Plaintiffs, by and through their undersigned attorneys, bring this complaint against the above-named Defendants, their employees, agents, and successors in office and, in support thereof, state the following upon information and belief:

INTRODUCTORY STATEMENT

1. This civil rights action, arising under 42 U.S.C. §1983, challenges the constitutionality of the practice of denying indigent defendants who have pleaded guilty or nolo contendere in Michigan courts the right to appointed appellate counsel. This practice of denying appointed appellate counsel to indigents who have pleaded guilty or nolo contendere has also been recently codified by the enactment of P.A. 1999, No. 200, an act which is scheduled to take effect

on April 1, 2000.

2. Plaintiffs seek declaratory and injunctive relief against both the existing practice in some Michigan courts and the practice which will take effect statewide on April 1, 2000 under P.A. 1999, No. 200.

JURISDICTION AND VENUE

3. Jurisdiction is conferred on this Court by 28 U.S.C. §§ 1331, 1342(a)(3), and 1343(a)(4).

4. Plaintiffs' claims for declaratory and injunctive relief are authorized by 28 U.S.C. §§ 2201 and 2202 and by Rules 57 and 65 of the Federal Rules of Civil Procedure, and by the general legal and equitable powers of this Court.

5. Venue is appropriate under 28 U.S.C. § 1392(b) because a substantial part of the events or omissions giving rise to the claim occurred in this district.

PARTIES

6. Plaintiff John Clifford Tesmer is a resident of the County of Alcona who is presently incarcerated in the Saginaw Correctional Facility. He brings this suit on behalf of himself and all other persons similarly situated.

7. Plaintiff Charles Carter is a resident of the County of Saginaw who is presently incarcerated at the State Prison of Southern Michigan. He brings this suit on behalf of himself and all other persons similarly situated.

8. Plaintiff Alois Schnell is a resident of the County of Saginaw who is presently incarcerated at the Cotton Correctional Facility. He brings this suit on behalf of himself and all other persons similarly situated.

9. Plaintiff Arthur M. Fitzgerald is an attorney licensed to practice law in the State of

Michigan. Mr. Fitzgerald's principal place of business is located in Bay County, Michigan.

10. Plaintiff Michael D. Vogler is an attorney licensed to practice law in the State of Michigan. Mr. Vogler's principal place of business is located in Presque Isle County, Michigan.

11. Defendant Jennifer M. Granholm is the Attorney General of the State of Michigan. She will be responsible for the enforcement of P.A. 1999, No. 200. Defendant Granholm is sued herein in her official capacity, as are her successors.

12. Defendant John F. Kowalski is a judge of the State of Michigan's 26th Circuit Court. He is being sued herein in his official capacity and as a class representative of all circuit court judges in the State of Michigan.

13. Defendant William A. Crane is a judge of the State of Michigan's 10th Circuit Court. He is being sued herein in his official capacity and as a class representative of all circuit court judges in the State of Michigan.

14. Defendant Lynda L. Heathscott is a judge of the State of Michigan's 10th Circuit Court. She is being sued herein in her official capacity and as a class representative of all circuit court judges in the State of Michigan.

FACTUAL BACKGROUND

15. In November 1994, article 1, §20 of the Michigan Constitution was amended to provide that the first direct appeal from a plea-based felony conviction would be by application for leave to appeal filed in the Michigan Court of Appeals.

16. The 1994 amendment to article 1, §20 of the Michigan Constitution changed the procedure for initial appeals of a plea-based felony conviction from appeals of right to appeals only by leave of the Court of Appeals.

17. The 1994 amendment of article 1, §20 of the Michigan Constitution did not address the appointment of counsel by which indigents who had pleaded guilty or nolo contendere to felony charges could challenge their convictions or sentences.

18. Some time after the 1994 amendment of article 1, §20 of the Michigan Constitution, a number of circuit court judges, particularly the judges of the 10th Circuit Court in Saginaw, began routinely denying requests filed by indigent defendants for the appointment of appellate counsel to prepare applications for leave to appeal in the Michigan Court of Appeals to challenge plea-based convictions and sentences.

19. Plaintiff John Clifford Tesmer is an indigent who pleaded guilty in 1999 to a charge of home invasion in the 26th Circuit Court in Alcona.

20. Judge John F. Kowalski sentenced Mr. Tesmer to a period of incarceration of between 9 and 15 years based on his plea of guilty to the home invasion charge.

21. Within 42 days of the date of his sentencing, Mr. Tesmer presented a written request to Judge Kowalski for the appointment of an appellate attorney to prepare an application for leave to appeal in the Michigan Court of Appeals from his plea-based conviction.

22. On September 7, 1999, Judge Kowalski denied Mr. Tesmer's request for appointed appellate counsel.

23. Plaintiff Charles Carter is an indigent who pleaded guilty in 1999 to a charge of attempted murder in the 10th Circuit Court in Saginaw.

24. Judge William A. Crane sentenced Mr. Carter to life imprisonment based on his plea of guilty to the attempted murder charge.

25. Within 42 days of the date of his sentencing, Mr. Carter presented a written request

to Judge Crane for the appointment of an appellate attorney to prepare an application for leave to appeal in the Michigan Court of Appeals from his plea-based conviction.

26. On May 12, 1999, Judge Crane denied Mr. Carter's request for appointed appellate counsel.

27. Plaintiff Alois Schnell is an indigent who pleaded guilty in 1998 to the charge of operating a vehicle under the influence of liquor (OUIL), third offense.

28. Judge Lynda L. Heathscott sentenced Mr. Schnell to a period of incarceration of between five and ten years based on his plea of guilty to the OUIL charge.

29. Within 42 days of the date of his sentencing, Mr. Schnell presented a written request to Judge Heathscott for the appointment of an appellate attorney to prepare an application for leave to appeal in the Michigan Court of Appeals from his plea-based conviction.

30. On September 21, 1998, Judge Heathscott denied Mr. Schnell's request for appointed appellate counsel.

31. In December 1999, P.A. 1999, No. 200 was signed into law. This act, which amends provisions of Michigan's Code of Criminal Procedure, takes effect on April 1, 2000.

32. Under P.A. 1999, No. 200, an indigent who pleads guilty or nolo contendere to a felony charge has the right to appointed counsel to file an application for leave to appeal in only a limited number of circumstances. P.A. 1999, No. 200 also prohibits circuit court judges from appointing counsel to indigent defendants in most cases in which these defendants have pleaded guilty or nolo contendere.

33. Plaintiff Arthur M. Fitzgerald earns a portion of his income as an attorney taking assigned appeals from trial and plea based convictions. Mr. Fitzgerald is on a list of attorneys

qualified to take such assignments arising out of the State of Michigan's 10th Circuit Court.

34. Plaintiff Michael D. Vogler earns a portion of his income as an attorney taking assigned appeals from trial and plea based convictions. Mr. Vogler is on a list of attorneys qualified to take such assignments arising out of the State of Michigan's 26th Circuit Court.

35. The present practice in several Michigan courts of routinely denying requests for appointment of appellate counsel made by indigent defendants who have pleaded guilty or nolo contendere has adversely affected the incomes of Mr. Fitzgerald and Mr. Vogler in that it has reduced the number of cases in which they could be appointed and paid as assigned appellate counsel.

36. The operation of P.A. 1999, No. 200 will adversely affect the incomes of Mr. Fitzgerald and Mr. Vogler in that it will reduce the number of cases in which they could be appointed and paid as assigned appellate counsel.

37. Mr. Fitzgerald and Mr. Vogler also assert, under the doctrine of *jus tertii*, the constitutional rights of the indigent criminal defendants who will plead guilty or nolo contendere after April 1, 2000, and who will request, but be denied, the appointment of appellate counsel, based on the operation of P.A. 1999, No. 200.

FIRST CLAIM FOR RELIEF

38. Plaintiffs incorporate by reference all of the allegations contained above as though stated in full herein.

39. Defendants Kowalski, Crane and Heathscott violated Plaintiffs' rights to due process and equal protection rights as guaranteed by the United States Constitution when they denied Plaintiffs and all similarly situated individuals the right to the appointment of appellate counsel to

prepare an original appeal from their plea-based convictions.

40. Defendants Kowalski, Crane and Heathscott took the aforementioned actions denying the constitutional rights of the Plaintiffs and all similarly situated individuals while acting under color of state law.

41. Plaintiffs seek redress for the Defendants' violation of federal constitutional rights pursuant to the federal civil rights act, 42 U.S.C. §1983.

SECOND CLAIM FOR RELIEF

42. Plaintiffs incorporate by reference all of the allegations contained above as though stated in full herein.

43. By denying indigent defendants the right to appointed appellate counsel to process their initial appeal, P.A. 1999, No 200 will violate due process and equal protection rights guaranteed by the United States Constitution.

44. The violations of federal constitutional rights described in the preceding paragraph will result from actions taken under color of state law.

45. Plaintiffs seek redress for the violation of federal constitutional rights caused by the operation of P.A. 1999, No. 200 pursuant to the federal civil rights act, 42 U.S.C. §1983.

CLASS ALLEGATIONS

46. The Plaintiff class consists of all indigent Defendants who have pleaded or will plead guilty or nolo contendere to a felony in a Michigan court and who filed or will file a request for the appointment of appellate counsel which was or will be denied by a circuit court judge.

47. This proposed class meets the requirements of F.R.C.P. 23(a) and (b) because:

- A. The class is so numerous that joinder of all members is impracticable, there are questions of law and fact common to the class, the claims of the representative parties are typical of the claims of the class, and the representative parties will adequately protect the interests of the class.
- B. The prosecution of separate actions by individual members of the class would create a risk of varying adjudications or adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the Defendants.
- C. The parties opposing the class have in refusing to appoint appellate counsel, acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.

48. The Defendant class consists of all Michigan circuit court judges and their successors.

49. This proposed Defendant class meets the requirements of F.R.C.P. 23(a) and (b)

because:

- A. The class is so numerous that joinder of all members is impracticable, there are questions of law and fact common to the class, the claims against the representative parties are typical of the claims against the class as a whole, and the representative parties will adequately protect the interests of the class.

- B. The prosecution of separate actions against individual members of the class would create a risk of varying adjudications or adjudications with respect to individual members of the class which would establish incompatible standards of conduct for parties opposing the class.
- C. The named class representatives, in refusing to appoint appellate counsel, acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.

RELIEF REQUESTED

WHEREFORE, Plaintiffs ask this Court to do the following:

- A. Issue an order declaring that the practice of Defendants Kowalski, Crane, Heathscott and other similarly situated circuit court judges, denying individuals who have pleaded guilty or nolo contendere the right to appointed appellate counsel to handle an initial appeal, violates the United States Constitution;
- B. Issue a temporary restraining order, a preliminary injunction and a permanent injunction restraining the Defendants, and all other members of the Defendant class, as well as their employees, agents, and successors from violating the federal constitutional rights of Plaintiffs and the Plaintiff class;
- C. Issue an order declaring that P.A. 1999, No. 200 violates the United States Constitution;

- D. Issue a temporary restraining order, a preliminary injunction and a permanent injunction enjoining the enforcement of P.A. 1999, No. 200;
- E. Issue an order specifying that Plaintiffs and the members of the Plaintiff class shall be provided appointed counsel to file an application for leave to appeal to the Michigan Court of Appeals and that the Court of Appeals must accept any application for leave to appeal filed by Plaintiffs' appointed counsel for filing and must give full consideration to that application;
- F. Issue an order awarding Plaintiffs their reasonable attorney fees and costs;
- G. Issue other orders awarding Plaintiffs any other relief to which they may be entitled.

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