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

RESPONDENTS' BRIEF

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QUESTIONS PRESENTED

1. Do criminal defense attorneys who would be denied appointments to represent indigent criminal defendants under a state statute have standing to challenge the statute?

2. Does the Fourteenth Amendment guarantee the assistance of counsel to an indigent criminal defendant who wishes to file a first-tier direct application for leave to appeal to an intermediate appellate court from a plea-based felony conviction and sentence, where the appellate court grants or denies such applications for leave to appeal on the merits?

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Appeals from Plea-Based Felony Convictions in Michigan

In 1994, Article 1, § 20 of the Michigan Constitution was amended to provide that, "In every criminal prosecution, the accused shall have the right . . . to have an appeal as a matter of right, *except as provided by law an appeal by an accused who pleads guilty or nolo contendere shall be by leave of the court.*" Pet. App. 138a (amended language emphasized). The purpose of this amendment was to reduce the workload of the Michigan Court of Appeals by streamlining the appellate process for appeals from plea-based felony convictions. *See People v. Bulger*, 614 N.W.2d 103, 106-107 (Mich. 2000) (discussing history of amendment).

Since 1994, therefore, a criminal defendant who pleads guilty to a felony in Michigan and who believes that error occurred at his or her sentencing or at some other point in the proceedings must file an application for leave to appeal to the Michigan Court of Appeals. If the application is granted, the appeal proceeds to full briefing and argument. Mich. Ct. R. 7.205(D)(3). Pet. App. 155a. If, on the other hand, the Michigan Court of Appeals denies the application, it does so by issuing a standard order that "uniformly state[s] that leave is denied 'for lack of merit in the grounds presented.'" *Bulger*, 614 N.W.2d at 124 (Cavanagh, J., dissenting); *see also* J.A.22-27 (examples of orders denying leave to appeal from plea-based convictions). The Michigan Court of Appeals treats its orders denying leave to appeal "for lack of merit in the grounds presented" as decisions on the merits with preclusive effect under the law of the case doctrine. *See, e.g., People v. Hayden*, 348 N.W.2d 672, 684 (Mich. Ct. App. 1984) (holding order denying application "for lack of merit in the grounds presented" was decision on merits barring relitigation); *Contineri v. Clark*, 2003 WL 21771236 (Mich. Ct. App. 2003) (holding law of the case barred relitigation of issues raised in previous application

denied "for lack of merit in the grounds presented" because order "did, in fact, express an opinion on the merits"); *see also People v. Weathers*, 2003 WL 21362810 (Mich. Ct. App. 2003) (same).

More than ninety percent of felony convictions in Michigan are obtained by plea. *See* Petitioner's Brief at 30 n. 21 (collecting statistics). Most indigent defendants who plead guilty in Michigan do not appeal. *Compare id.* (citing statistics showing that there were 38,196 felony convictions by guilty plea in 2001) *with* Affidavit of Terence R. Flanagan, J.A. 29 (observing that there were approximately 2000 requests for appointment of appellate counsel in plea cases in 1999). Those that do appeal primarily raise sentencing issues. *See* Mara Matuszak, Note, *Limiting Michigan's Guilty and Nolo Contendere Plea Appeals*, 73 U. Det. Mercy L. Rev. 431, 438 (1996) (discussing Michigan State Bar Report finding "a significant majority of guilty plea appeals involve only sentencing issues").

The Trial Judges' Denial of Counsel to Indigent Appellants and the *Bulger* Decision

Since the 1994 amendment to the state constitution did not eliminate the right to counsel for first appeals, the vast majority of Michigan trial judges continued to routinely appoint counsel to indigent plea defendants who requested the assistance of appellate counsel. *See* Flanagan Affidavit, J.A. 29. However, a few trial judges, including Petitioners Kowalski, Crane and Heathscott, began to routinely deny appellate counsel to such indigents. Pet. App. 3a.

In 1996, a group of thirteen indigents who had been denied the appointment of appellate counsel filed, with the assistance of a volunteer attorney, an original complaint in the Michigan Supreme Court requesting that their trial judges be ordered to appoint appellate counsel to assist them with their applications for leave to appeal. The Michigan Supreme Court

dismissed the complaint but ordered that counsel be appointed to the indigents for the limited purpose of arguing to the trial judges that the indigents were entitled to appointed counsel for their individual appeals. *Bulger, et al. v. Judges of Tenth Circuit Court*, 562 N.W.2d 200 (Mich. 1997). After the trial judges held that the indigents were not entitled to appellate counsel, one of those indigents, still assisted by counsel appointed solely to argue that he had a right to the assistance of appellate counsel, appealed that decision back to the Michigan Supreme Court. *See Bulger*, 614 N.W.2d at 105-106 (describing procedural history). A divided Michigan Supreme Court ultimately held that indigent plea defendants enjoyed no constitutional right to the assistance of appellate counsel. *Id.* at 110-115. This Court subsequently denied certiorari. *Bulger v. Michigan*, 531 U.S. 994 (2000).

The Statute and the Present Litigation

While the *Bulger* case was still pending in the Michigan Supreme Court, the Michigan Legislature enacted Mich. Comp. Laws § 770.3a (2000) ("the statute"), which provides that Michigan 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. Pet. App. 139a-140a. 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. Pet. App. 140a. If the indigent wishes to raise any other type of issue on appeal, such as whether the judge erroneously ordered the sentences to run consecutively, whether the judge erroneously denied credit for prior incarceration, whether the sentences and/or the convictions violate double jeopardy, whether the sentence violates the principles of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), or whether the judge illegally

ordered restitution, the statute prohibits the appointment of appellate counsel.

This lawsuit was filed before the statute took effect. The plaintiffs included two distinct groups. The first group consisted of Respondents Tesmer, Carter and Schnell, who had been denied appellate counsel by Petitioners Kowalski, Crane and Heathscott, respectively. J.A. 14-15. These three plaintiffs therefore challenged only the constitutionality of the pre-statutory practice of those particular judges. J.A. 17, Pet. App. 100a.

The second group of plaintiffs consisted of Respondents Fitzgerald and Vogler, each of whom is an appellate attorney listed on his home county's roster of attorneys qualified to receive appointments to represent indigents on appeal. J.A. 16. Fitzgerald receives appointments from the trial court in which Judges Crane and Heathscott sit, and Vogler receives appointments from the trial court in which Judge Kowalski sits. J.A. 16. Therefore, Fitzgerald and Vogler complained that the pre-statutory practice of Kowalski, Crane and Heathscott of routinely denying the appointment of counsel to indigents had reduced their incomes because it meant that they and the other attorneys on the rosters received fewer appointments. J.A. 16. Similarly, since the statute would deny appellate counsel to most indigent defendants, Fitzgerald and Vogler complained that the statute would also reduce their incomes by reducing the number of appointments for each attorney on the rosters. J.A. 16.

The district court issued a declaratory judgment that both the statute and the practice of the judges violate the Fourteenth Amendment. Pet. App. 116a-124a. The district court also concluded that Respondent attorneys had standing to challenge the judges' pre-statutory practice and the statute under the doctrine of *jus tertii*. Pet. App. 93a-100a. However, the district court abstained from adjudicating Respondent Tesmer's

challenge to the pre-statutory practice of the judges since he still had proceedings pending in the state appellate courts. Pet. App. 100a-107a.

Petitioners appealed that decision to the Sixth Circuit.[1] A panel of that court agreed with the district court that Respondent attorneys have *jus tertii* standing, Pet. App. 73a-77a, but reversed the district court's refusal to abstain from hearing the claims of all three Respondent indigents and the district court's conclusion that the statute is unconstitutional. Pet. App. 67a-73a, 77a-84a.

On rehearing *en banc*, the Sixth Circuit held that the district court should have abstained from hearing the claims of all three Respondent indigents. Pet. App. 6a-10a. The *en banc* court also agreed with the district court that the Respondent attorneys have *jus tertii* standing. Pet. App. 10a-19a. The *en banc* court then affirmed the district court's conclusion that the statute is unconstitutional. Pet. App. 19a-29a.

SUMMARY OF ARGUMENT

Respondents Fitzgerald and Vogler may challenge the constitutionality of the statute as they meet each of the three requirements of *jus tertii* standing. First, Petitioners have never denied that Fitzgerald and Vogler, who are appellate lawyers on the roster of attorneys to be assigned to indigent appellants, will suffer loss of income if Michigan is permitted to deny appellate counsel to most indigent felony defendants who plead guilty. Since the Court has repeatedly recognized in similar contexts that economic loss is the classic injury in fact, Fitzgerald and Vogler easily satisfy the first prong of *jus tertii* standing.

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[1] The district court subsequently enjoined Respondent Kolenda, a state court judge who was not a named defendant, from continuing to deny appellate counsel to indigents. Pet. App. 132a-136a. Respondent Kolenda appealed separately to the Sixth Circuit, which ultimately ruled that the injunction against him was improper. Pet. App. 29a-35a.

Since Petitioners never challenged the second and third prongs of *jus tertii* standing below, the Court should not entertain Petitioners' arguments now. In any event, Fitzgerald and Vogler satisfy both of those prongs. This Court has repeatedly recognized that the attorney-client relationship, including an attorney's relationship with future or prospective clients, satisfies the second prong. As for the third prong, the denial of appellate counsel is precisely the type of serious impediment that would prevent indigent defendants from raising and litigating their constitutional rights on their own. This Court has repeatedly observed that a typical indigent defendant is completely incapable of overcoming the procedural hurdles necessary to perfect a first direct appeal or identifying or coherently raising his or her own appellate issues. Therefore, *jus tertii* standing is appropriate.

The Michigan statute, which would deny appellate counsel to the great majority of indigent defendants who wish to appeal from their plea-based convictions and sentences, violates the Fourteenth Amendment. An application for leave to appeal to the Michigan Court of Appeals is an appeal of right for purposes of *Douglas v. California*, 372 U.S. 353 (1963), and not a "discretionary" appeal for purposes of *Ross v. Moffitt*, 417 U.S. 600 (1974). The distinction between *Douglas* and *Ross* is between first-tier direct appeals and subsequent appeals and between appeals decided on the merits and appeals that can be denied for any reason. Since an application for leave to appeal to the Michigan Court of Appeals from a plea-based conviction and sentence is a first-tier appeal that is actually decided on the merits, Michigan must provide appellate counsel, just as every other jurisdiction with a first-tier appeal by application has done since *Douglas*.

Even if *Douglas* did not dictate the result, the statute would still be unconstitutional because it deprives indigents of meaningful access to the appellate court. The statute would require indigents to overcome all of the procedural hurdles

necessary to file a first direct appeal. As the Court has specifically recognized in the context of appeals from plea-based convictions, indigent laymen, who may well be functionally illiterate, cannot be expected to overcome those hurdles, nor can they be fairly expected to identify and coherently argue their own appellate issues. The narrow exceptions in the statute would permit the appointment of appellate counsel only in very rare circumstances while denying counsel to indigents with meritorious and complex issues, such as sentencing guidelines challenges and double jeopardy issues. Meanwhile, moneyed defendants would always be assured of meaningful appellate review of sentencing or other errors committed in their cases.

Finally, Respondent Kolenda and *Amicus Curiae* Iowa, et al., have raised a novel waiver issue that is not properly before the Court as it was not raised or decided below. In any event, Michigan cannot require indigents, and only indigents, to waive their constitutional right to the assistance of appellate counsel as a condition of receiving the benefits of a guilty plea, just as Michigan cannot impose such discriminatory waivers on other groups.

ARGUMENT

I. Respondents Fitzgerald and Vogler Have Standing to Challenge the Constitutionality of the Statute Under the Doctrine of *Jus Tertii*.

This case was filed on March 1, 2000, on behalf of five plaintiffs. Three of these plaintiffs, John Tesmer, Charles Carter and Alois Schell, were indigents who had pleaded guilty to felonies and had requested the appointment of appellate counsel. These requests had been denied pursuant to the routine practice of Petitioners Kowalski, Heathscott and Crane. The remaining two plaintiffs, Arthur M. Fitzgerald and Michael D. Vogler, are Michigan attorneys who derive a portion of their income through assigned criminal appeals. Fitzgerald and

Vogler asserted that they had standing under the doctrine of *jus tertii* to challenge the constitutionality of Mich. Comp. Laws §770.3a ("the statute"), which was scheduled to take effect on April 1, 2000. J.A. 17.

Petitioners and their *amici* first contend that Fitzgerald and Vogler lack *jus tertii* standing to challenge the statute. A litigant has standing to assert the constitutional rights of third parties if three requirements are met: (1) "the litigant must have suffered an 'injury in fact,' thus giving him or her a 'sufficiently concrete interest' in the outcome of the issue in dispute;" (2) "the litigant must have a close relationship to the third party;" and (3) "there must exist some hindrance to the third party's ability to protect his or her own interests." *Powers v. Ohio*, 499 U.S. 400, 411 (1991); *see also Edmonson v. Leesville Concrete Company, Inc.*, 500 U.S. 614, 629 (1991). All three of these requirements are satisfied here.

A. Fitzgerald and Vogler Have Suffered an "Injury In Fact"

In seeking to raise the constitutional rights of indigents who will be denied the appointment of appellate counsel under the statute, Fitzgerald and Vogler must first establish that they will suffer an actual or imminent injury by operation of that statute. *Friends of the Earth v. Laidlaw Environmental Systems, Inc.*, 528 U.S. 167, 180 (2000); *United States v. Hays*, 515 U.S. 737, 743 (1995). Therefore, Fitzgerald and Vogler alleged in the Complaint that the statute would cause them direct economic loss because it "will reduce the number of cases in which they could be appointed and paid as assigned appellate counsel." J.A. 16. Petitioners concede that this allegation of lost income must be accepted as true. Petitioners' Brief at 15 (citing *Warth v. Seldin*, 422 U.S. 490, 501 (1975)); *cf. Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992).

To understand why the statute would cause Fitzgerald and Vogler to suffer direct economic loss, it is necessary to

consider the process by which appellate counsel are assigned to indigent defendants in Michigan. In 1981, the Michigan Supreme Court established the Michigan Assigned Appellate Counsel System (MAACS) to oversee the appointment of appellate counsel for felony appeals. Mich. Sup. Ct. Admin. Order 1981-7, 412 Mich. lxv (1981). MAACS maintains a statewide list of attorneys who are deemed qualified to accept assigned appeals. *Id.*, 412 Mich. at lxviii. After qualifying for the statewide list of qualified appellate counsel, an attorney places his or her name on a separate roster for each circuit court from which he or she is willing to accepts appeals. A circuit court must appoint attorneys to represent indigents in the order in which the attorneys' names appear on the local roster. Mich. Sup. Ct. Admin. Order 1989-3(4)-(5), 432 Mich. cxxii (1989).

Since the Michigan system for assigning appellate attorneys to indigent defendants operates on a strict rotation, as the number of cases requiring appointed appellate counsel increases, the more often the assignment list will be exhausted and the more often a particular lawyer on that list will receive a paid appointment. The method by which the assigned counsel system operates in Michigan dictates that if the statute were to take effect, a very large proportion of indigent appellants would be removed from the assigned counsel system. Thus, there would be far fewer cases to be assigned, and Fitzgerald and Vogler would earn far less money for representing indigents in assigned appeals.

Petitioners do not deny that the statute would cause Fitzgerald and Vogler to suffer a loss of income, nor can there be any real dispute that such loss of income is the type of concrete "injury in fact" necessary to establish standing. In a long series of cases, the Court has recognized that a party has standing to challenge governmental action that results in economic loss to that party. *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 236-237 (1990)(motel owners whose business is affected by an adult entertainment ordinance has a "live

controversy"); *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 623 n. 3 (1989) (lawyer=s interest in fee represents an "injury in fact"); *Craig v. Boren*, 429 U.S. 190, 194 (1976) (bar owner has standing to raise constitutionality of a state statute causing "direct economic injury through the constriction of her buyer=s market"); *Singleton v. Wulff*, 428 U.S. 106, 112-113 (1976) (physicians performing abortions have standing to challenge state law limiting abortion funding because "if the physicians prevail in their suit to remove this limitation, they will benefit for they will receive payment for the abortions").

Petitioners and their *amici* further note that the harm necessary to support standing "must be actual or imminent, not 'conjectural' or 'hypothetical.'" *Whitmore v. Arkansas,* 495 U.S. 149, 155 (1990). Thus, Petitioners contend that Fitzgerald and Vogler lack standing because their claim of injury involves a future injury. But, as the above analysis of the Michigan assigned appellate counsel system demonstrates, the economic injury that the statute would cause to Fitzgerald and Vogler is neither conjectural nor hypothetical. The number of appellate appointments Fitzgerald and Vogler would receive and, therefore, the amount of money they would earn, *will* be reduced if the statute takes effect.[2]

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[2]*Amici Curiae*, Iowa, *et al.*, attempts to analogize the economic harm to Fitzgerald and Vogler with the conjectural economic loss claimed in *Diamond v. Charles*, 476 U.S. 54 (1986), but the analogy is inapt. In *Diamond*, an Illinois pediatrician sought to defend the constitutionality of a state law restricting abortion by claiming that the law would result in more live births, thereby increasing the pool of potential fee paying clients for his pediatric services. The Court concluded that the possibility that fetuses subject to the Illinois abortion law would survive and ultimately find their way to Dr. Diamond was "unadorned speculation" that would not support standing. *Id.* at 56. In contrast to the speculative claim in *Diamond*, Respondents have established a direct relationship between the operation of the statute and the earnings that Fitzgerald and Vogler would lose in court appointed appeals. Indeed, *Diamond* actually confirms that Fitzgerald and

B. Fitzgerald and Vogler Have a Sufficiently Close Relationship With Indigents Who Will Be Injured by the Statute

The second requirement for *jus tertii* standing is that the litigants have a "close relationship" with the third parties whose rights they seek to assert. *Powers,* 499 U.S. at 411. Before addressing the merits of Petitioners' arguments on the second and third requirements for *jus tertii* standing, this Court must first decide whether Petitioners have waived those arguments.

In the district court and again before the Sixth Circuit, Petitioners argued that Fitzgerald and Vogler could not establish *jus tertii* standing only because they had not sustained a sufficient "injury in fact." Petitioners have substantially modified their position in this Court. They now contend that Fitzgerald and Vogler lack standing because they cannot satisfy any one of the three requirements.

The Court held in *Craig v. Boren* that, although a party=s failure to contest the reach of a federal court=s authority under Article III would not be binding on the Court, the same was not true with respect to the prudential, judicially-created "rules of self-restraint" governing *jus tertii* standing. 429 U.S. at 193-194. In *Craig*, the parties assumed throughout the litigation that a female vendor of alcohol was a proper party to challenge a statute limiting the sale of beer to young men. Thus, the prudential considerations that normally surface in such a case were never argued in the lower courts in *Craig*. This Court concluded under the circumstances presented in *Craig* that "[t]hese prudential objectives, thought to be enhanced by restrictions on third-party standing, cannot be furthered here."

Vogler have suffered an "injury in fact" since the Court cited its prior decision in *Singleton* for the principle that "a physician who demonstrates that abortion funding regulations have a direct financial impact on his practice" may assert the rights of his or her patients. *Id.* at 65. Fitzgerald and Vogler have made precisely such a demonstration in this case.

Id. at 193; *see also City of Revere v. Massachusetts General Hospital*, 463 U.S. 239, 243 (1983).

The Court=s reasoning in *Craig* applies equally to this case. In the district court and again before the Sixth Circuit, Petitioners acknowledged the existence of the three-part test for *jus tertii* standing, but Petitioners never denied in either the district court or the court of appeals that Fitzgerald and Vogler had a sufficiently close relationship with indigent criminal defendants to satisfy the second requirement of *jus tertii* standing. Similarly, Petitioners never contested in the courts below Respondents' claim that the third requirement of *jus tertii* standing is satisfied because there are substantial hindrances to the ability of the indigent defendants to assert their own constitutional rights. As in *Craig*, Petitioners= failure to contest the second and third requirements of *jus tertii* standing below should lead this Court to conclude that the prudential concerns that could have been raised in the lower courts "cannot be furthered here."

In any event, Fitzgerald and Volger clearly meet all three prongs of the *jus tertii* test. Petitioners claim that Fitzgerald and Vogler do not possess a "close relationship" to the indigent clients whose rights they seek to assert. However, the Court has held on at least two prior occasions that the attorney-client relationship is sufficiently close to support third party standing. *Caplin & Drysdale*, 491 U.S. at 623 n. 3 (recognizing that the attorney-client relationship "is one of special consequence"); *see also United States Department of Labor v. Triplett*, 494 U.S. 715, 720-721 (1990).

Petitioners and their *amici* maintain, however, that a "close relationship" cannot be found in this case because Fitzgerald and Vogler are asserting the rights of future clients. According to Petitioners, this is significant since a "close relationship" only exists where there is an established relationship between the litigant and the third parties whose

rights he seeks to raise. Both the premise and the substance of this argument are incorrect.

First, Petitioners incorrectly assume that Fitzgerald and Vogler could only assert the rights of future clients. However, Fitzgerald and Vogler are both still taking assigned appeals, including appeals from guilty pleas. Thus, Fitzgerald and Vogler are currently representing individuals who would be directly injured if the statute took effect and forced Fitzgerald and Vogler to withdraw from further representation.[3]

Second, Petitioners are clearly incorrect in claiming that the Court=s decisions require an existing relationship between the litigant and the third parties whose rights the litigant seeks to raise. The Court has held in numerous cases that *jus tertii* standing may be premised on prospective relationships between the actual litigant and the individuals whose rights are being asserted. *See, e.g., Pierce v. Society of the Sisters*, 268 U.S. 510, 535 (1925) (schools can challenge state statute on behalf of "present and prospective patrons of their schools"); *Griswold v. Connecticut*, 381 U.S. 479, 481 (1965) (characterizing *Pierce* as allowing school to "assert the rights of potential pupils and their parents"); *Craig v. Boren*, 429 U.S. at 190 (bar owner asserting constitutional rights of her future customers); *Carey v. Population Services*, 431 U.S. 678, 687 (1977) (corporate

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[3]As noted above, Petitioners never contested the "close relationship" requirement of *jus tertii* standing in the district court. If they had, Respondents would have also responded to such an argument with sworn statements from Fitzgerald and Vogler demonstrating that these two attorneys take trial court cases on an assigned basis. Fitzgerald and Vogler would also have been able to confirm that many or most of the indigents whom they represent at the trial court level plead guilty. Thus, had the "close relationship" issue actually been contested in the district court instead of being raised for the first time in this Court, Respondents would have been able to establish that Fitzgerald and Vogler do in fact have existing attorney-client relationships with indigent criminal defendants who would be directly affected by the statute.

distributor of contraceptives has standing to challenge state law limiting sale of its products, "not only in its own right, but also on behalf of its potential customers").

Two of this Court=s decisions on the subject of "close relationship" deserve particular attention. In *Triplett,* this Court specifically held that an attorney had *jus tertii* standing to challenge a limitation on the fees that could be charged to a client where that limitation "deprives the lawyer=s *prospective* client of a due process right to obtain legal representation." 494 U.S. at 720 (emphasis added). Thus, the Court in *Triplett* expressly approved *jus tertii* standing where the necessary relationship existed between an attorney and that attorney=s prospective client. The Court=s analysis in *Triplett*, therefore, directly refutes Petitioners= assertion that an established relationship between Respondents and the clients whose rights they seek to assert is a prerequisite for *jus tertii* standing.

Finally, Petitioners= argument on the "close relationship" requirement is inconsistent with *Georgia v. McCollum*, 505 U.S. 42 (1992). In *McCollum,* three whites were charged with assaulting an African-American couple. Prior to trial, the prosecution moved to prohibit the defendants from exercising preemptory challenges in a racially discriminatory manner. The trial court denied the motion and the prosecution appealed on an interlocutory basis. The issue in *McCollum*, therefore, was whether a state prosecutor could object to a defendant=s discriminatory exercise of preemptory challenges. To decide this question, the Court had to consider *jus tertii* standing questions similar to those addressed in *Edmonson* and *Powers*, that is, whether the prosecutor had standing to assert the equal protection rights of African-American jurors who might be discriminatorily excluded from serving. The Court concluded in *McCollum* that A[t]he State=s relation to potential jurors in this case is closer than the relationships approved in *Powers* and *Edmonson.*" 505 U.S. at 56.

What is noteworthy about *McCollum* is that the Court found a sufficiently close relationship between the prosecutors and the veniremen whose rights they wished to assert even though the prosecutors and veniremen had never met. *Cf. Campbell v. Louisiana*, 523 U.S. 392 (1998) (allowing criminal defendant to assert rights of citizens discriminatorily excluded from grand jury). As the Court ultimately concluded in *McCollum*, the second requirement for *jus tertii* could be satisfied by the prosecutor's relationship to "potential jurors." The analysis employed in *McCollum* demonstrates why Petitioners' argument that there must be an existing relationship between Respondents and the clients whose rights they represent must be rejected.

C. Significant Obstacles Prevent Indigent Defendants From Asserting Their Own Rights

The final requirement for *jus tertii* standing is that the third party=s ability to assert his own interest must in some way be hindered. As the Sixth Circuit observed, this Court=s precedents do not require proof that it would be impossible for the third party to protect his own interest. Pet. App. 12a-13a. All that is required is some hindrance affecting the "likelihood and ability of the third parties . . . to assert their own interests," *Powers*, 499 U.S. at 414, or "practical obstacles [that] prevent a party from asserting rights on behalf of itself." *Secretary of State of Maryland v. Joseph H. Munson Co.*, 467 U.S. 947, 956 (1984).

In this case, the hindrance that would prevent the indigent defendants from asserting their own rights is directly tied to the constitutional right that the statute would take away from them. If the statute took effect, the indigent defendants would have to litigate their own right to the assistance of appellate counsel in the appellate courts without the assistance of appellate counsel. To accomplish that feat, they would be compelled to navigate on their own the "hopelessly forbidding"

procedural rules governing first-tier direct appeals. *Evitts v. Lucey*, 469 U.S. 387, 396 (1985). All of this would have to be done by individuals who are least equipped to advance their claims since, as discussed in Part II(B) of this Argument, *infra,* this Court has repeatedly recognized that a typical indigent defendant is completely incapable of identifying his or her own appellate issues, much less presenting a coherent constitutional argument to an appellate court without ever having had the assistance of appellate counsel. Given this Court's precedents establishing the necessity of appellate counsel for a first direct appeal, there should be no question that a statute requiring indigent criminal defendants to proceed *pro se* on a first appeal provides exactly the type of hindrance that would satisfy the third requirement of *jus tertii* standing.[4]

Petitioners attack the Sixth Circuit's analysis of the third requirement for *jus tertii* standing by arguing that it improperly conflated the issues of standing and the merits of Respondents= constitutional claim. This criticism misses the mark.

The Sixth Circuit did not confuse the merits of this case and *jus tertii* standing. The merits of this case involve the question of whether indigents who plead guilty in Michigan

[4]One of the dissenting opinions in the Sixth Circuit reasoned that there was no hindrance to an indigent raising these constitutional questions *pro se* because the indigent defendant in *Bulger* had supposedly taken his claim for appointed appellate counsel through the entire Michigan appellate system and even petitioned this Court for review. J.A. 48. The dissent apparently overlooked the fact that Bulger was represented by an attorney who had been specially appointed by the Michigan Supreme Court solely to litigate the question of whether Bulger had a constitutional right to appointed appellate counsel for his underlying appeal. *See Bulger, et al. v. Judges of Tenth Circuit Court*, 562 N.W.2d 200 (Mich. 1997) (ordering counsel be appointed for Bulger and other indigents to assist them in their challenge to denial of appellate counsel). In other words, even the Michigan Supreme Court, which ultimately ruled that Bulger was not entitled to appellate counsel, recognized that he could not reasonably be expected to litigate *pro se* his constitutional entitlement to appellate counsel.

courts have a constitutional right to appointed appellate counsel. Whether such a constitutional right exists, the fact remains that an indigent who seeks to challenge the constitutionality of the statute must do so without the benefit of counsel. It is the fact that an indigent will be forced to litigate this constitutional question without the assistance of counsel that is relevant for purposes of the hindrance requirement, not whether the indigent has a constitutional right to the assistance of counsel.[5]

D. *Jus Tertii* Standing Is Appropriate In This Case

Respondents Fitzgerald and Vogler have satisfied all three requirements for *jus tertii* standing. In addition to these requirements, Petitioners and their *amici* have argued two other points which merit a response. First, Petitioners suggest that this Court should be particularly hesitant to recognize a claim of *jus tertii* standing made on behalf of an attorney because such standing creates the prospect of innumerable constitutional challenges being advanced by attorneys. Petitioners are, in essence, claiming that special principles of *jus tertii* standing should apply where the party asserting the rights of third parties is an attorney. However, this Court=s decisions in *Caplin & Drysdale* and *Triplett* demonstrate that attorneys are subject to the same three-part test of *jus tertii* standing that applies in every other case.

In any event, cases in which attorneys would be able to satisfy the third requirement for *jus tertii* standing on behalf of criminal defendants will remain rare. For most statutes adversely affecting criminal defendants, the criminal defendants would be able to bring their own challenges aided, of course, by

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[5] In any event, this Court has recognized that there is a class of cases "where standing and the merits are inextricably intertwined." *City of Revere*, 463 U.S. at 243, n. 5. Thus, even if the Sixth Circuit could be accused of mixing the requirements of *jus tertii* standing with the merits of the constitutional issue, it would not have been error to do so since standing and the merits are intertwined in this litigation.

their attorneys. What makes this case unusual is that the statute being challenged deprives the indigent criminal defendants of the essential tool they would need to challenge the statute on their own.

Second, Petitioners and their *amici* make much of the fact that the three individuals who pleaded guilty and joined this case as plaintiffs were dismissed on the basis of *Younger v. Harris*, 401 U.S. 37 (1971). Petitioners and their *amici* assert that there is an incongruity in dismissing the constitutional claims of the Respondent indigent defendants under *Younger* while allowing those of the Respondent attorneys to proceed.

This argument fails in several respects. First, Petitioners overlook the fact that this case encompasses two distinct constitutional challenges. Prior to the passage of the statute, Tesmer, Carter and Schnell were denied the assistance of appellate counsel pursuant to the Petitioners' pre-statutory practices. These three indigent defendants joined this case to challenge that denial. These three indigents could not challenge the constitutionality of the statute since they had suffered no injury as a result of the statute, which did not even exist when they were denied counsel. *See Lujan*, 504 U.S. at 561 (standing requires a "causal connection between the injury and the conduct complained of"). Therefore, only Fitzgerald and Vogler challenged the constitutionality of the statute. Since the five original plaintiffs were raising two distinct constitutional challenges, there is nothing incongruous in the fact that Fitzgerald's and Vogler's challenge to the statute survived the dismissal of the indigents' challenge to the Petitioners' pre-statutory practice of denying counsel.

Second, it is clear from *Wooley v. Maynard*, 430 U.S. 705, 711 (1977), and *Steffel v. Thompson*, 415 U.S. 452, 462 (1974), that Fitzgerald's and Vogler's claim for prospective declaratory relief could not have been subject to *Younger* abstention since they had no cases pending in state court. Since

these claims would not have been subject to *Younger* if brought on their own, these claims cannot be subject to *Younger* merely because they happened to be joined with other claims that were subject to abstention.

Finally, it should be observed that if Fitzgerald and Vogler (or other similarly situated attorneys) could not bring this challenge to the statute, the same impediments that prevent indigent defendants from litigating their constitutional right to appellate counsel *pro se* would allow Michigan to deprive thousands of indigents of their constitutional rights every year without any realistic prospect of decisive federal review. Since the federal courts would abstain from hearing the challenge of any individual indigent denied appellate counsel, an indigent seeking to litigate the issue in federal court would first have to coherently litigate the constitutional issue all the way through the Michigan appellate courts without the assistance of counsel. *See generally O'Sullivan v. Boerckel*, 526 U.S. 838 (1999) (requiring habeas petitioner to exhaust constitutional issues to state supreme court); *see also Baldwin v. Reese*, ___ U.S. ___, 124 S.Ct. 1347 (2004) (requiring habeas petitioner to have adequately identified federal issue in appeal to state supreme court). Since, as this Court specifically recognized in *Evitts*, 469 U.S. at 396, a typical indigent criminal defendant will be completely incapable of even coping with the procedural requirements of filing a first appeal, much less adequately raising, identifying, and preserving a constitutional issue all the way through a state appellate system, there is virtually no chance that a typical indigent could successfully exhaust the issue in state court. And, of course, the indigent could not win in state court since the Michigan Supreme Court has already held that Michigan may constitutionally deny appellate counsel.

Even if a *pro se* indigent defendant were somehow able to properly litigate the constitutional issue all the way through the state courts, he or she still could not prevail on habeas corpus unless the federal court concluded that the decision of

the Michigan courts denying appellate counsel is "contrary to, or involved an unreasonable application of," the decisions of this Court. 28 U.S.C. § 2254 (d)(1). Since the Sixth Circuit has already concluded that this Court "has yet to address the situation the statute presents," Pet. App. 20a, a district court presumably could not find that a state court decision upholding the statute would meet the standard for habeas corpus relief.

However, even if some intrepid *pro se* indigent defendant were able to exhaust the constitutional issue all the way through the state courts and persuade a federal district judge to grant habeas relief, *that relief would not apply to any other indigents*. That is, even if a district judge were to grant habeas relief, so long as Michigan chose not to appeal the habeas grant all the way to this Court, there would be no decision binding the Michigan state courts. On the contrary, the habeas grant would require Michigan to provide relief only to that one habeas petitioner, while the Michigan state courts would continue to be bound by *Bulger* and the statute to continue denying appellate counsel to all other similarly situated indigents.

Finally, even if the hypothetical *pro se* indigent somehow managed to exhaust the constitutional issue through the state courts and somehow managed to get the merits of the issue before this Court (on direct appeal or through habeas), that process would inevitably take many years during which thousands or tens of thousands of other indigents would suffer the irreparable constitutional injury of being denied appellate counsel for their one and only direct appeal on the merits. In short, if attorneys such as Fitzgerald and Vogler cannot challenge this statute in federal court, the practically insurmountable barriers that indigent criminal defendants would face in trying to obtain federal relief would mean that Michigan could deny a fundamental constitutional right to more than half of its criminal defendants for years, or even forever, without any realistic prospect of federal judicial intervention.

II. The Denial of Appointed Counsel to Indigent Defendants Filing Their Initial Direct Appeals on the Merits After Pleading Guilty or *Nolo Contendere* Violates the Fourteenth Amendment.

As Petitioners acknowledge, *Douglas v. California*, 272 U.S. 353 (1963), stands for the proposition that "if a State grants a right to a first appeal on the merits, then it generally cannot deny appointed counsel to an indigent." Petitioners' Brief at 27. The Michigan statute at issue in this litigation, however, would do precisely that. The Michigan Constitution grants a right for those who plead guilty to file an application for leave to appeal to the Michigan Court of Appeals, which decides all such properly filed applications on the merits, but the statute would deny the assistance of counsel to the vast majority of indigents who wish to pursue that appeal.

Petitioners cannot cite a single post-*Douglas* case from any American jurisdiction, other than the Michigan Supreme Court's decision in *Bulger*, holding that counsel may be denied for a first direct appeal from a felony conviction. In fact, every state currently appoints counsel for indigents filing first direct appeals from felony convictions even if the convictions were obtained by plea and even if the appeals are by leave of the appellate court. *See* n. 6, *infra*.

The statute is unconstitutional for two reasons. First, an appeal to the Michigan Court of Appeals from a plea-based conviction is not "discretionary" as the Court defined that term in *Douglas*, *Ross v. Moffitt*, 417 U.S. 600 (1974), and *Evitts v. Lucey*, 469 U.S. 387 (1985). A discretionary appeal for purposes of the Fourteenth Amendment is a second-tier appeal in which the appellate court's refusal to hear the appeal does not amount to a decision on the merits, while an application for leave to appeal from a plea-based felony conviction in Michigan is a first-tier appeal that the Michigan Court of Appeals actually decides on the merits. Therefore, *Douglas* requires that counsel

be appointed.

Second, even if the appeal to the Michigan Court of Appeals were regarded as "discretionary," an indigent denied counsel under the statute would not enjoy the "meaningful access" to the appellate system required by *Ross*. Unlike the indigents in *Ross*, a Michigan indigent denied counsel under the statute has not had any prior assistance of appellate counsel, has not had an attorney's assistance in identifying potentially meritorious appellate issues, does not have an appellate brief to use as a model, and does not even have a transcript unless he can figure out how to order one. As the Court has repeatedly recognized in appeals from plea-based convictions, an indigent on a first-tier appeal cannot be expected to even identify his own appellate issues, much less overcome the procedural obstacles necessary to perfect such an appeal.

A. An Application for Leave to Appeal to the Michigan Court of Appeals from a Plea-Based Felony Conviction Is Not a "Discretionary" Appeal Within the Meaning of *Douglas* and *Ross*.

1. "Discretionary" Appeals Do Not Include First-Tier Direct Appeals Decided on the Merits.

The Court held in *Douglas* that the Fourteenth Amendment requires states to appoint counsel for an indigent's first appeal from a felony conviction because "a State may not grant appellate review in such a way as to discriminate against some convicted defendants on account of their poverty." 372 U.S. at 355; *see also M.L.B. v. S.L.J.*, 519 U.S. 102, 120 (1996) (recognizing "the Court's decisions concerning access to judicial processes . . . reflect both equal protection and due process concerns").

An indigent defendant forced to represent himself on his first appeal has "only the right to a meaningless ritual, while the rich man has a meaningful appeal." *Douglas*, 372 U.S. at 358. The Court carefully distinguished the "first appeal" at issue in

Douglas from subsequent discretionary appeals:

> 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* . . . .

Id. at 356 (emphasis added; citations omitted).

By using the phrase "of right" in *Douglas*, the Court distinguished a first direct appeal from subsequent discretionary appeals. The Court did not need to elaborate because, like the California system at issue in *Douglas,* almost all first appeals from criminal convictions in the United States are labeled "of right." As of 1987, 47 of the 50 states and the federal government provided automatic appeals of right from felony convictions. *See Bundy v. Wilson*, 815 F.2d 125, 136-142 (1st Cir. 1987) (describing criminal appellate systems for all American jurisdictions).[6]

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[6] Since criminal defendants in New Hampshire now have an automatic right of appeal to the New Hampshire Supreme Court, *see* N.H. S.Ct. R. 4, 7, Virginia and West Virginia are apparently the only two states in which first-tier criminal appeals are generally by application or petition. Certain types of first-tier felony appeals are by application or petition in at least five other states. *See* Me. R. App. P. 20 (sentencing appeals); Md. Code Ann. § 12-1302(e) (appeals from plea-based convictions); N.Y. Crim.

Eleven years after *Douglas*, the Court in *Ross* addressed the issue *Douglas* left open: whether the right to counsel extended to a second-tier, discretionary appeal to a state supreme court. The second-tier appeal at issue in *Ross* was truly "discretionary" since the North Carolina Supreme Court heard an appeal from the North Carolina Court of Appeals only if the case had significant public interest or major significance to the jurisprudence of the state or identified a conflict with a decision of the state supreme court. *Ross*, 417 U.S. at 614.

The Court in *Ross* held that the Fourteenth Amendment did not require the appointment of counsel for such a second-tier appeal. *Id.* at 610-616. In reaching this conclusion, the Court relied on two factors. First, appointment of appellate counsel was not essential because the defendant 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 that 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.

Id. at 614-615 (quoting *Douglas* at 356).

Proc. L. §§ 450.10(1), 450.15 (certain sentencing appeals from plea-based convictions); N.C. Gen. Stat. § 15A-1444(e) (certain appeals from plea-based convictions); Okla. Stat. Tit. 22 § 1051(a) (appeals from plea-based convictions). In all seven of these states, appellate counsel is automatically provided to indigents to assist them with filing such applications or petitions. *See* Me. R. Crim. P. 44(a)(2); Md. Ann. Code, art 27A § 4; N.Y. County Law § 717(1); N.C. Gen. Stat. § 7A-451; Okla. Stat. Tit. 22 § 1356; Va. Code § 19.2-163.3; W.Va. R. Crim. P. 44(a).

Second, the Court heavily relied on the fact that the North Carolina Supreme Court's decision to grant review was truly "discretionary," that is, not dependent on "whether there has been a correct adjudication of guilt in every individual case." *Id.* at 615 (internal quotation marks and citation omitted). Instead, *Ross* recognized that discretionary review at the second tier is designed only to identify important cases: "Once a defendant's claims of error are organized and presented in a lawyerlike 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 summarized these two points: "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* collapses when applied to any *first* appeal that is decided on the *merits,* regardless of whether that first appeal is automatic or by application for leave to appeal. This conclusion is dictated both by a fair reading of *Douglas* and *Ross* as well as by numerous decisions of the Court subsequent to *Douglas* and *Ross*.

The Court has repeatedly confirmed that the holding in *Ross* is limited to second-tier or collateral appeals. In *United States v. MacCollom*, 426 U.S. 317, 324 (1976), the plurality explained that "in [*Ross*], we declined to extend [*Douglas*] to a discretionary second appeal from an intermediate appellate court to the Supreme Court of North Carolina." In *Murray v. Giarratano*, 492 U.S. 1, 9 (1989), the Court cited *Douglas* for the proposition 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* established that the right to counsel at the trial and initial appeal stages "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."

The Court's clearest statement of the distinction between *Douglas* and *Ross* is found in *Evitts v. Lucey*, 469 U.S. 387 (1985). In response to a Kentucky criminal defendant's claim that he had received ineffective assistance of appellate counsel, the warden argued on the basis of *Ross* that there was no right to counsel in the Kentucky Court of Appeals since such an appeal is "conditional." The Court rejected this argument because the "discretionary appeal" discussed in *Ross* did not refer to a first direct appeal decided 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 (citations and quotation marks omitted).

Six years after *Evitts*, the Court again made it clear in *Coleman v. Thompson*, 501 U.S. 722 (1991), that the *Douglas* right to counsel attaches to an initial criminal appeal, even if that first appeal is by application for leave to appeal. *Coleman* involved a habeas corpus petition challenging a Virginia conviction. Notwithstanding the fact that the first appeal in Virginia is by application, the Virginia Supreme Court had long held that *Douglas* required the appointment of counsel. *See Cabaniss v. Cunningham*, 143 S.E.2d 911, 913-914 (Va. 1965). In *Coleman*, the Court explicitly approved that conclusion: Cabaniss had defaulted the direct appeal of his criminal conviction because the trial court had failed to honor his request for appointed counsel on appeal, a request the court was required to honor under the Constitution. *See Douglas v. California*, 372 U.S. 353 (1963)." *Coleman*, 501 U.S. at 742 (internal citation omitted).

In *Smith v. Robbins*, 528 U.S. 259 (2000), the Court upheld a California rule allowing an indigent's appellate counsel to file an "*Anders* brief" that does not specify any potential appellate issues. In arriving at this conclusion, the Court revisited its pre-*Douglas* decision in *Ellis v. United States*, 356 U.S. 674 (1958). *Smith*, 528 U.S. at 270-271, 278-281. Under the federal rules in effect at the time *Ellis* was decided, an indigent convicted in federal district court who wished to appeal had to file an "application for leave to appeal in forma pauperis" in the court of appeals. *Ellis*, 356 U.S. at 674. In *Ellis*, the Court peremptorily reversed the court of appeals' refusal to appoint counsel before denying the indigent's application for

leave to appeal, observing: "Normally, allowance of an appeal should not be denied until an indigent has had adequate representation by counsel." *Id.* at 675.

Since *Ellis* was decided before *Douglas,* the rule announced in *Ellis* was not based on the Fourteenth Amendment. However, in *Smith*, the Court indicated that the constitutional rule announced in *Douglas* would have dictated the result reached in *Ellis*:

> Although we did not, in *Anders*, explain in detail why the [former] California procedure was inadequate under each of these precedents, our particularly heavy reliance on *Ellis* makes clear that a significant factor was that the old California procedure did not require either counsel or the court to determine that the appeal was frivolous; instead, the procedure required only that they determine that the defendant was unlikely to prevail on appeal. *Compare Anders, supra*, at 741-742 ("If counsel is convinced, after conscientious investigation, that the appeal is frivolous, of course, he may ask to withdraw. If the court agrees with counsel's evaluation of the case, then leave to withdraw may be allowed and leave to appeal may be denied.") quoting *Ellis*, *supra*, at 675)).

Smith, 528 U.S. at 279 (internal ellipses and quotation marks omitted).

The *Smith* Court also cited *Ellis* in support of the following statement: "Although an indigent whose appeal is frivolous has no right to have an advocate make his case to the appellate court, such an indigent does, in all cases, have the right to have an attorney, zealous for the indigent's interests, evaluate his case and attempt to discern nonfrivolous arguments." *Id.* at 279, n. 10 (citing *Ellis*, 356 U.S. at 675;

additional citation omitted). Thus, the Court in *Smith* regarded the *Ellis* requirement that counsel be appointed to evaluate the case before an indigent's first application for leave to appeal as part of the constitutional minimum dictated by *Douglas*.

Given these decisions from the Court, it is not surprising that, with the single exception of the Michigan Supreme Court's decision in *Bulger*, no state or federal appellate court since *Douglas* has ever held that an indigent may be denied the assistance of appellate counsel for a first direct felony appeal, even if that first appeal is by leave and even if it follows a plea-based conviction. The relatively few courts to reach the question had uniformly held until *Bulger* that counsel must be appointed for first-tier applications for leave to appeal. *See, e.g., Cabaniss*, 143 S.E.2d at 913-914 (holding that counsel must be appointed for first-tier petition to appeal to Virginia appellate court); *State v. Trowell*, 739 So.2d 77, 80-81 (Fla. 1999) (*Douglas* guarantees counsel for petition to appeal from guilty plea); *Perez v. State*, 4 S.W.3d 305, 307 (Tex. Ct. App. 1999) (same); *see also Bundy*, 815 F.2d at130 (concluding that *Douglas*, not *Ross*, governs first-tier petition to appeal to New Hampshire Supreme Court).

2. The Appeal At Issue in This Case Is Not "Discretionary."

It is clear from *Douglas*, *Ross*, and all of the authority interpreting and applying those two cases that an application for leave to appeal to the Michigan Court of Appeals, like the application for leave to appeal in *Ellis*, is an appeal for which counsel must be provided. An application for leave to appeal 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.

Further, the purpose of that appeal to the Michigan Court of Appeals is precisely to determine whether the individual defendant has been lawfully convicted and sentenced. *Id.* Thus, the Michigan Court of Appeals, like the Virginia appellate courts discussed in *Coleman*, actually makes a decision on the *merits* of a properly filed application for leave to appeal. *Cf. Jackson v. Virginia*, 443 U.S. 307, 311 n. 4 (1979) ("Each petition for writ of error under Va.Code § 19.2-317 (1975) is reviewed on the merits ... and the effect of a denial is to affirm the judgment of conviction on the merits"). Therefore, the Michigan Court of Appeals' standard order denying leave to appeal from a plea-based conviction invariably reads, "The Court orders that the application for leave to appeal is DENIED *for lack of merit in the grounds presented.*" J.A. 22a-27a (emphasis added).

Despite Petitioners' claim to the contrary, the Michigan Court of Appeals has held many times that such an order is a conclusive determination of the merits that precludes relitigation under the law of the case doctrine. *See, e.g., People v. Hayden*, 348 N.W.2d 672, 684 (Mich. Ct. App. 1984) ("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). The Michigan Court of Appeals continues today to routinely hold that an order denying leave to appeal "for lack of merit in the grounds presented" is a decision on the merits and therefore subject to the law of the case doctrine. *See, e.g., Contineri v. Clark*, 2003 WL 21771236 (Mich. Ct. App. 2003) (holding that since order denying previous application for leave to appeal "for lack of merit in the grounds presented" "did, in fact, express an opinion on the merits," law of the case doctrine applied); *see also People v. Weathers*, 2003 WL 21362810

(Mich. Ct. App. 2003); *Sabaugh v. Riga*, 2003 WL 21362981 (Mich. Ct. App. 2003); *DiCicco v. City of Grosse Poine Woods*, 2002 WL 346126 (Mich. Ct. App. 2002).

Petitioners cite three old cases, *Great Lakes Realty Corp. v. Peters*, 57 N.W.2d 901 (Mich. 1953), *People v. Berry*, 157 N.W.2d 310 (Mich. Ct. App. 1968), and *State v. Bobenal Investment*, 314 N.W.2d 512 (Mich. Ct. App. 1981), supposedly in support of the claim that an order denying an application for lack of merit is not a decision on the merits. Petitioners' Brief at 40-42. However, none of these cases even arguably stands for that proposition; indeed, the phrase "lack of merit in the grounds presented" never appears in any of these cases. In *Peters*, 57 N.W.2d at 903, the Michigan Supreme Court simply observed that its standard order denying an application for leave to appeal, which never expresses an opinion on the merits, does not amount to an affirmance. In *Berry*, 157 N.W.2d at 311-312, and *Bobenal*, 314 N.W.2d at 514 n. 2, the Michigan Court of Appeals simply refused to apply the law of the case doctrine without ever stating whether the prior applications had been denied for lack of merit or for some other reason. In any event, as the cases cited above demonstrate, it is indisputable that the Michigan Court of Appeals now routinely treats its standard orders denying leave to appeal for "lack of merit in the grounds presented" as decisions on the merits.

By using the term "discretionary" to describe an application to the Michigan Court of Appeals, Petitioners are attempting to have their cake and eat it too. By calling the appeal "discretionary," Petitioners hope to avoid appointing appellate counsel to indigents, but by having such appeals decided on the merits, Petitioners receive the substantial benefit of barring those indigents from ever relitigating the issues presented in those *pro se* appeals.

In reality, the system that Michigan has set up for appellate review of plea-based convictions and sentences is

simply an example of the type of expedited or screened first-tier appeals found in several other states. *See, e.g.*, Nev. R. App. P. 3C (creating "fast track" appellate system for certain types of first-tier criminal appeals); Va. Code § 17.1-406(A) (providing first-tier appeal by petition for leave to appeal). Criminal defendants in such systems have the right to file such an appeal, the appeals are decided on the merits, and counsel is automatically appointed for indigents. *See* Nev. Rev. Stat. § 178.397 (requiring appointment of counsel for indigents on first-tier appeal); Va. Code § 19.2-163.3 (same).

In short, an application for leave to appeal to the Michigan Court of Appeals is not a discretionary appeal. It is a first-tier direct appeal, criminal defendants have a state constitutional right to file such an appeal, and the appeal is decided on the merits. Therefore, like every other first-tier direct appeal from a felony conviction in the United States, it is an appeal for which counsel must be provided under *Douglas*.

B. Indigent Defendants Forced to File Applications for Leave to Appeal Without Counsel Will Receive a "Meaningless Ritual" Instead of Meaningful Appellate Review.

Even if *Ross*, rather than *Douglas*, governed an application for leave to appeal to the Michigan Court of Appeals, the denial of appellate counsel to indigent defendants would violate the Fourteenth Amendment. An indigent forced to proceed without counsel has "only the right to a meaningless ritual, while the rich man has a meaningful appeal." *Douglas*, 372 U.S. at 358. Therefore, even those few states that have truly "discretionary" first appeals uniformly provide appellate counsel. *See, e.g., Rhodes v. Leverett*, 239 S.E.2d 136, 140 (W.Va. 1977) (state constitution guarantees counsel for discretionary first-tier petition to appeal); *State v. Cooper*, 498 A.2d 1209, 1213 (N.H. 1985) (state constitution and statutes guarantee counsel for former discretionary first-tier petition to

appeal); *cf. Bundy*, 815 F.2d at 130 (concluding *Douglas* governs former first-tier discretionary appeal in New Hampshire).

Petitioners make essentially three arguments, however, as to why Michigan indigents will receive meaningful access to the Michigan Court of Appeals when they attempt to appeal sentencing and other errors after their plea-based convictions. First, they claim that appeals from plea-based convictions are relatively simple. Second, they argue that the indigent may use his or her trial counsel's work product to write an application for leave to appeal. Third, they point out that the statute does permit the appointment of counsel in several situations. Respondents shall address each of these arguments in turn.

1. A Typical Indigent Cannot Identify or Coherently Argue Appellate Issues Arising From His Plea-Based Appeal or Overcome the Procedural Hurdles Arising in a First-Tier Appeal.

First, the most obvious objection to the argument that *Douglas* should not apply to plea-based convictions is that it finds no support in *Douglas* or in any of the Court's other cases. To 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, no matter how simple it might be, without the assistance of counsel. 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."

A guilty plea limits the number of potential appellate issues, but many potential appellate issues of all levels of complexity remain. After pleading guilty, Michigan defendants retain the right to challenge dozens of different types of

sentencing errors, *see* pp. 39-40, *infra*, including Double Jeopardy Clause violations, improper imposition of consecutive sentences, excessive or improper restitution and forfeiture 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.* However, the statute provides that a trial judge "may," but is not required 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 *pro se* complex sentencing guidelines questions, many of which would be questions of first impression in Michigan.

As the Court specifically recognized in *Flores-Ortega*, 528 U.S. at 486, a typical indigent plea defendant will be completely incapable of even identifying his meritorious appellate issues, much less capable of arguing them coherently so that the Michigan Court of Appeals can decide whether to review them. *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 difficulties a typical indigent defendant would face are illustrated by the handwritten declaration of Respondent Charles Carter, who wrote: "I have not filed an appeal because I cannot afford a lawyer. I do not know how to represent myself. I don't know the law and I don't have any one to help me. I made it to the10th grade, I had special ed reading class. My family can not hire a lawyer for me. I was sentence to Life for atemted murder [sic]." J.A. 28. The statute would require

thousands of persons like Mr. Carter to identify and argue their own appellate issues every year. Compounding the problem still further, approximately 70% of all inmates in the United States are functionally illiterate, *see* U.S. Dep't of Educ., *Literacy Behind Prison Walls*, NCED 1994-102 at 10, 17.

Petitioners' argument that plea appeals are relatively simple also completely ignores the *procedural* hurdles that indigents such as Mr. Carter must overcome in order to even have their applications considered by the appellate court. As the Court put it in *Evitts*, 469 U.S. at 396, "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."

The Michigan Supreme Court has provided an excellent example of the "hopelessly forbidding" procedural hurdles indigent plea defendants would face if this Court upholds the statute. In *People v. Plaza*, 617 N.W.2d 687 (Mich. 2000), the court refused to hear an appeal from an indigent plea defendant whose request for appellate counsel had been denied and whose application for leave to appeal to the Michigan Court of Appeals had been denied after he had been unable to obtain his sentencing transcript. In a concurrence to that denial, the author of the *Bulger* opinion explained "defendant never raised the issue of his failure to receive the sentencing transcript. . . . Defendant had an opportunity to direct the attention of the Court of Appeals to his troubles in obtaining a copy of the sentencing transcript, but he failed to do so." *Id.* (Corrigan, C.J., concurring). In other words, because the defendant, who was forced to proceed *pro se*, failed to also raise in his appeal the fact that he had been wrongfully denied his sentencing transcript, he waived his right to appellate review of his sentence.

Plaza is illustrative of the point from *Evitts* that the appellate procedure involved in any first direct appeal is "hopelessly forbidding" for laymen. To perfect an appeal, an indigent who may well be illiterate, mentally ill, or retarded--and is certainly unschooled in the intricacies of the law--must figure out from a long and complicated set of instructions, *see* Pet. App. 160a-164a, how to obtain his or her "register of actions," his or her transcripts, the presentence information report, his or her prisoner account statement, and the judgment of sentence. Then he or she must make the requisite number of copies of all of these documents, which must be served and filed (with proof of service), along with a motion to waive fees, an affidavit of indigency, and the application for leave to appeal itself. The application for leave to appeal itself requires the indigent to fill out another long and complicated form, *see* Pet. App. 165a-169a, on which he or she is supposed to identify and argue his or her own appellate issues in the tiny spaces provided (or attach additional pages), and identify the controlling legal authorities that support his or her arguments.

If the indigent fails to overcome any one of these numerous procedural hurdles, he or she can expect to have the application denied without consideration of the issues, as occurred in *Plaza*. These obstacles are far greater than those faced by the indigents in *Ross*, who already had the benefit of transcripts, appellate court opinions, and, most critically, their lawyers' briefs from their first-tier appeals identifying and arguing their appellate issues. Therefore, Petitioners are mistaken in their claim that indigents can receive meaningful access to appellate review simply because the appeal is from a plea-based conviction.

2. Indigents Cannot Rely on Trial Counsel's Work Product to Perfect First-Tier Direct Appeals.

Petitioners' second argument, that an indigent should be able to make do with trial counsel's work product, is both

misleading and directly contrary to the Court's precedents. The argument is misleading because there is almost always no written work product of trial counsel for the indigent to use. Petitioner points to Michigan court rules requiring trial counsel to file motions to withdraw pleas in writing, Petitioners' Brief at 35-36, but, as Respondent Kolenda correctly points out, the overwhelming majority of plea appeals involve *sentencing* issues, not plea withdrawal issues. Kolenda Brief at 21; *see also* Mara Matuszak, Note, *Limiting Michigan's Guilty and Nolo Contendere Plea Appeals*, 73 U. Det. Mercy L. Rev. 431, 438 (1996) (discussing Michigan State Bar Report that found "a significant majority of guilty plea appeals involve only sentencing issues"). Unlike plea withdrawal, there is no requirement in Michigan law that trial counsel must object in writing to guidelines scoring, jail credit, consecutive sentencing, consideration of prior convictions, restitution orders, *Apprendi* violations, double jeopardy issues, or any other sentencing issues. Such objections, if trial counsel makes them at all, are almost invariably made orally at the sentencing hearing at the time the particular issue first arises.

Even if trial counsel actually files a written motion, Petitioners' claim that such a motion is an adequate substitute for appellate counsel is directly contrary to *Swenson v. Bosler*, 386 U.S. 258 (1967). In *Swenson*, the Court unanimously held that a pre-*Douglas* Missouri system requiring indigents to rely on trial court motions to file *pro se* appellate briefs violated the Fourteenth Amendment. *Id.* at 259. Appellate counsel need not be provided for a *second-tier* appeal because the indigent has already received *appellate* counsel's work product, but the same reasoning does not apply to the use of trial counsel's work product on a first-tier appeal. *See Ross*, 417 U.S. at 614 (stressing that Respondent received meaningful access to state supreme court because his claims had "once been presented by a lawyer and passed upon by an *appellate* court") (emphasis added; quoting *Douglas*); *see also Evitts*, 469 U.S. at 402

(recognizing that second-tier appellant has benefit of "previous appellate brief"); *Swenson*, 386 U.S. at 259 (recognizing "substantial benefit" in "assistance of appellate counsel in preparing and submitting a brief to the appellate court which defines the legal principles upon which the claims or error are based and which designates and interprets the relevant portions of the trial transcript").

3. The Statutory Exceptions Are Insufficient to Provide Indigents Meaningful Access to the Michigan Court of Appeals.

Finally, Petitioners' claim that the exceptions in the statute render it constitutional cannot withstand any scrutiny. The statute requires the appointment of counsel in only four circumstances: (1) to defend a prosecutor's appeal; (2) if the sentence amounts to an upward departure from the sentencing guidelines range; (3) if the Michigan Court of Appeals grants the indigent's application for leave to appeal; or (4) if the plea was conditional. Pet. App. 140a.

The first and third 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 third 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 potentially meritorious issue so that the Michigan Court of Appeals grants the application, the Michigan Court of Appeals will then finally 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 third exception could possibly apply.

The fourth exception, for conditional pleas, is also useless to the vast majority of indigents who need the assistance of counsel. First, there is no right in Michigan to enter a conditional plea, and such pleas are very rare in Michigan

because they require the consent of both the judge and the prosecutor. *See* Mich. Ct. R. 6.301(C)(2) (providing that a defendant may enter a conditional plea "only with the consent of the court and the prosecutor"); Pet. App. 145a. Second, a defendant can enter a conditional plea only to challenge "pretrial rulings." *Id.* But most appeals after guilty pleas concern sentencing issues. *See* Matuszak, *supra*, at 438. In other words, the possibility of a conditional plea is of no use at all 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 been entered and accepted.

The only other statutory exception is for indigents who receive an upward departure from the sentencing guidelines. While such indigents need the assistance of appellate counsel, the problem is that they are not the only ones who may have meritorious appellate issues. Indeed, the statute would allow a trial judge to deny appellate counsel to an indigent who receives a sentence that would have been an upward departure if the trial judge had scored the guidelines correctly, even when the indigent has preserved his challenge to the trial judge's scoring.

For all other types of appellate issues, no matter how meritorious or complex, the statute flatly forbids the judge from appointing appellate counsel. Therefore, an indigent would have to litigate *pro se* all other potentially meritorious appellate claims, including arguments that: (1) the sentence should have been concurrent instead of consecutive, *see, e.g. People v. Hunter*, 507 N.W.2d 768 (Mich. Ct. App. 1993); (2) the judge failed to award proper jail credit, *see, e.g., People v. Resler*, 532 N.W.2d 907 (Mich. Ct. App. 1995); (3) the prosecutor and/or judge breached a plea and/or sentencing agreement, *see, e.g., People v. Nixten*, 454 N.W.2d 160 (Mich. Ct. App.1990); (4) the plea bargain was illusory, *see, e.g., People v. Graves*, 523 N.W.2d 876 (Mich. Ct. App. 1994); (5) the judge erred in ordering restitution that the defendant cannot pay; *see, e.g., People v. Orweller*, 494 N.W.2d 753 (Mich. Ct. App. 1992); or

(6) the convictions and/or sentences violate the Double Jeopardy Clause, *see, e.g., People v. Artman*, 553 N.W.2d 673 (Mich. Ct. App. 1998).

Many of the indigents who will be unable to file their own appeals will have meritorious grounds for appeal and will therefore be denied any chance of obtaining the relief to which they would be entitled. *See* Matuszak, *supra*, at 443 (discussing studies showing 12% to 47% of Michigan guilty plea appeals resulted in relief to defendants). By contrast, a Michigan plea defendant who can afford an attorney will always be able to obtain meaningful appellate review of such errors.

In many cases, the indigent defendant will be completely unaware of meritorious grounds for appeal because trial counsel will have overlooked the error. *See Coppedge v. United States*, 369 U.S. 438, 449-450 (1962) (recognizing that indigent appellants often suffer disadvantages at the trial court level because of their poverty). Even if trial counsel spotted the error, a typical indigent defendant cannot possibly be expected to know which of his trial counsel's objections, if any, merit appellate review. *See Peguero v. United States*, 526 U.S. 23, 30 (1999) (O'Connor, J., concurring) (recognizing, in a guilty plea appeal, that "[t]o require defendants to specify the grounds for their appeal and show that they have some merit would impose a heavy burden on defendants"); *see also Smith*, 528 U.S. at 279 n. 10 ("an indigent does, in all cases, have the right to have an [appellate] attorney, zealous for the indigent's interests, evaluate his case and attempt to discern nonfrivolous arguments"). Finally, even if the indigent somehow does correctly identify his meritorious appellate issues, he still must overcome the daunting procedural hurdles necessary to perfect his application for leave to appeal.

In short, the vast majority of indigent defendants who wish to appeal from their sentences or pleas would receive only a "meaningless ritual," while moneyed defendants would

receive "a meaningful appeal." *Douglas*, 372 U.S. at 358. The statute violates the Fourteenth Amendment, and the statutory exceptions cannot save it.

C. An Indigent Defendant Cannot Be Forced to Waive His or Her Right to Equal Treatment and Due Process As a Condition of Pleading Guilty.

Respondent Kolenda and one of Petitioners' *amici* argue that even if indigent plea defendants in Michigan have the right to the assistance of appellate counsel, the statute requires them to make a valid waiver of that right as a condition of entering a guilty plea. Kolenda Brief at 17-20; Brief of *Amici Curiae* Iowa, et al., at 15-21. This argument fails for several reasons.

First, this argument is not properly before the Court as it was never raised in the Petition for Writ of Certiorari, nor, for that matter, does it appear in Petitioners' Brief on the merits. Neither the district court nor the Sixth Circuit ever addressed this argument because Petitioners also never advanced it there. The argument has therefore been waived. *See Muhammad v. Close*, ___ U.S. ___, 124 S.Ct. 1303,1306-1307 (2004) (holding that "[h]aving failed to raise the claim when its legal and factual premises could have been litigated," party "cannot raise it now").

Second, the argument ignores the fact that the purported "waiver" itself violates 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. Only the poor lose their right to a meaningful appeal.

As this Court has long recognized, a criminal defendant usually receives substantial benefits in exchange for entering a guilty plea. *See, e.g., Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978). If the statute were upheld, however, an indigent defendant could obtain these substantial benefits only by losing any opportunity for meaningful review of any errors the judge

or prosecutor might commit at sentencing, while a moneyed defendant would not be required to give up meaningful appellate review of such sentencing errors.

Michigan could not constitutionally enforce a statute that would require only black and female defendants to give up their right to appellate counsel in order to receive the benefits of a guilty plea because such a discriminatory "waiver" requirement would plainly violate the Fourteenth Amendment. For the same reason, it cannot constitutionally require indigents, and only indigents, to give up their right to the assistance of appellate counsel in order to obtain the benefits of a guilty 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. [In *Griffin*], 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 of abrogating an indigent's Fourteenth Amendment right to the assistance of appellate counsel, Michigan could also presumably require indigents to waive their right to free transcripts (guaranteed by *Griffin)* and require them to pay the appellate filing fees. *See Burns v. Ohio*, 360 U.S. 252, 257-258 (1959) (holding Fourteenth Amendment prohibits

State from requiring indigents to pay appellate filing fees). That is, Michigan could make it effectively impossible for indigents to appeal, while fully preserving the right of moneyed defendants to appeal.

But that is exactly what this statute does. An indigent appellant forced to proceed without the assistance of appellate counsel, like the indigent forced to proceed without transcripts or the indigent whose appeal can proceed only upon payment of filing fees, "has only the right to a meaningless ritual, while the rich man has a meaningful appeal." *Douglas,* 372 U.S. at 358. The argument of Respondent Kolenda and *amici curiae*, which Petitioners have never advanced in this Court or in any lower court, therefore proves too much.[7] Because it requires only the poor to give up their right to a meaningful appeal from any errors that might arise after the "waiver," while moneyed defendants waive nothing at all, the supposed "waiver" is itself unconstitutional.

[7] Indeed, if Michigan could constitutionally require indigents, and only indigents, to give up their right to appellate counsel as a condition of pleading guilty, presumably Michigan could also require such indigents to give up their right to counsel at sentencing as a condition of pleading guilty.

CONCLUSION

The judgment of the United States Court of Appeals for the Sixth Circuit should be affirmed.

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