No. 03-10198

In The Supreme Court of the United States

ANTONIO DWAYNE HALBERT,

Petitioner,

v.

MICHIGAN,

Respondent.

On Writ Of Certiorari To The Michigan Court Of Appeals

BRIEF FOR THE PETITIONER

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QUESTIONS PRESENTED

1. Does the Fourteenth Amendment guarantee the assistance of counsel to an indigent criminal defendant for 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 on the merits?

2. Is Petitioner entitled to a new direct appeal with the assistance of appellate counsel so that he may develop the record necessary to support his appellate claims, including ineffective assistance of trial counsel?

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

ORDERS BELOW

The December 21, 2001, and October 25, 2002, orders of the Saginaw County Circuit Court denying Petitioner's requests for appellate counsel are unreported. J.A. 44-45, 51-52, 64-65.

The Michigan Court of Appeals' January 13, 2003, order denying Petitioner's application for leave to appeal "for lack of merit in the grounds presented" is unreported. J.A. 72.

The Michigan Supreme Court's September 19, 2003, order denying Petitioner's application for leave to appeal is reported as *People v. Halbert*, 669 N.W.2d 814 (Mich. 2003). J.A. 84-85.

JURISDICTION

The Michigan Supreme Court's order denying Petitioner's application for leave to appeal was entered on September 19, 2003. The petition for writ of certiorari was filed within 90 days of that date, on November 20, 2003. This Court has jurisdiction under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

Section 1 of the Fourteenth Amendment to the United States Constitution provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are

> citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Michigan Constitution 1963, art. I, § 20, provides:

> In every criminal prosecution, the accused shall have the right to a speedy and public trial by an impartial jury, which may consist of less than 12 jurors in prosecutions for misdemeanors punishable by imprisonment for not more than 1 year; to be informed of the nature of the accusation; to be confronted with the witnesses against him or her; to have compulsory process for obtaining witnesses in his or her favor; to have the assistance of counsel for his or her defense; 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; and as provided by law, when the trial court so orders, to have such reasonable assistance as may be necessary to perfect and prosecute an appeal.

The statute under challenge in this case, Mich. Comp. Laws § 770.3a, provides:

> (1) Except as provided in subsections (2) and (3), a defendant who pleads guilty, guilty but mentally ill, or nolo contendere shall not have appellate counsel appointed for review of the defendant's conviction or sentence.

(2) The trial court shall appoint appellate counsel for an indigent defendant who pleads guilty, guilty but mentally ill, or nolo contendere if any of the following apply:

(a) The prosecuting attorney seeks leave to appeal.

(b) The defendant's sentence exceeds the upper limit of the minimum sentence range of the applicable sentencing guidelines.

(c) The court of appeals or the supreme court grants the defendant's application for leave to appeal.

(d) The defendant seeks leave to appeal a conditional plea under Michigan Court Rule 6.301(C)(2) or its successor rule.

(3) The trial court may appoint appellate counsel for an indigent defendant who pleads guilty, guilty but mentally ill, or nolo contendere if all of the following apply:

(a) The defendant seeks leave to appeal a sentence based upon an alleged improper scoring of an offense variable or a prior record variable.

(b) The defendant objected to the scoring or otherwise preserved the matter for appeal.

(c) The sentence imposed by the court constitutes an upward departure from the upper limit of the minimum sentence range that the defendant alleges should have been scored.

(4) While establishing that a plea of guilty, guilty but mentally ill, or nolo contendere was made understandingly and voluntarily under Michigan Court Rule 6.302 or its successor rule, and before accepting the plea, the court shall advise the defendant that, except as otherwise provided in this section, if the plea is accepted by the court, the defendant waives the right to have an attorney appointed at public expense to assist in filing an application for leave to appeal or to assist with other postconviction remedies, and shall determine whether the defendant understands the waiver. Upon sentencing, the court shall furnish the defendant with a form developed by the state court administrative office that is nontechnical and easily understood and that the defendant may complete and file as an application for leave to appeal.

STATEMENT OF THE CASE

Appeals from Plea-Based Felony Convictions in Michigan

Before 1994, every person convicted of a felony in Michigan had the right to an automatic appeal with full briefing and oral argument to the Michigan Court of Appeals. In 1994, however, 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*." (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, 106-07 (Mich. 2000) (discussing history of 1994 amendment).

Since 1994, therefore, criminal defendants who pleaded guilty or nolo contendere to felonies in Michigan and who believed that error occurred at sentencing or at some other point in the proceedings have filed applications for leave to appeal to the Michigan Court of Appeals. If such an application is granted, the appeal proceeds to full briefing and argument. Mich. Ct. R. 7.205(D)(3). 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); *accord*, J.A. 72 (order denying Petitioner's application).

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*, No. 237739, 2003 WL 21771236, at *2 (Mich. Ct. App. Jul. 31, 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 Abela v. Martin*, 380 F.3d 915, 923 (6th Cir. 2004) (holding that Michigan Court of Appeals' decision denying leave to appeal "for lack of merit in the grounds presented" is a "merits determination" for habeas corpus purposes);

People v. Walker, 653 N.W.2d 621, 622, 623 n.5 (Mich. 2002) (Corrigan, C.J.) (noting that order denying application "for lack of merit in the grounds presented" demonstrates "[t]he Court of Appeals reviewed the substantive arguments advanced in the application and concluded that they lacked merit" and that "the Court of Appeals plainly considered the merits of defendant's arguments").

More than ninety percent of felony convictions in Michigan are obtained by plea. *See* Michigan Supreme Court 2003 Annual Report, Circuit Court Statistical Supplement at 3 (showing that of 52,913 felony criminal cases disposed of by verdict or by plea in 2003, 49,833 (94.1%) were disposed of by guilty plea). The great majority of those nearly 50,000 defendants who enter pleas do not appeal. *Compare id. with* Michigan Supreme Court 2003 Annual Report at 18 (observing that there were 7445 appeals of all types filed in the Michigan Court of Appeals in 2003). Those who do appeal most commonly do so in order to 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").

Michigan's Denial of Counsel to Indigent Appellants

Since the 1994 amendment to the state constitution did not, by its terms, 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. However, a few trial judges began to routinely deny

appellate counsel to such indigents. *See Kowalski v. Tesmer*, ___ U.S. ___, 125 S.Ct. 564, 566 (2004). In 2000, a divided Michigan Supreme Court upheld that practice, concluding that indigent plea defendants have no constitutional right to appellate counsel. *Bulger*, 614 N.W.2d at 110-15.

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. The statute provides that 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. The statute forbids a trial judge from appointing counsel if the indigent wishes to raise any other type of issue on appeal.

Before the statute took effect in 2000, a group of indigent criminal defendants and appellate attorneys filed a lawsuit in federal district court seeking, *inter alia*, a declaratory judgment that the statute is unconstitutional. *See Kowalski*, 125 S.Ct. at 566. Both the district court and the *en banc* Sixth Circuit declared the statute unconstitutional. *Id.* at 566-67. This Court reversed that judgment without reaching the merits, concluding that the plaintiff attorneys lacked standing and that the lower courts had properly abstained from deciding the claims of the indigent criminal defendants. *Id.* at 567-70.

During the pendency of the *Tesmer* litigation, most Michigan trial judges continued to appoint appellate counsel for indigents who wished to file applications for leave to appeal from plea-based convictions and sentences. However, while *Tesmer* was pending in this Court, the Michigan Supreme Court issued an order declaring the statute constitutional and directing Michigan trial judges to deny counsel to indigent plea defendants notwithstanding the contrary federal court opinions and that the issue was pending in this Court. *People v. Harris*, 681 N.W.2d 653 (Mich. 2004).

Petitioner Halbert's Case

Petitioner Antonio Dwayne Halbert pleaded nolo contendere to two counts of second-degree criminal sexual conduct on November 7, 2001, in the Saginaw County Circuit Court. J.A. 23. In exchange for his plea, the prosecutor agreed to dismiss two additional counts. J.A. 18. The trial judge announced that he had found the factual basis for the first count by "review[ing] the preliminary examination." J.A. 23. In fact, the docket entries reveal that Mr. Halbert had waived the preliminary examination for both counts. J.A. 1, 4.

In the course of taking the plea, the trial judge informed Petitioner that he was waiving various rights by entering a plea. J.A. 19-22. The judge then advised Petitioner that he would appoint appellate counsel to assist Petitioner with an application for leave to appeal if Petitioner entered a conditional plea or if the judge departed upward from the sentencing guidelines and that he might appoint appellate counsel if Petitioner preserved an outcome-determinative challenge to the scoring of the

sentencing guidelines. J.A. 22-23. The judge did not advise Petitioner that he would otherwise refuse to appoint appellate counsel for him.

In preparation for Petitioner's sentencing, the probation department prepared two Sentencing Information Reports, one for each count, on which the probation agent scored the Michigan Sentencing Guidelines. J.A. 27-30. For case 00-019193-FH ("the first case"), the agent scored 10 points on Offense Variable 9 ("OV 9"), J.A. 28, for the alleged existence of "2-9 victims," Michigan Sentencing Guidelines Manual at 31, Br. Opp. App. 31b, even though Petitioner had pleaded nolo contendere in that first case to a count involving only one victim. Similarly, the probation agent scored 25 points on OV 13, J.A. 28, for "a pattern of felonious criminal activity involving 3 or more crimes against a person," Manual at 32, Br. Opp. App. 32b, even though Petitioner had pleaded nolo contendere to a total of only two crimes. That scoring resulted in a guideline sentence range of 12 to 24 months for the minimum sentence. J.A. 28. The probation agent also scored 25 points for OV 13 in case 01-020597-FH ("the second case"). J.A. 30. That scoring resulted in a guideline sentence range of 29 to 57 months for the minimum sentence. J.A. 30.

At Petitioner's sentencing, his attorney did not object to the probation agent's guidelines scoring but did request that the sentences run concurrently. J.A. 33. The trial judge sentenced Petitioner to the top of the guidelines ranges for both cases (24 months to 15 years and 57 months to 15 years, respectively) and ordered the sentences to run consecutively. J.A. 35.

Shortly after his sentencing, Petitioner moved to withdraw his plea. The trial judge denied that motion, observing that the motion was untimely, that there had been no agreement as to whether Petitioner would receive concurrent sentences, and that Petitioner's "proper remedy is to appeal to the Michigan Court of Appeals." J.A. 43.

Petitioner filed two timely requests for appointment of appellate counsel, one for each of his cases. J.A. 46-50, 53-57. The trial judge promptly denied both requests by issuing form orders, on which he checked boxes to indicate that Petitioner had no constitutional right to appellate counsel and that he did not meet the criteria set forth in the statute for appointment of counsel. J.A. 44-45, 51-52.

Petitioner had 21 days from the date of his sentencing to file a timely application for leave to appeal to the Michigan Court of Appeals. Mich. Ct. R. 7.205(A). It would have effectively been impossible for Petitioner to file a timely application since the court reporter did not produce a transcript of the plea hearing until July 30, 2002, some seven months after the sentencing. J.A. 3, 5. Michigan law, however, allows an appellant who cannot file a timely application twelve months to file a delayed application, along with a statement of facts explaining the reason for the delay. Mich. Ct. R. 7.205(F).

On September 6, 2002, some nine months after his sentencing, Petitioner wrote the trial judge from prison and again requested appellate counsel. J.A. 58. In the letter and accompanying motion, Petitioner specifically explained that he believed his sentencing guidelines had been misscored and that, since the issue was unpreserved, he needed the assistance of appellate counsel to help him preserve the issue before proceeding with his appeal. J.A.

58, 61-62. Petitioner explained in the motion that he "required special education due to learning disabilities," that he was "a mentally impaired person," and that he had been forced to rely on assistance from a fellow inmate. J.A. 61, 62. Petitioner also cited the federal district court's decision in *Tesmer* in support of his claim that he was constitutionally entitled to the appointment of appellate counsel. J.A. 58. On October 25, 2002, the trial judge denied Petitioner's motion for appointment of appellate counsel in a brief order citing *Bulger* for the proposition that Petitioner "does not have a constitutional or statutory right to appointment of appellate counsel to pursue a discretionary appeal." J.A. 64.

On November 5, 2002, Petitioner filed a delayed application for leave to appeal in the Michigan Court of Appeals by filling out a form supplied to prisoners. J.A. 66-71. Petitioner checked a box to explain that the application was delayed because, among other reasons, "I needed to get help to complete this application." J.A. 67. In his application, Petitioner claimed that he had received ineffective assistance of trial counsel because his attorney, who was preoccupied with other cases, had not reviewed the scoring of the sentencing guidelines. J.A. 69. The application also observed that Petitioner's mental state "was established as having been deficient" and that the trial court had denied Petitioner's request for appellate counsel. J.A.70. Petitioner attached the motion for appointment of counsel he had filed in the trial court and asked the Court of Appeals to remand the case back to the trial court either for resentencing or "for consideration of the issues presented in his Motion for Appointment of Counsel and Remand for Evidentiary Hearing/Resentencing." J.A. 71.

On January 13, 2003, the Michigan Court of Appeals denied Petitioner's application for leave to appeal in a standard form order. The order recites that Petitioner's application was denied "for lack of merit in the grounds presented." J.A. 72.

Petitioner then filed an application for leave to appeal to the Michigan Supreme Court, to which he attached the orders of the trial court denying his request for appellate counsel. In his application to the Michigan Supreme Court, Petitioner again argued that his trial counsel provided ineffective assistance in failing to challenge the scoring of the sentencing guidelines. J.A. 78. He also claimed, with a citation to the Sixth Circuit's decision in *Tesmer*, that he was entitled to the appointment of appellate counsel to assist him with his ineffective assistance claim. J.A. 80-81.

On September 19, 2003, the Michigan Supreme Court declined to hear Petitioner's appeal from the order of the Michigan Court of Appeals by a vote of five to two. J.A. 84. Two justices would have ordered the trial court to appoint appellate counsel for Petitioner and the Michigan Court of Appeals to reconsider Petitioner's appeal after appellate counsel was appointed for Petitioner. J.A. 84-85.

SUMMARY OF ARGUMENT

The Michigan statute which resulted in the denial of appellate counsel to Petitioner 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).

There are two critical distinctions between *Douglas* and *Ross*. First, *Douglas* held that there is a right to appellate counsel for first-tier direct appeals, while *Ross* held that there is no such right for subsequent direct appeals and collateral appeals. Second, *Douglas* and *Ross* distinguished between appeals decided on the merits, for which the right to counsel attaches, and appeals that can be denied for any reason. Each of these distinctions compels the conclusion that Petitioner was entitled to counsel for his application to the Michigan Court of Appeals. Unlike the appeals at issue in *Ross*, an application for leave to appeal to the Michigan Court of Appeals from a plea-based conviction and sentence is a first-tier appeal, and the Court of Appeals actually decides that appeal on the merits. Therefore, Michigan must provide appellate counsel to Petitioner and others in his position, just as every other jurisdiction with a first-tier appeal by application has done since *Douglas*.

Even if *Douglas* did not directly dictate the result, the statute is still unconstitutional because it deprives indigents of meaningful access to Michigan's appellate system. The statute requires indigents such as Petitioner 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 such as Petitioner 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 permit the appointment of appellate counsel only in very limited circumstances while denying counsel to indigents with

meritorious and complex issues, such as sentencing guidelines challenges, ineffective assistance of counsel claims, and double jeopardy issues. Meanwhile, moneyed defendants receive meaningful appellate review of sentencing or other errors committed in their cases.

Petitioner's case illustrates the constitutional deficiencies in the statute. Petitioner, a former special education student who required the assistance of a fellow inmate to file his first-tier appeal, attempted to raise a potentially meritorious ineffective assistance of trial counsel claim. Michigan precedent requires ineffective assistance claims to be raised on direct appeal and requires the defendant to hold an evidentiary hearing to create the necessary record on appeal. Petitioner, an incarcerated indigent with cognitive defects, could not possibly be expected to hold the evidentiary hearing necessary to his ineffectiveness claim without the assistance of appellate counsel. Lacking appellate counsel, Petitioner filed an application that failed to provide the record necessary to support the only claim it contained and completely failed to advance several other colorable claims for relief.

Finally, contrary to Respondent's suggestion, there was no waiver of Petitioner's constitutional right to appellate counsel. Michigan cannot constitutionally require indigents, and only indigents, to waive their right to the assistance of appellate counsel as a condition of receiving the substantial benefits of a guilty plea, just as Michigan cannot impose such discriminatory waivers on other groups. In any event, Petitioner never specifically waived his right to appellate counsel.

ARGUMENT

I. The Denial of Appointed Counsel to Petitioner on His Initial Direct Appeal on the Merits Violated His Fourteenth Amendment Right to Appellate Counsel.

As Respondent acknowledges, *Douglas v. California*, 372 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." Br. Opp. 16-17. The Michigan statute at issue in this litigation, however, does precisely that.

Under the Michigan Constitution, Petitioner, along with all other felony defendants who plead guilty or nolo contendere to a felony, had a right to file an application for leave to appeal to the Michigan Court of Appeals. Mich. Const. 1963, art. I, § 20. Even though that court considers all properly-filed applications on the merits, Petitioner was forced to proceed on that first-tier appeal without counsel. Predictably, Petitioner's application completely failed to coherently argue potentially meritorious issues, and the Michigan Court of Appeals denied it for lack of merit. Moneyed defendants, on the other hand, receive meaningful appellate review of their applications for leave to appeal with the assistance of counsel.

There is not a single post-*Douglas* decision 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 other than Michigan currently appoints counsel for indigents filing first direct appeals from felony convictions even if the convictions are obtained by plea and even if the appeals are by leave of the appellate court.

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. An application for leave to appeal from a plea-based felony conviction in Michigan, by contrast, 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 could be regarded as "discretionary," an indigent such as Petitioner who is denied counsel under the statute does not receive 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 may 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. Petitioner's frustrated attempt to appeal from his convictions and sentences proves that an indigent cannot receive meaningful access to a first-tier appeal without the assistance of counsel.

A. Petitioner Was Entitled to Appellate Counsel Because 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. 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 thus distinguished a first appeal to the California Court of Appeal, which that court decided on the merits, from a subsequent appeal to the California Supreme Court, which could be denied for any reason. The Court did not distinguish between first-tier direct appeals that automatically receive full review and first-tier direct appeals that require leave of the appellate court because California did not have such a system. The Court had no reason to elaborate because almost all first appeals from felony convictions in the United States were, and are, automatic appeals. *See Bundy v. Wilson*, 815 F.2d 125, 136-42 (1st Cir. 1987) (demonstrating that, as of 1987, 47 states and the federal government provided automatic appeals from felony convictions).

In *Ross*, the Court 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 in North Carolina was truly "discretionary" because the North Carolina Supreme Court's refusal to hear an appeal was not a decision on the merits. *Ross*, 417 U.S. at 615. Instead, the North Carolina Supreme Court heard an appeal from the North Carolina Court of Appeals only if the case attracted public interest, was of major significance to the jurisprudence of the state, or involved a conflict with a decision of the state supreme court. *Id.* 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 610-16. 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 614-15 (quoting *Douglas*, 372 U.S. at 356).

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, not to correct error: "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 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, holding that the "discretionary appeal" discussed in *Ross* did not refer to any 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. Even though the first appeal in Virginia is by application, the Virginia Supreme Court had long held that *Douglas* required the appointment of counsel for that appeal. *See Cabaniss v. Cunningham*, 143 S.E.2d 911, 913-14 (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. *See Anders v. California*, 386 U.S. 738 (1967). 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 270-71, 278-81. 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-tier application for leave to appeal is denied 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 have uniformly held, with the exception of *Bulger*, that counsel must be appointed for first-tier applications for leave to appeal. *See, e.g., Cabaniss*, 143 S.E.2d at 913-14 (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) (holding that *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 at 130 (concluding that *Douglas*, not *Ross*, governs first-tier petition to appeal to New Hampshire Supreme Court). Indeed, a federal court has recently rejected *Bulger* itself and granted habeas relief to Mr. Bulger. *See Bulger v. Curtis*, 328 F. Supp. 2d 692, 701-03 (E.D. Mich. 2004) (concluding that Michigan Supreme Court's decision in *Bulger* was an "objectively unreasonable application" of *Douglas* and *Ross*).

With the exception of Michigan, every state automatically provides appellate counsel for indigents pursuing first-tier appeals. Since New Hampshire recently changed its system to provide for automatic first-tier appeals to the New Hampshire Supreme Court, *see* N.H. S. Ct. R. 4, 7, Virginia and West Virginia are currently the only two

states in which first-tier criminal appeals are generally by application or petition. Both Virginia and West Virginia automatically provide counsel to indigents pursuing those appeals. Va. Code § 19.2-163.3; W.Va. R. Crim. P. 44(a). In at least five other states besides Michigan, certain types of first-tier appeals are by application or petition. *See* Me. R. App. P. 20 (sentencing appeals); Md. Code Ann. § 12-1302(e) (appeals from plea-based convictions); N.Y. Crim. 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). Unlike Michigan, all five of these states automatically provide appellate counsel to assist indigents who wish to file such applications or petitions. *See* Me. R. Crim. P. 44(a)(2); Md. Code Ann., art. 27A § 4; N.Y. County Law § 717(1); N.C. Gen. Stat. § 7A-451; Okla. Stat. Tit. 22 § 1356.

Thus, with the exception of the Michigan Supreme Court in *Bulger*, every state and federal court to consider the question since *Douglas* has concluded that an indigent felony defendant is entitled to the assistance of counsel for a first-tier appeal even if that appeal is by petition or application and even if the appeal follows a plea. With the exception of Michigan, every state with a first-tier appeal by petition or application automatically provides counsel to indigents by statute or court rule. This near unanimity of practice reflects a clear and longstanding consensus that *Douglas,* not *Ross*, governs such appeals.

2. Petitioner's Appeal to the Michigan Court of Appeals Was Not "Discretionary."

It is clear from *Douglas*, *Ross*, and all of the authority interpreting and applying those two cases that Petitioner's application for leave to appeal to the Michigan Court of Appeals, like the application for leave to appeal in *Ellis*, was an appeal for which he was entitled to appellate counsel. An application for leave to appeal to the Michigan Court of Appeals is a *first appeal*; that is, Petitioner did not already have "a brief on the merits of the appeal, or a previous written opinion" on the issues he wished to present, and he "ha[d] 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. Therefore, even those very few states that actually have or previously had truly "discretionary" first appeals have uniformly provided appellate counsel. *See, e.g., Rhodes v. Leverett*, 239 S.E.2d 136, 140 (W. Va. 1977) (holding state constitution guarantees counsel for discretionary first-tier petition to appeal); *State v. Cooper*, 498 A.2d 1209, 1213 (N.H. 1985) (holding 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).

Unlike the system in West Virginia and the former system in New Hampshire, Petitioner's first-tier appeal to the Michigan Court of Appeals was not "discretionary" in any sense because the entire purpose of that appeal was to determine whether he had been lawfully convicted and sentenced. *Evitts*, 469 U.S. at 402. Thus, the Michigan Court of Appeals, like the Virginia appellate courts discussed in *Coleman*, actually made a decision on the *merits*

of Petitioner's application, J.A. 72, just as it does for any 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, when Petitioner received a Michigan Court of Appeals standard order denying leave to appeal from a plea-based conviction, that order stated, "The Court orders that the defendant-appellant's delayed application for leave to appeal is DENIED *for lack of merit in the grounds presented*." J.A 72 (emphasis added).

Despite Respondent's claim to the contrary, Br. Opp. 22-26, the Michigan Court of Appeals has held many times that its orders denying leave to appeal "for lack of merit in the grounds presented" are conclusive determinations of the merits of the issues presented. The Michigan Court of Appeals firmly established this principle in three published opinions issued more than twenty years ago. *See People v. Hayden*, 348 N.W.2d 672, 684 (Mich. Ct. App. 1984) ("[A]nother 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."); *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 and frequently apply its decisions in *Hayden*, *Douglas*, and *Wiley* to conclude that its orders denying leave to appeal "for lack of merit in the grounds presented" are conclusive decisions on the merits. *See, e.g., Contineri v. Clark*, No. 237739, 2003 WL 21771236, at *2 (Mich. Ct.

App. Jul. 31, 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. Lathon*, No. 252936, 2005 WL 77151, at *5 (Mich. Ct. App. Jan. 13, 2005); *People v. Weathers*, No. 238494, 2003 WL 21362810, at *4 (Mich. Ct. App. Jun. 12, 2003); *Sabaugh v. Riga*, No. 233687, 2003 WL 21362981, at *2 (Mich. Ct. App. Jun. 12, 2003); *Rusiecki v. SADO*, No. 235206, 2002 WL 1277042, at *3 (Mich. Ct. App. Jun. 4, 2002); *DiCicco v. City of Grosse Pointe Woods*, No. 222751, 2002 WL 346126, at *3 (Mich. Ct. App. Mar. 1, 2002).

The Michigan Supreme Court also recognizes that such orders of the Michigan Court of Appeals are conclusive determinations of the merits. *See People v. Walker*, 653 N.W.2d 621, 622, 623 n.5 (Mich. 2002) (Corrigan, C.J.) (observing that order denying application "for lack of merit in the grounds presented" demonstrated that the "Court of Appeals reviewed the substantive arguments advanced in the application and concluded that they lacked merit," and that "the Court of Appeals plainly considered the merits of defendant's arguments"); *id*. at 624 (Kelly, J., dissenting) (agreeing that order demonstrated that "Court of Appeals reached the merits of the claims presented"). The Sixth Circuit has recently reached the same conclusion. *See Abela v. Martin*, 380 F.3d 915, 923 (6th Cir. 2004) (holding that Michigan Court of Appeals' decision denying leave to appeal "for lack of merit in the grounds presented" was "a merits determination" for purposes of habeas corpus).

Respondent nevertheless claims, with citations to three 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), that a Michigan Court of Appeals order denying an application for lack of merit is not a decision on the merits. Br. Opp. 22-24. 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 311-12, 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, all three of these cases predate the Michigan Court of Appeals' decisions in *Hayden, Douglas*, and *Wiley*, in which the court squarely held that its orders finding "lack of merit in the grounds presented" were decisions on the merits. It is now beyond reasonable dispute that the Michigan Court of Appeals regards such orders as conclusive decisions on the merits, as does the Michigan Supreme Court and the Sixth Circuit.

By using the term "discretionary" to describe an application to the Michigan Court of Appeals, Respondent is attempting to have its cake and eat it too. By calling the appeal "discretionary," Respondent hopes to avoid appointing appellate counsel to indigents such as Petitioner, but by having such appeals decided on the merits, Respondent receives the substantial benefit of barring Petitioner and others in his position from ever relitigating the issues presented in their *pro se* appeals.

The system that Michigan has set up for appellate review of plea-based convictions and sentences is, in reality, 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(c) (same).

Even if the Michigan Court of Appeals did not decide applications for leave to appeal on the merits, Petitioner would still have been entitled to appellate counsel to assist with his application. The prior assistance of appellate counsel and the provision of the other basic tools of appellate advocacy on a first-tier appeal were crucial to the conclusion in *Ross* that a state need not provide counsel for subsequent appeals. *Ross*, 417 U.S. at 614-16. Thus, those few states that have or formerly had first-tier direct appeals not decided on the merits have unanimously provided appellate counsel to indigents.

In sum, an application for leave to appeal to the Michigan Court of Appeals is not a discretionary appeal within the meaning of *Douglas, Ross*, or *Evitts*. 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. 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*.

Therefore, Petitioner's Fourteenth Amendment rights were violated when his requests for appointment of appellate counsel were denied. He is accordingly entitled to have the order of the Michigan Court of Appeals denying his application vacated, to have appellate counsel appointed for him, and to be given an opportunity to file a new application for leave to appeal to the Michigan Court of Appeals with the assistance of counsel. *See Penson v. Ohio*, 475 U.S. 75, 88-89 (1988) (holding that denial of appellate counsel requires automatic relief without showing of prejudice).

B. Petitioner and Other Indigent Defendants Forced To File Applications for Leave To Appeal Without Counsel 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 such as Petitioner still violates the Fourteenth Amendment because 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. Petitioner's case proves the point.

1. As Petitioner's Case Demonstrates, an 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.

Respondent claims that the distinctions between convictions following trials and convictions following guilty

pleas justify the denial of Petitioner's requests for appellate counsel. Br. Opp. 18-20. The most obvious objection to this claim 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. On the contrary, the Court has consistently recognized that a typical indigent such as Petitioner is 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. Thus, in *Roe v. Flores-Ortega*, 528 U.S. 470, 486 (2000), the Court specifically recognized, *in an appeal from a guilty plea*, "[i]t 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 does limit 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 errors, including Double Jeopardy Clause violations, ineffective assistance of trial counsel, 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 *Blakely v.Washington*, ___ U.S. ___, 124 S.Ct. 2531 (2004).

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*. Despite that complexity, a Michigan 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 requires most indigents to litigate complex sentencing guidelines questions, many of which are questions of first impression in Michigan, on their own.

As the Court specifically recognized in *Flores-Ortega*, 528 U.S. at 486, a typical indigent plea defendant is 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").

Petitioner's case illustrates the difficulties a typical indigent defendant faces under the statute. Petitioner, who has explained that he is a former special education student and a mentally impaired person with learning disabilities, J.A. 61-62, was forced to file his own application for leave to appeal after the trial judge repeatedly denied his requests for appellate counsel.

In that application, Petitioner, aided by a fellow prisoner, attempted to raise the claim that he had received ineffective assistance of counsel from his trial attorney who had failed to object to the scoring of the sentencing guidelines. J.A. 68. Indeed, Michigan law ordinarily requires criminal defendants to raise ineffective assistance claims on direct appeal. *See generally People v. Ginther*, 212 N.W.2d 922 (Mich. 1973).

Petitioner's attempt to obtain meaningful review of his ineffective assistance claim was doomed from the outset because Michigan law also requires the defendant to create the record necessary for an ineffective assistance claim by first holding an evidentiary hearing in the trial court before proceeding with the appeal to the Michigan Court of Appeals. *See Ginther*, 212 N.W.2d at 925; *see also People v. Mitchell*, 560 N.W.2d 600, 612 (Mich. 1997) (holding that defendant must present testimony of trial counsel, who is "necessary witness" at ineffective assistance hearing, before proceeding with appeal).

In other words, to preserve his ineffective assistance claim, Petitioner was required to hold an evidentiary hearing in the trial court in which he would have had to call and examine witnesses, including his own trial attorney, all without the assistance of counsel. With the assistance of another inmate, Petitioner did actually manage to point out to the trial court in his renewed motion for appointment of counsel that he needed to hold an evidentiary hearing on the ineffective assistance claim, J.A. 60-62, but the trial court, as required by the statute and the Michigan Supreme Court's decision in *Bulger*, had no choice but to deny the request. J.A. 64.

Thus, Petitioner, who could not possibly be expected to organize and conduct an evidentiary hearing without the assistance of counsel (or even another prisoner), had no option but to present his ineffective assistance claim to the Michigan Court of Appeals without the necessary record support. Without the necessary record, it was a foregone conclusion that the Michigan Court of Appeals would deny relief.

In addition, Petitioner's written argument to the Michigan Court of Appeals demonstrates that even if Petitioner had received an incompetent appellate attorney, "it is reasonable to assume that counsel's performance [would have been] more effective than what the unskilled appellant could have provided for himself." *Martinez*, 528 U.S. at 161. In his application, Petitioner claimed that trial counsel was ineffective for failing to object to the scoring of the sentencing guidelines, but Petitioner neglected to identify the guidelines scores to which trial counsel should have objected. J.A. 68. Thus, even aside from his inability to create the record necessary for appellate review, Petitioner (or, more precisely, Petitioner's fellow prisoner) was completely incapable of coherently articulating the claim he was attempting to make.

In fact, there were obvious grounds to object to the scoring of several of Petitioner's sentencing guideline variables. For example, Petitioner received 10 points on Offense Variable 9 ("OV 9") in the first case for multiple victims, J.A. 28, notwithstanding the fact that Petitioner had entered a plea to a single count involving a single victim in that first case. J.A. 23. Indeed, Respondent concedes in this Court that "OV 9 may have been scored incorrectly." Br. Opp. 29. In both cases, Petitioner received 25 points on OV 13 for a pattern of three or more crimes against persons, J.A. 28, 30, even though Petitioner had entered a plea to only two crimes. J.A. 23. While Respondent is correct that this variable allows for the scoring of other crimes committed within a five-year period, Br. Opp. 30, neither the judge nor anyone else ever made a finding that Petitioner committed more than two crimes during that period.

If both variables had been scored at zero, the top of the guidelines range on the first case would have been 17 months (guidelines grid cell A-II), and the top of the guidelines range on the second case would have been 24 months (grid cell C-II). Michigan Sentencing Guidelines Manual, Br. Opp. App. 97b. Petitioner thus may have received a sentence seven months longer than the top of the proper guidelines range for his first case and a sentence thirty-three months longer than the top of the proper guidelines range in the second case.

To make matters even worse, Petitioner's application to the Michigan Court of Appeals completely omitted at least two other potentially meritorious claims for relief that are apparent on the record. First, the trial judge stated on the record at the plea hearing that he found the factual basis necessary to accept Petitioner's nolo contendere plea for one of the two cases by reviewing the preliminary examination, J.A. 24, even though the docket entries reveal that the preliminary examination was waived in both cases. J.A. 1, 4. *See, e.g., People v. Booth*, 324 N.W.2d 741, 748 (Mich. 1982) (discussing requirement that judge find factual basis to support nolo contendere plea). Second, the trial judge rejected Petitioner's request for concurrent sentencing and ordered Petitioner's two sentences to run consecutively without providing any explanation for that decision. J.A. 35. *See, e.g., People v. Gjidola*, 364 N.W.2d 698, 705 (Mich. Ct. App. 1985) (noting that trial judge's decision to impose consecutive sentencing reviewed for abuse of discretion).

Finally, if Petitioner had received the assistance of appellate counsel, that attorney may well have discovered and raised additional appellate issues. For example, an

appellate attorney might have argued for Petitioner that the entire mandatory Michigan sentencing guidelines scheme is unconstitutional in light of *Apprendi v. New Jersey*, 530 U.S. 466 (2000). Such an attack on the Michigan sentencing guidelines may or may not ultimately succeed. *Compare Blakely*, 125 S.Ct. at 2549 (O'Connor, J., dissenting) (noting that majority decision "casts constitutional doubt" on, *inter alia*, Michigan sentencing guidelines scheme), *with People v. Claypool*, 684 N.W.2d 278, 286 n.14 (Mich. 2004) (stating, in dicta, that "the Michigan system is unaffected by the holding in *Blakely*"). Whether or not a *Blakely* challenge to the Michigan sentencing guidelines ultimately succeeds, it would be absurd to expect a typical indigent defendant such as Petitioner to identify such a complex constitutional issue and argue it coherently without the assistance of counsel.

Petitioner was, in short, plainly denied meaningful access to the Michigan Court of Appeals. If Petitioner had funds to hire an appellate attorney, that attorney would have held the evidentiary hearing necessary to preserve the ineffective assistance claim, and Petitioner then would have received meaningful review of that claim. If Petitioner had funds to hire an appellate attorney, that attorney would have, at the very least, known that he would need to identify the guidelines scores to which trial counsel should have objected. If Petitioner had funds to hire an appellate attorney, that attorney presumably would have discovered the other arguable claims for appellate relief on the face of the trial court record and would have raised other claims, such as a *Blakely*-type challenge, that are not apparent on the record.

By any standard, Petitioner was denied meaningful review in the Michigan Court of Appeals, and he was

denied that meaningful review solely because he is indigent. That denial therefore violated the Fourteenth Amendment.

The circumstances establishing that Petitioner was denied meaningful access to the Michigan Court of Appeals are hardly unique to him. Like Petitioner, many other inmates have mental disabilities and other characteristics that render them completely incapable of prosecuting their own first-tier appeals. For example, approximately seventy percent 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.

As Petitioner's case demonstrates, even if the appellate issues actually had been simple, a typical indigent such as Petitioner has no real chance of overcoming the *procedural* hurdles necessary to have those issues considered by the appellate court. As the Court put it in *Evitts*, 469 U.S. at 396, "[t]o 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 another excellent example of the "hopelessly forbidding" procedural hurdles indigent plea defendants face under 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, forced to proceed without counsel, whose application for leave to appeal to the Michigan Court of Appeals had been denied after he had failed in his efforts to obtain his

sentencing transcript. In a concurrence to that denial, the author of the *Bulger* opinion explained that "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, the defendant, who was forced to proceed *pro se*, waived his right to appellate review of his sentence because he failed to specifically claim in his appeal that he had been wrongfully denied his sentencing transcript.

Petitioner's inability to hold the evidentiary hearing in support of his ineffectiveness claim and Plaza's inability to obtain his sentencing transcript are illustrative of the point from *Evitts* that the appellate procedure involved in any first direct appeal is "hopelessly forbidding" for non-lawyers. To perfect an appeal, an indigent who may well be illiterate, mentally ill, or unfamiliar with the English language, must figure out how to obtain the "register of actions," all of the transcripts, the sentencing information reports, 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* J.A. 66-71, 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 any real consideration of the issues.

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. As Petitioner's case proves, a typical indigent cannot expect to receive meaningful access to appellate review simply because the appeal is from a plea-based conviction.

2. The Statutory Exceptions Do Not Make the Statute Constitutional.

As Petitioner's case demonstrates, the fact that the statute has a few narrow exceptions cannot save it. 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. Mich. Comp. Laws § 770.3a(2).

The first and third exceptions, by definition, could not apply to Petitioner or to any other indigent defendant who requests 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 Petitioner would have received counsel if and only if he had somehow been able, without the assistance of counsel, to overcome the procedural hurdles that prevented him from creating an adequate record for appeal, to identify the potentially

meritorious issues for appeal, and to coherently argue those potentially meritorious issues in his application so that the Michigan Court of Appeals granted leave to appeal. In other words, Petitioner had no chance of ever getting to the point where the third exception could possibly apply, and the same is true for almost all indigent defendants.

The fourth exception, for conditional pleas, is also useless to Petitioner and 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"). Second, a defendant can enter a conditional plea only to challenge "pretrial rulings." *Id.* But in Petitioner's case, there were no contested pretrial rulings of any kind.

In fact, most appeals after guilty pleas concern sentencing issues, *see* Matuszak, *supra*, 73 U. Det. Mercy L.Rev. at 438, while other issues may arise during the plea taking proceeding. 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 some pretrial ruling but from the sentence the judge imposed or from the plea itself.

The only other statutory exception is for indigents who receive an upward departure from the sentencing guidelines. While such indigents unquestionably need the assistance of appellate counsel, they are not the only ones who may have meritorious appellate issues. Indeed, the

statute permits 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's trial attorney has preserved his challenge to the trial judge's scoring. Mich. Comp. Laws § 770.3a(3).

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 must litigate *pro se* all other potentially meritorious appellate claims, including such arguments as: (1) the sentences 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 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 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 unable to file their own appeals have meritorious grounds for appeal and are therefore denied any meaningful chance of obtaining the relief to which they would be entitled. *See* Matuszak, *supra*, at 443 (discussing studies showing twelve percent to forty-seven percent 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, 449-50 (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 ("[A]n 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.

The statute guarantees that the vast majority of indigent defendants who wish to appeal from their sentences or pleas receive only a "meaningless ritual," just as Petitioner did, while moneyed defendants receive "a meaningful appeal." *Douglas,* 372 U.S. at 358. The statute therefore violates the Fourteenth Amendment, and the statutory exceptions cannot save it.

C. Petitioner Cannot Be Forced To Waive His Right to Equal Treatment As a Condition of Entering a Plea.

Respondent suggests that Petitioner waived any right he had to appellate counsel when he entered his nolo contendere plea. Br. Opp. 19-20. This argument fails for two reasons.

First, the argument ignores the fact that the purported "waiver" itself violates the Fourteenth Amendment because it applies only to indigents such as Petitioner. The statute does not require a moneyed criminal defendant to give up his or her constitutional right to the assistance of appellate counsel by pleading guilty or nolo contendere. Only the poor lose their right to a meaningful appeal.

As this Court has long recognized, a criminal defendant usually receives substantial benefits in exchange for entering a guilty or nolo contendere plea. *See, e.g., Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978). If the Respondent's waiver argument were upheld, however, an indigent defendant could obtain these substantial benefits only by losing any opportunity for meaningful review of any errors the judge, the prosecutor, or defense counsel 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 or nolo contendere 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 or nolo contendere 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 Respondent's argument were accepted, Michigan could also presumably require indigents who wish to plead guilty or nolo contendere 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, 257-58 (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 the purported "waiver" of appellate counsel does. As Petitioner's experience proves, 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.

Respondent's argument therefore proves too much. Because it requires only the poor to give up their right to a meaningful appeal from any errors that might arise after the "waiver" in order to receive the benefits of a plea bargain, while moneyed defendants receive those same benefits and waive nothing at all, the supposed "waiver" is itself unconstitutional.

A second reason Respondent's argument fails is that Petitioner did not, in fact, "waive" his constitutional right to appellate counsel. Contrary to Respondent's claim that "Petitioner Halbert was fully informed of the consequences of his pleas, including the fact that he was giving up the right to appointed counsel on appeal," Br. Opp. 19-20, Petitioner was never informed of any such thing before entering his plea.

At Petitioner's plea hearing, the judge specifically advised Petitioner that by entering a plea he was giving up various rights, including the right to a jury or non-jury trial, the right to be presumed innocent, the right to have his guilt proven beyond a reasonable doubt, the right to confront the witnesses against him, the right to compulsory process, the right to remain silent or to testify at trial, and the right to have an automatic appeal. J.A. 19-22. The judge then continued:

> THE COURT: You understand if I accept your plea and you are financially unable to retain a lawyer to represent you on appeal, the Court must appoint an attorney for you if the sentence

> I impose exceeds the sentencing guidelines or you seek leave to appeal a conditional plea or the prosecutor seeks leave to appeal or the Court of Appeals or Supreme Court grants you leave to appeal. Under those conditions I must appoint an attorney, do you understand that?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: Further, if you are financially unable to retain a lawyer to represent you on appeal, the Court may appoint an attorney for you if you allege an improper scoring of the sentencing guidelines, you object to the scoring at the time of the sentencing and the sentence I impose exceeds the sentencing guidelines as you allege it should be scored. Under those conditions I may appoint an attorney, do you understand that?
>
> THE DEFENDANT: Yes, sir.

J.A. 22-23. The judge thus listed some circumstances under which he would or might appoint appellate counsel, but the judge never told Petitioner that he would *not* receive the assistance of appellate counsel otherwise. Nor, for that matter, was Petitioner ever asked to waive his right to appellate counsel to assist him in all circumstances other than those articulated by the judge.

Thus, even if Michigan could constitutionally require the poor, and only the poor, to waive their right to a meaningful appeal as a condition of entering a plea, Petitioner's plea proceeding fell far short of the "intentional relinquishment or abandonment of a known right or privilege" necessary to create an effective waiver of a constitutional right. *Johnson v. Zerbst,* 304 U.S. 458, 464 (1938). Indeed, Petitioner correctly believed he had not

relinquished his right to the assistance of appellate counsel, as he filed two requests for appellate counsel just two days after his sentencing. J.A. 47-50, 54-57.

In short, Michigan could not constitutionally require the poor, and only the poor, to give up the right to a meaningful appeal in order to receive the benefits of a plea, and Petitioner did not do so in any event.

II. Petitioner Is Entitled to a New Direct Appeal With the Assistance of Appellate Counsel So That He May Develop the Record Necessary To Support His Appellate Claims, Including Ineffective Assistance of Trial Counsel.

In the second issue in his petition, Petitioner once again raised the ineffective assistance of counsel claim he had tried to raise in the Michigan Court of Appeals. Pet. 15-21. As discussed above, Petitioner does have a strong ineffective assistance claim since his attorney failed to object to the scoring of several sentencing guidelines variables, including one Respondent concedes may have been misscored. In his argument to this Court, however, Petitioner recognized that he had been unable to create the record necessary to support that claim solely because he had been denied the assistance of appellate counsel. Pet. 20-21.

Given the existing record, this Court cannot conclusively determine whether Petitioner received ineffective assistance of trial counsel, just as the Michigan Court of Appeals could not make such a determination without providing appellate counsel to Petitioner. *See, e.g., People v. Mitchell*, 560 N.W.2d 600, 612 (Mich. 1997) (requiring defendant presenting ineffective assistance claim on direct

appeal to hold evidentiary hearing at which trial counsel is "necessary witness"). If Petitioner had funds, he would have been able to hire an appellate attorney who would have created the record necessary for meaningful review of his ineffective assistance claim, as well as any other colorable claims that attorney may have discovered.

Therefore, the proper remedy is for this Court to vacate the Michigan Court of Appeals' order denying Petitioner's application for leave to appeal. The Michigan Court of Appeals should be directed to order the trial court to appoint appellate counsel for Petitioner and to allow Petitioner, with the assistance of appellate counsel, to file a new application for leave to appeal after appellate counsel has had an opportunity to create the evidentiary record necessary for consideration of the ineffective assistance claim. *See Penson v. Ohio*, 475 U.S. 75, 88-89 (1988) (holding denial of appellate counsel requires automatic relief without showing of prejudice).

CONCLUSION

The judgment of the Michigan Court of Appeals denying Petitioner's application for leave to appeal should be vacated, and the Michigan Court of Appeals should be ordered to direct the trial court to appoint appellate counsel for Petitioner and to permit Petitioner, with the assistance of appellate counsel, to file a new application for leave to appeal after appellate counsel has had an opportunity to create the evidentiary record necessary for consideration of Petitioner's claims.

Respectfully submitted,

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