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IN THE SUPREME COURT OF THE UNITED STATES

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JOHN F. KOWALSKI, JUDGE, 26TH :

JUDICIAL CIRCUIT COURT OF :

MICHIGAN, ET AL., :

Petitioners :

v. : No. 03-407

JOHN C. TESMER, ET AL. :

- - - - -X

Washington, D.C.

Monday, October 4, 2004

The above-entitled matter came on for oral
argument before the Supreme Court of the United States at
11:02 a.m.

APPEARANCES:

THOMAS L. CASEY, ESQ., Solicitor General, Lansing,
Michigan; on behalf of the Petitioners.

DAVID A. MORAN, ESQ., Detroit, Michigan; on behalf of the
Respondents.

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P R O C E E D I N G S

(11:02 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in No. 03-407, John F. Kowalski v. John C. Tesmer.

Mr. Casey.

ORAL ARGUMENT OF THOMAS L. CASEY

ON BEHALF OF THE PETITIONERS

MR. CASEY: Mr. Chief Justice, and may it please the Court:

In this facial challenge to the Michigan statute, court of appeals rulings that these lawyers have third party standing and that their potential clients have a constitutional right to appointed counsel in discretionary appeals are both wrong.

First, with respect to the standing argument, in our brief we argue that the respondent attorneys could not meet any of the criteria for standing. This morning I'd like to focus on the element of prudential standing that considers whether there is a hindrance to the ability of a third party to protect his own -- to protect his own interest.

JUSTICE GINSBURG: -- there is an injury in fact. These lawyers claim that if the State were compensating for this service and they're on the list to be appointed, they would have more money in their pockets.

1 You're not -- you're not challenging that there is an
2 injury in fact.

3 MR. CASEY: Yes. In our -- in our brief we have
4 challenged that. The -- the requirement is that there be
5 an injury in fact, a concrete and particularized actual or
6 imminent injury in fact.

7 JUSTICE GINSBURG: But you -- you said now you
8 were going on to the prudential factors, and so I asked
9 were you recognizing that there was an injury in fact, and
10 you said no. And -- and why not? Because it seems so
11 obvious that they would get appointments if the system
12 were --

13 CHIEF JUSTICE REHNQUIST: I take it you're
14 reserving it for -- in your -- in your brief.

15 MR. CASEY: I -- I am not waiving the argument.
16 I -- I would like to rest on the brief.

17 But I -- in answer to your question, we believe
18 yes, there is a likelihood that these lawyers on the list
19 for appointed counsel will some day -- if they stay on the
20 list and a case comes up in that county, there is a
21 likelihood that there will be a case. We submit, however,
22 that on these facts in this facial challenge, we don't
23 know how many lawyers are on the list for appointments in
24 Saginaw County. We don't know how many appeals of this
25 nature come up. So it may be many years before the

1 situation arises. This is not a concrete and
2 particularized actual or imminent injury in fact, and
3 we've argued that in the brief.

4 At -- at best, if there is an injury in fact and
5 if there is -- another factor is the close relationship to
6 the third party. We believe those are weak at best, and
7 we've argued in our brief that they don't exist. I think
8 it is most clear, however, that the criteria concerning
9 the hindrance to the third party does not exist here.

10 This is a facial challenge bought by -- brought
11 by lawyers before the statute took effect, claiming not
12 that the statute violates their own constitutional rights,
13 but that it violates the rights of potential future
14 clients, and that the lawyers will suffer economic harm.

15 JUSTICE O'CONNOR: May I clarify something about
16 this case? Are any of the indigent defendants whose
17 rights the respondent attorneys want to advance -- do any
18 of those people themselves have standing to bring their
19 claims in Federal court now?

20 MR. CASEY: Yes. We argue that there are --
21 there are three ways that an indigent defendant can bring
22 this claim themselves without having to rely on an
23 attorney in this type of case. First, they can bring the
24 challenge directly through the State courts.

25 JUSTICE O'CONNOR: I'm asking if there are any

1 individuals now before this Court in this case --

2 MR. CASEY: No. None of these -- none of these
3 defendants --

4 JUSTICE O'CONNOR: -- who would be available and
5 who would have remedies or standing to bring their claims.
6 Are we just talking pure hypotheticals here?

7 MR. CASEY: In this facial challenge, we're
8 talking about pure hypotheticals. The -- the three named
9 indigent defendants --

10 JUSTICE O'CONNOR: There were three named
11 indigents.

12 MR. CASEY: Correct.

13 JUSTICE O'CONNOR: They were?

14 MR. CASEY: They were denied counsel.

15 JUSTICE O'CONNOR: Denied counsel, and they were
16 also dismissed at some point down the line?

17 MR. CASEY: Yes. The -- the Sixth Circuit held
18 that the Federal court should abstain from deciding their
19 claims because they could have brought their claims in
20 their direct State appeals. They raised claims about the
21 practice of denying counsel before the statute took
22 effect.

23 JUSTICE GINSBURG: Mr. Casey, was it a Younger
24 abstention --

25 MR. CASEY: Yes.

1 JUSTICE GINSBURG: -- with respect to the --

2 MR. CASEY: The -- the Sixth Circuit en banc
3 held that under *Younger v. Harris*, the Federal court
4 should abstain from deciding the claims of the three
5 indigent defendants.

6 JUSTICE GINSBURG: So that means that the
7 defendants could never bring this 1983 suit. Only the
8 lawyers arguably could.

9 MR. CASEY: No. *Younger v. Harris* is only --
10 only defers the time when a proper Federal civil rights
11 action can be brought. There were -- at the time this
12 action was brought, there were pending State appeals in
13 two of the cases. One of the defendants never appealed at
14 all.

15 The Sixth Circuit recently issued an opinion
16 not --

17 JUSTICE SCALIA: Why didn't these lawyers
18 instead of -- instead of trying to sue on their own, why
19 didn't they just offer their services to -- to these
20 defendants through the State courts?

21 MR. CASEY: Your Honor, perhaps opposing counsel
22 could answer that better than I. We say that is the --

23 JUSTICE SCALIA: I mean, that's what I don't
24 understand about -- about the fact that they won't --
25 won't have the right to counsel. It -- it's at least as

1 easy for -- for counsel to appear in cases in which
2 indigents need counsel as it is for counsel to bring their
3 own lawsuit.

4 MR. CASEY: That is our point on the standing
5 issue precisely, Your Honor.

6 JUSTICE GINSBURG: Didn't -- didn't the Michigan
7 Supreme Court already rule on this issue and said that the
8 statute was constitutional, that there was no right to
9 counsel, therefore no possibility of appointing counsel,
10 paid counsel?

11 MR. CASEY: That's correct. In -- in 2000, the
12 -- the -- while this case was pending, the Michigan
13 Supreme Court issued an opinion, the Bulger decision
14 that's discussed in the briefs, saying that the practice
15 of denying appointed counsel was constitutional. The
16 statute was not in effect at that time. The statute took
17 effect, and in a case just decided in June of this year,
18 People v. Harris, the Michigan Supreme Court relied on
19 Bulger and said this statute is constitutional. It does
20 not violate any rights.

21 JUSTICE GINSBURG: So going through the State
22 system, there's no possibility that these lawyers or the
23 defendants could successfully assert a right to paid
24 counsel --

25 MR. CASEY: That is correct.

1 JUSTICE GINSBURG: -- because that's already
2 been decided by the Michigan Supreme Court.

3 MR. CASEY: As -- as a matter of jurisprudence
4 by the State supreme court, yes. Both State and Federal
5 constitutional --

6 JUSTICE SCALIA: There -- there's an appeal from
7 -- they could request certiorari from the State supreme
8 court to this Court, I assume.

9 MR. CASEY: There are, in fact, two cases
10 pending, the Harris case that I just mentioned. A
11 petition for certiorari was filed about 2 weeks ago
12 raising this precise claim. There is another case Halbert
13 v. Michigan. It's docket --

14 JUSTICE GINSBURG: Was there -- was there a cert
15 petition in Bulger itself?

16 MR. CASEY: There was a petition in Bulger.

17 JUSTICE GINSBURG: And it was denied.

18 MR. CASEY: It was denied.

19 In -- in addition --

20 JUSTICE O'CONNOR: But there -- there is a cert
21 petition filed in what case? In the June case?

22 MR. CASEY: In the -- the case is pending in
23 this Court as Melody Harris v. Michigan. It was filed
24 about 2 weeks ago. I have not been able to find out the
25 docket number.

1 There was another case, Halbert v. Michigan,
2 which is a pro se defendant who was denied counsel. His
3 applications, pro se applications, were denied in the
4 State appellate courts. A pro se petition was filed. I
5 filed a response to that about a month ago. That's docket
6 number 03-10198. It's on this Court's conference for
7 Friday, October 8th.

8 JUSTICE O'CONNOR: So your point is that there
9 are petitions filed here that would enable this Court to
10 decide whether the Michigan Supreme Court was correct in
11 holding the statute constitutional.

12 MR. CASEY: That's correct. There are at least
13 those two petitions pending that I'm aware of in this
14 Court now.

15 JUSTICE O'CONNOR: Do you acknowledge there is a
16 good Federal question there at least?

17 MR. CASEY: Oh, yes. It's -- it's an important
18 question.

19 JUSTICE O'CONNOR: Yes.

20 MR. CASEY: We -- we -- in the Bulger case, I
21 opposed certiorari, saying that yes, it's an important
22 question, but it was correctly decided. At that time,
23 there was no conflict. Then when the Sixth Circuit
24 opinion came up, we filed the petition saying it's an
25 important question and now there's a conflict between the

1 State supreme court and the Federal court of appeals.

2 JUSTICE GINSBURG: That's the position you've
3 taken in -- in the Halbert case, that the Court should
4 take the case?

5 MR. CASEY: What I said in the Halbert case is
6 that the Court need not grant this petition now because,
7 although it's an important question, the issue is pending
8 in -- in this Tesmer, the current case, Kowalski v.
9 Tesmer. If this Court rules in our favor on standing and
10 then does not reach the constitutional question, then it
11 would be appropriate to grant certiorari in either the
12 Halbert case or the Harris case because the -- the
13 determination of the constitutionality of this statute is
14 important to the State of Michigan.

15 JUSTICE SCALIA: Do they have lawyers in those
16 cases?

17 MR. CASEY: Now, the Halbert petition is pro se.
18 The Harris petition has either retained or pro bono
19 counsel. But the -- the constitutionality of the statute
20 is -- excuse me -- is directly challenged in both of those
21 petitions.

22 JUSTICE STEVENS: May I ask you if in exercising
23 prudential judgment on whether to accord prudential
24 standing, because I guess there's article III standing
25 here, is it appropriate to take into consideration as one

1 fact that it's already been argued in this case and it's
2 now ripe for decision, or should we just totally ignore
3 that aspect of the case?

4 MR. CASEY: As a matter of judicial economy,
5 there is a point to be made that it -- the issue has been
6 briefed and argued. So perhaps it should be decided.
7 Just last term in Elk Grove v. Newdow, the Court faced a
8 similar situation. They disposed of the case on
9 standing --

10 JUSTICE STEVENS: No, but in that case there was
11 a conflict between the interests of the third party and
12 the interests of the litigant or a potential client. Here
13 there's no conflict between the lawyers and the clients.

14 MR. CASEY: That's true. That's true.

15 JUSTICE SCALIA: Of course, also bearing upon
16 our prudential judgment, I -- I suppose, would be that in
17 order to reach the merits, we have to do what you assert
18 to be an end run around the Younger abstention. And --

19 MR. CASEY: That's -- that's correct. In my
20 view, the -- the most logical, most appropriate
21 disposition would be to say that these attorneys do not
22 have standing. Therefore, reverse the Sixth Circuit's
23 judgment.

24 There are these other vehicles pending now to
25 reach the constitutional issue.

1 JUSTICE STEVENS: But -- but why isn't the
2 Younger abstention problem just like the mootness problem
3 in Craig against Boren? It took one class of litigants
4 unavailable but then allowed the third party to have
5 standing. Why -- why aren't -- aren't your opponents here
6 just like the bartenders in Craig against Boren?

7 MR. CASEY: Well, in determining prudential
8 standing, there are several criteria that should be
9 examined in deciding whether there's an exception to the
10 general rule where a litigant cannot argue the rights of
11 third parties. In Craig v. Boren, the statute directly
12 affected the vendor in that case. It was a statute
13 against sale of certain alcoholic beverages. And in this
14 case we don't have that.

15 Also, in Craig v. Boren, nobody argued
16 prudential standing considerations until the case reached
17 the Supreme Court apparently.

18 But in our case, we have a situation where we
19 have lawyers who do not have any present clients who are
20 not directly affected by the statute. They're not
21 claiming rights --

22 JUSTICE STEVENS: No, but they have the same
23 interest that the bartenders had because they won't make
24 some -- sell their services and the bartenders wouldn't
25 sell the booze. I don't see the difference.

1 MR. CASEY: Well, in -- in Craig v. Boren, the
2 -- if the bartenders did not comply with the statute,
3 they'd be subject to criminal penalties. Here, the
4 attorneys will not be subject to any criminal penalties.

5 JUSTICE SOUTER: Well, why --

6 JUSTICE GINSBURG: That wasn't true -- that
7 wasn't true in the Pierce v. Society of Sisters case and
8 it wasn't true in the Singleton case. Both of those cases
9 recognized third party standing, although the prohibition
10 was not on the plaintiff who was seeking to raise the
11 rights of another person.

12 MR. CASEY: That's -- that's true. The parties
13 have discussed many cases. Almost all of them have some
14 factors similar to the circumstances here, and as we've
15 argued, all of them have distinguishing factors too.

16 JUSTICE SOUTER: But isn't -- isn't the biggest
17 distinguishing factor the one that you raised in response
18 to Justice Scalia's question? These -- these lawyers can
19 represent somebody on a direct appeal, the same way and
20 raise exactly the same issue that they're trying to raise
21 on third party standing now. Isn't -- isn't that true?

22 MR. CASEY: That -- precisely. Just normal
23 principles of litigation counsel that it is appropriate to
24 have a real party in interest. The criminal defendants
25 whose rights are at stake in the statute litigate that

1 case. If you take the step and allow standing for an
2 attorney, based on speculative claims about future clients
3 and economic harm to the attorney, as the dissent in the
4 Sixth Circuit says, that opens up the possibility of
5 vastly expanding the doctrine of standing beyond what this
6 Court has ever said.

7 JUSTICE STEVENS: Well, is it correct as a
8 factual matter that these particular lawyers do have
9 clients that they could be representing --

10 MR. CASEY: That is not in --

11 JUSTICE STEVENS: -- on direct appeal?

12 MR. CASEY: -- that is not in the record. In
13 their response brief, they said that they currently do
14 have clients, but in the complaint -- this case was,
15 again, a facial challenge. It was decided on summary
16 disposition or it was a motion to dismiss. It was filed
17 and decided within about a month. And there was no
18 factual development here.

19 If they had actual clients, there would be
20 clearly a closer relationship, but again, those clients
21 would not be hindered from making the claims themselves.
22 There is no reason --

23 JUSTICE SOUTER: But the -- the claim that --
24 I'm sorry.

25 JUSTICE STEVENS: Well, it just would seem to me

1 that the lawyers who are advancing this claim may or may
2 not be representing individuals who want to make the same
3 claim, but there -- there must be some lawyers who want to
4 make these claims who don't have any clients, and the
5 question is whether they have standing. And are they to
6 be defeated standing because there are a lot of other
7 lawyers who might also sue?

8 MR. CASEY: In our view, as a general
9 proposition, lawyers should not be given independent
10 standing to raise claims of their clients. When the
11 clients can present their own issues themselves, as they
12 can in this case or in this situation under the statute,
13 there's no need --

14 JUSTICE GINSBURG: Is that different from Caplin
15 & Drysdale where the lawyers didn't raise the interest of
16 the client and --

17 MR. CASEY: Again, there was an actual client in
18 that case and there was significant money at stake. The
19 lawyers had been paid money from drug forfeiture. They
20 had been paid \$25,000, and they wanted another 107 --

21 JUSTICE GINSBURG: But as far as the actual
22 client, you moved to dismiss. So that's why there's no --
23 was no back-development. You moved to dismiss.
24 Therefore, you have to assume whatever facts --

25 MR. CASEY: That -- that's correct.

1 JUSTICE GINSBURG: -- in favor of the opponent
2 of the motion.

3 MR. CASEY: That's correct. But my response on
4 that was to the question of, you know, do they in fact now
5 have clients. There is no allegation in the complaint and
6 no proof that they now have clients. They may --

7 JUSTICE SOUTER: But if -- if you assume -- you
8 assume the correctness of the allegations, which you --
9 you have to do at this point, the allegation is that they
10 would get clients and would be paid but for this bar to
11 payment. Isn't that correct? So if you take them in
12 terms of their claim, you've got to assume that they will
13 have clients and they can bring this -- this issue on
14 behalf of the client.

15 MR. CASEY: Correct. That goes to the criteria
16 of injury in fact and close relationship with the third
17 party. We still have the criteria that I wanted to
18 discuss this morning about hindrance to the right -- to
19 the ability of the third party to litigate for themselves.
20 Excuse me.

21 In our view, there is no need to expand the
22 doctrine of standing to permit lawyers to have independent
23 standing to make these claims because the clients, who are
24 directly affected by the statute, can make them
25 themselves. There are the two pending habeas -- or two

1 pending petitions for certiorari that we've mentioned.

2 There is another case, the Bulger case. Mr.
3 Bulger himself, after he lost in the Michigan courts, he
4 filed a petition for -- for habeas corpus. And the
5 district court granted the writ of habeas corpus. We
6 appealed. That case is now pending in the Sixth Circuit.
7 So that's another vehicle.

8 It is also possible that an indigent inmate
9 himself could bring a section 1983 case. It's simply not
10 necessary to expand the doctrine of standing to give
11 lawyers --

12 JUSTICE GINSBURG: How could an indigent bring a
13 1983 case? I thought you said that that would be barred
14 by Younger.

15 MR. CASEY: If they had a pending prosecution,
16 it would be barred by Younger. Once that pending
17 prosecution is over, they could bring a 1983 action.

18 JUSTICE GINSBURG: Could they? Because I
19 thought this Court had held that -- that you can't bring a
20 1983 suit if what you're seeking to do is overturn the
21 conviction.

22 MR. CASEY: Under Heck v. Humphrey, if the
23 outcome of the 1983 case would necessarily imply that the
24 conviction or sentence is invalid, you cannot bring the
25 1983 case. Here, the allegation is simply that they were

1 entitled to counsel. That's not the substantive merits of
2 whether the claim -- whether they are properly convicted
3 or properly sentenced.

4 The Sixth Circuit, in a case decided August
5 31st --

6 JUSTICE GINSBURG: Well, if that -- that --
7 that's -- you're saying that the defendants themselves
8 could not sue now under 1983?

9 MR. CASEY: A -- a defendant who is currently in
10 the State system on direct appeal is barred by the
11 abstention doctrine from filing a 1983 action. But after
12 they go through the State court and lose, in addition to
13 filing a writ of certiorari with this Court --

14 JUSTICE SCALIA: And presumably up to this
15 Court, if they want to come that far.

16 MR. CASEY: Oh, certainly. After -- after they
17 go through the State court, they could file a writ of cert
18 in this Court, as the two pending petitions have. They
19 could file a complaint for habeas corpus. They could
20 bring a facial challenge under 1983.

21 In a case called Howard v. Whitbeck from the
22 Sixth Circuit, just decided about a month ago, that was
23 the very question that was decided. An inmate -- a prison
24 inmate, challenging another statute, litigated and lost in
25 the State court, then filed a 1983 action. We argued in a

1 Federal case under Rooker v. Feldman, he was actually
2 trying to seek review of the State court judgment. The
3 district court agreed. But the Sixth Circuit just said
4 Rooker v. Feldman bars the as-applied challenge, but they
5 remanded for a trial on the merits of the facial
6 challenge, which is not barred by Rooker v. Feldman. So
7 an inmate who has been unsuccessful in the State court,
8 under Sixth Circuit law in my jurisdiction, can bring a
9 1983 action.

10 So there are at least three vehicles that an
11 inmate can bring --

12 JUSTICE GINSBURG: And do you -- do you agree
13 that that's right? And you said that that's their theory,
14 that they could bring a 1983 action.

15 MR. CASEY: We are not filing a petition for
16 certiorari from that decision. We are abiding by that
17 decision. We're going back and we're going to try that
18 case on the merits of the facial challenge to the statute.
19 That -- that case is Howard v. Whitbeck, docket number
20 03-1396.

21 JUSTICE SCALIA: Of course, what the other side
22 says is, well, yes, maybe they can bring these suits, but
23 in all of those suits, they don't have counsel, what they
24 -- what they --

25 MR. CASEY: That's true. That -- that gets into

1 the -- the merits of the constitutional claim. And in our
2 view, talking about the merits, all that is required in
3 the Michigan application for leave to appeal process is
4 that a defendant identify the issues and ask the appellate
5 court to review it. Unlike Douglas, this is not a review
6 on the merits. An order denying an application for leave
7 is not an affirmance. It's not an adjudication of the
8 merits of any legal issue.

9 JUSTICE KENNEDY: What -- what do we look to in
10 order to verify what -- what you've just said? Do the
11 Michigan appellate courts catch mistakes all the time?
12 And if so, what's the standard that they use?

13 MR. CASEY: The court rules concerning
14 applications for leave do not set out specific standards.
15 What -- what the court of appeals can do on an application
16 for leave is grant the application, deny it, or issue
17 peremptory relief.

18 JUSTICE KENNEDY: But what are the standards
19 they use? Where -- where do I look to find out what
20 standards they use, if I get there?

21 MR. CASEY: To the best of my knowledge, there
22 are no published standards in court rule or statute on
23 that. The court is free to exercise its discretion to --
24 to deny leave for any reason that it chooses.

25 JUSTICE KENNEDY: Can you give me an example of

1 where they grant leave to appeal, and if not -- and it's
2 not one of the exceptions listed in the statute such as
3 incorrect --

4 MR. CASEY: If -- if --

5 JUSTICE KENNEDY: -- such as incorrect
6 sentencing?

7 MR. CASEY: Well, if -- under the statute, if
8 the court of appeals grants leave, counsel is
9 automatically appointed.

10 JUSTICE KENNEDY: Right. What are the instances
11 in which they grant leave, other than sentencing or some
12 other statutory --

13 MR. CASEY: They're -- most often they are
14 sentencing issues. The statistics we put in our brief, in
15 footnote 25 of our brief, indicated that out of the -- in
16 2001, there were 38,000 guilty plea convictions. The
17 court of appeals that year disposed of 7,600 cases. 14
18 percent of them were guilty plea appeals. Most of them
19 were disposed of by order. There were somewhere in the
20 neighborhood of about 50 decisions -- opinions issued in
21 guilty plea cases. I have not canvassed all of them. I
22 suspect that the vast majority of them are sentencing
23 issues.

24 JUSTICE GINSBURG: Do we -- do we know whether
25 any of those were cases that didn't fall under the four

1 categories where you a -- a right to?

2 MR. CASEY: In every case where there was an
3 opinion, counsel was appointed. The statute requires it.

4 JUSTICE GINSBURG: But one of the problems, I
5 thought, for the indigent is the rulings -- am I correct
6 -- in Michigan, that they're not required -- say, there's
7 an objection. There's no written record that the indigent
8 could look to, even assuming he could understand it, to --
9 to determine what issues might be raised on -- on appeal.

10 MR. CASEY: I believe you're incorrect on that,
11 Your Honor. The -- what an indigent inmate will -- or
12 defendant will have available to him to prepare an
13 application for leave to appeal is a transcript of the
14 proceedings. He's entitled to that for free. He will
15 have whatever written motions and written decisions the
16 trial judge may have issued. He will have -- in the
17 transcript, he will have the oral motions and the
18 decisions of the judge, and then in addition to whatever
19 pro se materials, as in the Ross v. Moffitt case, the
20 inmate can muster.

21 In -- in these cases, there are other pro se
22 materials available. The district court's opinion in this
23 case noted that there is a -- a form brief, 38-page brief
24 that was circulating among inmates on the precise question
25 of entitlement to counsel, which two of the defendants

1 used in their State court appeals.

2 But in determining whether counsel is
3 constitutionally required under Ross v. Moffitt, this
4 Court has said you look to two things. Are the merits
5 decided? What is the nature of the appellate process?
6 And if the merits are not being decided, as in the
7 Michigan case, we say that falls within the Ross v.
8 Moffitt line of cases, unlike the Douglas case. In -- in
9 addition to the nature of the appellate proceedings, he --

10 CHIEF JUSTICE REHNQUIST: Well, now, your --
11 your opponents quote some language from the -- one of the
12 Michigan court of appeals which suggests that the reason
13 that an appeal was denied was it had no merit.

14 MR. CASEY: A -- a typical order that the court
15 of appeals issues when it denies an application for leave
16 to appeal says, denied for lack of merit on the grounds
17 presented. But there is published, controlling Michigan
18 authority, which we cited in our brief, that says that
19 language does not mean that the court of appeals looked at
20 the merits of the underlying legal issue. What -- what
21 the court is looking at is the question of whether to
22 grant leave or deny leave. If they grant leave, counsel
23 will be appointed. In a very real sense --

24 JUSTICE SOUTER: What -- what are they getting
25 at when they say merit? I mean, I take it you concede

1 there was a quotation from that Containeri case on -- cited
2 on page 30 of their brief. I mean, what -- what is the
3 reference to merit supposed to mean?

4 MR. CASEY: I -- I do not know why the court of
5 appeals uses that language. What I do know is that the --

6 JUSTICE SOUTER: Isn't the reasonable thing to
7 assume that they use it as we would normally expect it
8 to --

9 MR. CASEY: Well, the --

10 JUSTICE SOUTER: -- to mean by the words they
11 use?

12 MR. CASEY: On its face, that would be the first
13 impression that is given from those words. However, the
14 published opinions of the court of appeals we've cited in
15 our brief reject that, and they say that in an application
16 for leave to appeal, the court of appeals is not
17 adjudicating the merits.

18 My opposing counsel in this case was counsel of
19 record in the Bulger case in the Michigan Supreme Court.
20 He made exactly that same argument. He persuaded the
21 dissent in that opinion, but he did not persuade the
22 majority. They didn't decide the issue precisely, but he
23 has been arguing that ever since.

24 But the -- all the precedent that Michigan has
25 on that point we've cited in our brief. Those are not

1 decisions on the merits.

2 JUSTICE GINSBURG: Is it true that Michigan is
3 the only State in the Union so far that denies counsel on
4 a first appeal, whether discretionary or mandatory?

5 MR. CASEY: I believe that is incorrect. The
6 plaintiffs have cited a 1987 habeas corpus case that
7 purports to make a national survey. In the Michigan v.
8 Bulger Michigan Supreme Court opinion in footnote 3, they
9 cited a 1992 Arizona study which reached almost an
10 opposite conclusion. They said there were only seven
11 States which give unrestricted right of appeal, and there
12 were 21 States that prohibited appeals --

13 JUSTICE GINSBURG: Not -- not the right of
14 appeal. The right to counsel, whether it's a mandatory
15 or --

16 MR. CASEY: It's my understanding that Michigan
17 may be the only State that has a specific statute
18 prohibiting it with exceptions like this, but it's also my
19 understanding that the practice in many other States is
20 that counsel is routinely denied in appeals from guilty
21 pleas.

22 I'd like to reserve my remaining time.

23 CHIEF JUSTICE REHNQUIST: Very well, Mr. Casey.

24 Mr. Moran, we'll hear from you.

25 ORAL ARGUMENT OF DAVID A. MORAN

1 ON BEHALF OF THE RESPONDENTS

2 MR. MORAN: Mr. Chief Justice, and may it please
3 the Court:

4 In fact, in the 41 years since this Court's
5 decision in Douglas, no State, not one, not even a -- a
6 territorial jurisdiction, except for Michigan, has even
7 attempted to deny counsel to any indigents appealing any
8 type of first tier appeal.

9 JUSTICE O'CONNOR: Well, Mr. Moran, this is a
10 very important question, whether the Michigan law can
11 survive. But I think before we can address that, we have
12 to decide whether there is standing for the lawyers you
13 represent here today, and that's a much tougher question I
14 think.

15 Is it possible that this Court could grant
16 certiorari in one of the pending petitions and resolve the
17 underlying issue of constitutionality of Michigan's
18 unusual law?

19 MR. MORAN: It is, of course, possible, Justice
20 O'Connor, that this Court could do that.

21 JUSTICE O'CONNOR: And if we were to grant you
22 standing here, wouldn't we have sort of expanded our
23 existing holdings on who has standing?

24 MR. MORAN: Not at all, Justice O'Connor. This
25 case fits squarely within the two prior lawyer-client

1 standing cases, the Triplett case in which this Court
2 unanimously found standing for a -- for a lawyer
3 representing black lung claimants, and the Caplin &
4 Drysdale case in which this Court found standing for a
5 third party assertion by a firm representing a criminal
6 defendant.

7 And what those three cases have in common and
8 what makes them unique is that this can only arise in a
9 case in which the statute or law being challenged
10 disentitles the client either through loss of funding or
11 through, like Michigan's law, a statute -- disentitles the
12 client to representation. Any other change in the law,
13 tort reform brought up by my --

14 CHIEF JUSTICE REHNQUIST: Well, it doesn't
15 really disentitle the client to representation. It says
16 counsel won't be appointed for him. But presumably these
17 lawyers could have offered their services.

18 MR. MORAN: Mr. Chief Justice, that wouldn't be
19 practical, and that raises a point that Justice Souter
20 also raised in the argument. It wouldn't be practical for
21 Mr. Fitzgerald or Mr. Vogler to offer their services pro
22 bono to some indigent in this position because to do so
23 would probably -- probably be unethical or malpractice.
24 First of all, they can't be appointed. What the statute
25 prohibits is the appointment of counsel like Mr.

1 Fitzgerald and Mr. Vogler. So they -- they cannot form an
2 attorney-client relationship by operation of law.

3 JUSTICE SOUTER: But isn't the answer that all
4 they have to do is to say, okay, I will represent him but
5 I am representing him with a claim for funds? And at the
6 end of the day, regardless of what the Michigan law says,
7 I'm going to say to the State of Michigan, through the
8 court, pay me for what I did. That isn't a waiver and
9 there's nothing unethical about it.

10 MR. MORAN: But Justice Souter, that's
11 impractical and unethical in this case because if Mr.
12 Fitzgerald and Mr. Vogler were to do that, they would have
13 to represent the indigent on his or her underlying plea
14 and sentencing issues --

15 JUSTICE SOUTER: Right.

16 MR. MORAN: -- or those would be lost forever --

17 JUSTICE SOUTER: Absolutely.

18 MR. MORAN: -- because the time would fly. And
19 so if they also represented him on the underlying plea and
20 sentencing issues, then this person would not -- then the
21 underlying defendant would not be a person with standing
22 to raise the lack of counsel because in fact they have
23 counsel.

24 JUSTICE O'CONNOR: Well, which -- which indigent
25 defendants are the attorney plaintiffs asserting claims on

behalf of here? Is it past defendants?

MR. MORAN: This was -- this was -- for Mr. Fitzgerald and Mr. Vogler, they were challenging both the prestatutory practice of the three defendant judges.

JUSTICE O'CONNOR: You're talking about the two individuals, but they've been dismissed.

MR. MORAN: No. Mr. Fitzgerald and Mr. Vogler, Justice O'Connor, are the attorneys. They were -- they --

JUSTICE O'CONNOR: Well, I'm trying to find out what indigent criminal defendants are these attorneys attempting to represent here.

MR. MORAN: They routinely take appointments.
They are on a list of --

JUSTICE O'CONNOR: Future defendants?

MR. MORAN: Presently and future defendants.

JUSTICE O'CONNOR: Past defendants?

MR. MORAN: Past defendants. They -- they --

JUSTICE O'CONNOR: Well, if it's past defendants who were convicted and didn't have counsel, how is it consistent with Heck v. Humphrey that they could be here, these attorneys?

MR. MORAN: I think I -- I think I misspoke. At the time the statute was passed, it had not gone into effect. This challenge was filed in order to prevent the statute from going into effect, to prevent approximately

1 2,000 Michigan indigents a year being denied the right to
2 counsel.

3 JUSTICE O'CONNOR: Well, are you asserting then
4 that these attorney respondents are here trying to
5 represent future defendants?

6 MR. MORAN: Present and future defendants.

7 JUSTICE O'CONNOR: And if it's present
8 defendants, how is that consistent with Younger? How can
9 they do that?

10 MR. MORAN: Well, they're not representing any
11 named defendants. The -- the problem is that as the
12 statute goes into effect, they will presumably not receive
13 any further funding for --

14 JUSTICE O'CONNOR: Well, if it's future people,
15 how is it consistent with Los Angeles v. Lyons? I mean, I
16 just don't see how these attorney representatives get
17 here.

18 MR. MORAN: Well, they're in exactly the same
19 position as the bartender in -- or the beer vendor in --
20 in Craig v. Boren. They're representing prospective
21 clients, prospective patients as in Singleton v. Wulff
22 again. This Court has over and over again -- in fact, in
23 Triplett itself, this Court recognized that --
24 specifically said that in Triplett that it applied to
25 prospective clients, that the -- and it said that in

1 Triplet that -- it quoted the three factors. And it said
2 that -- excuse me. I'm looking at the wrong page. It
3 said in Triplet that a restriction upon the fees a lawyer
4 may charge applied to the lawyer's prospective client of a
5 due process right to obtain legal representation falls
6 squarely within this principle. And that was the
7 principle of third party standing that this Court cited --

8 JUSTICE KENNEDY: Well, of course, in Triplet,
9 the attorneys themselves were subject to discipline. They
10 were raising third party rights in order to defend a
11 proceeding brought against themselves. It seems to me
12 that's distinguishable.

13 MR. MORAN: That's --

14 JUSTICE SCALIA: And the same thing in the bar
15 case. The -- the restriction against the sale of -- of
16 liquor was a restriction imposed upon the person seeking
17 to raise the third party right. But here, there's no
18 restriction that applies to these lawyers who are seeking
19 to raise the third party right.

20 MR. MORAN: But Justice Scalia, this Court has
21 never held that such a restriction is a condition
22 precedent or required in order for a person to assert
23 third party rights.

24 JUSTICE SCALIA: That's so, but we've never held
25 what you want us to hold either, that -- that when the law

1 does not bear upon you personally, you have the right to
2 raise the claim of a prospective client. We've never held
3 that either.

4 MR. MORAN: Well, in -- Singleton is a case in
5 which there was no direct sanction against the doctors who
6 provided Medicaid abortions.

7 JUSTICE KENNEDY: Well, just as -- as to
8 Triplett and Boren, you can't cite those two cases and say
9 those are controlling and then say, well, we've never held
10 it.

11 MR. MORAN: I'm sorry. I didn't follow that
12 question, Justice Kennedy.

13 JUSTICE KENNEDY: Well, we've said that Triplett
14 and -- and Boren are -- are distinguishable, and you said,
15 well, we've never ruled on this point. Well, then
16 Triplett and Boren aren't controlling.

17 MR. MORAN: Well, I think you have ruled on this
18 Court -- point by many times recognizing that even persons
19 against whom the statute or law would not directly affect
20 -- for example, all the way back to 1925 with *Pierce v.*
21 *Society of Sisters*, there was no legal prohibition against
22 the school. The legal prohibition was against the
23 students not going to public school. So 80 years ago this
24 Court recognized that. In a situation analogous to this,
25 the school --

1 JUSTICE GINSBURG: It was -- a prohibition was
2 on the parents and there were no parents as plaintiffs in
3 that case --

4 MR. MORAN: That's right.

5 JUSTICE GINSBURG: -- only the schools.

6 MR. MORAN: That's correct, Justice Ginsburg.
7 It was the school that was -- was held to have standing to
8 assert the rights of future and current students, and the
9 same is true of the Singleton case where, again, there was
10 no particular restriction against the doctors. It was
11 simply that they would not get funding.

12 JUSTICE GINSBURG: But there was a problem,
13 wasn't there, in Singleton that -- that the part that said
14 that the doctors could raise the patients' right as
15 opposed to the doctor's own right to practice or whatever,
16 that that was only a plurality?

17 MR. MORAN: That was a plurality portion of the
18 opinion.

19 JUSTICE SCALIA: Well, it shouldn't be cited
20 then. You're citing it for something that the Court
21 didn't hold.

22 MR. MORAN: Well, actually we've cited it in our
23 brief only for the article III proposition which this
24 Court unanimously agreed that the doctors had article III
25 standing because there was an economic energy --

1 JUSTICE SCALIA: You -- I thought you were
2 citing it here for the quite different proposition that --
3 that you can raise third party rights.

4 MR. MORAN: But ultimately this Court in
5 Singleton allowed the doctors' claim on behalf of the
6 patients to proceed. I understand that it was a plurality
7 opinion on the -- on the jus tertii standing.

8 JUSTICE SOUTER: I -- I could accept -- I guess
9 I probably would accept your position if I did not think
10 there -- there was another equally workable alternative
11 here. And I didn't understand your answer to my earlier
12 question in which you said, if I recall correctly, that it
13 would be unethical for these lawyers to represent a -- a
14 future client, subject to a claim to be paid and on behalf
15 both of the client and, I suppose, of themselves, but
16 essentially on behalf of a client, say, there is a right
17 to State money to pay the lawyer who is representing them.
18 It would be, as I understood you to say, unethical for the
19 lawyer to proceed on that basis. And I don't understand
20 the reason for your answer.

21 MR. MORAN: I think I might have misunderstood
22 your question, Justice Souter. The question I understood
23 was why don't they represent people and raise only the
24 entitlement to right to counsel. In the Bulger case, for
25 example, the Michigan Supreme Court --

1 JUSTICE SOUTER: Oh, no. I'm assuming they --
2 they represent the client for all purposes and one of the
3 client's claims is, pay my lawyer. I don't have any
4 money. Your statute is unconstitutional. Why cannot the
5 lawyer pursue that claim on behalf of the client and --
6 and raise exactly the issue that is being raised in
7 substance here?

8 MR. MORAN: If that attempt -- if that method
9 were attempted, Mr. Casey would undoubtedly argue that the
10 attorney would not be entitled to any funding because the
11 attorney was never appointed. You can't just go out and
12 find indigents that you would like to represent. You have
13 to be formally appointed.

14 JUSTICE SOUTER: Well, except that that's a very
15 formalistic answer. The -- the claim, in effect, would be
16 I have a right to be appointed whatever your statute says
17 because -- or my -- the -- the client would say my lawyer
18 -- I have a right to appointed counsel, whatever your
19 statute says, with the consequence of payment. So to say,
20 well, they're not appointed, that's the question. Should
21 they be appointed? I don't see why they cannot raise that
22 issue.

23 MR. MORAN: The problem is is that the way the
24 Michigan system works, it works on a strict rotation
25 system, and so there's no -- there's no line-jumping here.

1 There's no right for a -- a client to -- to request a
2 certain attorney, for a certain attorney to go the head of
3 the queue and say I would like to represent that fellow
4 and be --

5 JUSTICE SOUTER: Okay, but these -- these
6 lawyers are in the rotation. Are you suggesting that the
7 rotation is so enormous that it will be 20 years before
8 they get another client?

9 MR. MORAN: No, not at all. They --

10 JUSTICE SOUTER: Okay.

11 MR. MORAN: They routinely --

12 JUSTICE SOUTER: I mean, your -- your claim is
13 that they are going to get clients in the future and they
14 -- they ought to have a right to be paid when the time
15 comes. So why doesn't, number one, a lawyer representing
16 the next client, whoever he may be, have a right to raise
17 this, and why doesn't each one of these lawyers have a
18 right to raise it presumably within a reasonable time when
19 they next come up in the rotation?

20 MR. MORAN: I think it's clear that the Michigan
21 courts would unquestionably hold that a lawyer who simply
22 inserts himself into a relationship without formal court
23 appointment is not entitled to be paid.

24 JUSTICE SOUTER: Sure they would, and that's
25 what will get brought to this Court. That's what we're

1 here for.

2 MR. MORAN: But the problem is, Justice Souter,
3 we would then have an issue of Michigan law inserted as to
4 whether --

5 JUSTICE SOUTER: No, because the claim is that
6 they have a right under Federal law to an effective
7 procedure whereby paid counsel can be supplied to them.
8 That's a Federal issue, not a State issue.

9 MR. MORAN: That part is a Federal issue, but
10 what Michigan --

11 JUSTICE SOUTER: That's all you've got to get up
12 here.

13 JUSTICE SCALIA: It's at least an argument.

14 JUSTICE SOUTER: It's an argument.

15 JUSTICE SCALIA: And even if they lose on it,
16 they still will have -- would have raised the issue that
17 you are most concerned about getting raised. They're not
18 -- they're not so much interested in the so many dollars
19 for this particular representation. Even if they lose on
20 what seems to me at least a close argument, they will have
21 raised the question you're trying to raise today.

22 MR. MORAN: And they will have to do so without
23 any prospect of being paid, and that's -- that's the
24 problem.

25 JUSTICE SCALIA: Who's paying them for this

1 lawsuit?

2 MR. MORAN: They're not being paid for this
3 lawsuit.

4 JUSTICE SOUTER: Right. Exactly the same
5 situation. They can -- they can bring the case directly
6 for the client they're representing just as readily as
7 they can bring this one. And if that is true, why is
8 there an impediment to raising the issue unless we
9 recognize third party standing?

10 MR. MORAN: Because Justice Souter, they would
11 have to represent them on all of their issues. They would
12 have to represent them on their plea and sentencing issues
13 without being paid. And that's not what they're doing in
14 this --

15 JUSTICE SOUTER: Without being paid if they
16 lose --

17 MR. MORAN: -- in this litigation.

18 JUSTICE SOUTER: -- being paid if they win. In
19 this case, if they win, they don't get a dime because
20 they're not representing a client. All they get is a
21 declaration.

22 MR. MORAN: And --

23 JUSTICE SOUTER: And they'd be better off to
24 represent a real client.

25 JUSTICE SCALIA: That's right. They have a shot

1 at getting paid using this other method.

2 MR. MORAN: In -- in this lawsuit, if we win on
3 the merits, they will then get far more appointments on
4 the rotation system and then they will get paid for those
5 appointments.

6 JUSTICE SOUTER: Why will they get more
7 appointments?

8 MR. MORAN: Because --

9 JUSTICE SOUTER: I thought you said there's a
10 strict rotation system. When your name comes up, you get
11 an appointment. How is that going to change regardless of
12 how this comes out?

13 MR. MORAN: Because the statute, which is now in
14 effect -- and this goes, by the way, back to the issue of
15 prudential standing --

16 JUSTICE SOUTER: Oh, you're just saying there --
17 there's going to be a further class of clients to be
18 represented on the rotation.

19 MR. MORAN: Correct. Far more.

20 JUSTICE SOUTER: Okay, but that's -- that's
21 true.

22 MR. MORAN: And -- and while this Court
23 considers these issues of prudential standing, thousands
24 of Michigan defendants will be denied the right to
25 counsel --

1 JUSTICE BREYER: And while this suit is being
2 brought, we can't do the simple thing, which is to take a
3 case from an indigent who's raising it that we happen to
4 have on our docket and face it directly because everybody
5 is tied up in these knots on standing. I mean, what --
6 what is it that -- that you -- led you to bring this case
7 rather than just filing an amicus brief in a case brought
8 by a real indigent who wants a lawyer?

9 MR. MORAN: Because there -- there was no person
10 in position at the time. The problem was we had to file
11 this litigation before the statute went into effect
12 because once the statute went into effect, thousands of
13 Michigan indigents would be denied the right to counsel
14 every year and would suffer probably irreparable damage to
15 their right to appeal --

16 JUSTICE BREYER: I see -- I see that. That's a
17 good answer.

18 And the -- the question I have is if I now,
19 since we have real indigents, believe that there
20 absolutely is a way for a real indigent to raise this
21 claim that isn't even hard, you could file an amicus
22 brief. Suppose I believed that, and I do believe it
23 actually. If I believe it, then does your third party
24 standing claim disappear?

25 MR. MORAN: No.

1 JUSTICE BREYER: All right. Now, if it doesn't
2 disappear and I hold in your favor, would I then be
3 opening the door to any lawyer whose pocketbook is hurt by
4 tort reform, by any change at all, you know, that means
5 less money for him, and we'd be besieged with people?
6 Instead of the clients, we'd have all the lawyers in
7 complaining that they want to be richer. Now, that's
8 what's worrying me. So on my assumption, how could I
9 possibly decide in your favor without opening that door?

10 MR. MORAN: Your --

11 JUSTICE BREYER: That's the question I'd like
12 answered.

13 MR. MORAN: Your Honor, the only kind of case to
14 which this applies is a case exactly like Triplett, a case
15 exactly like Caplin & Drysdale where the claim is that the
16 underlying change in the law or the underlying law
17 disenfranchises or disentitles the indigent or the
18 criminal defendant or the defendant to representation.

19 JUSTICE BREYER: Because?

20 MR. MORAN: Because, first of all, if the
21 indigent or the client still has representation, then
22 there is no hindrance to the third party raising it
23 themselves.

24 JUSTICE SCALIA: Why is that? Why would a
25 change in substantive law --

1 JUSTICE BREYER: No, no. I assumed there's --

2 JUSTICE SCALIA: -- have the same result?

3 Suppose there's a change in -- in the antitrust law and --
4 and the person says this change -- this change has the --
5 the effect of -- of denying me equal protection of the
6 law. That's the claim that the -- that the client would
7 have. But there's a lawyer who says, my goodness, this
8 change will mean there are many -- many fewer antitrust
9 suits. I can demonstrate that. That's my specialty,
10 antitrust law. I'm going to lose a lot of business. Why
11 wouldn't he have the right to raise the equal protection
12 claim of the prospective client?

13 MR. MORAN: Because the client could raise it
14 directly, represented by the attorney. And so the third
15 prong in jus tertii standing would be clearly missing in
16 that case.

17 JUSTICE BREYER: No. I'm sorry. I -- I --
18 Justice Scalia and I were assuming the same thing. If I
19 assume that there's no problem with the real person, the
20 indigent, raising the claim himself -- and I'm saying on
21 that assumption, which I believe, then if I were to decide
22 in your favor, how would I not be opening the door that I
23 wanted to keep firmly closed?

24 MR. MORAN: But this Court's precedents
25 indicate, Justice Breyer, that the indigents do have a

1 significant hindrance to filing their claims themselves.

2 JUSTICE BREYER: Oh, okay. No. I agree with
3 you. If in fact you think that there's a problem about a
4 real indigent bringing a claim in Michigan, although we
5 have two on the docket, if I accepted that premise, I
6 would begin to think you were right. So then what I was
7 trying to explore is whether the whole thing comes down to
8 whether I accept that premise. And of course, that's
9 what's everybody has been talking about, and I do see at
10 the moment a couple of very good ways that indigents can
11 bring it themselves, and indeed they have.

12 MR. MORAN: But I think --

13 JUSTICE BREYER: But everything comes down to
14 that. Right?

15 MR. MORAN: I think an answer I need to give to
16 -- to cut through all of this is that third party standing
17 is never predicated on the impossible. Third party
18 standing is never predicated on the idea that third party
19 standing is appropriate only if it is impossible for some
20 indigent to make it into court or some third party or the
21 person whose rights are being violated to make it into
22 court. All that must be shown from this Court's
23 precedents is a hindrance. So this Court did not require
24 in Craig v. Boren that it was impossible that some young
25 man could get his claim in front of the court.

1 JUSTICE GINSBURG: It was altogether possible
2 there had been a young man. The problem was he turned 21.
3 So the case would -- from his point of view was moot.

4 MR. MORAN: Right, but this Court never
5 suggested that it was -- showing that it was impossible
6 for someone to quickly get his claim before the court
7 was --

8 JUSTICE BREYER: I think I agree with you on
9 that. I'm just -- the reason I think it's so easy is
10 because we get indigents. We get thousands of them. And
11 all you have to have is some indigent saying, hey, I want
12 a lawyer. Okay? That's all. He has to be able to write
13 those words. And at that point, you and the others come
14 in with amicus briefs, if necessary, and support him.

15 MR. MORAN: Well, the problem is is that in the
16 meantime thousands of Michigan indigents are going to be
17 denied counsel.

18 JUSTICE GINSBURG: May I ask you a practical
19 question about what is currently before the Court? Mr.
20 Casey I think told us that the Halbert case is on for the
21 October 8th conference. If we should grant cert in either
22 of those direct from the Michigan Supreme Court --
23 Michigan Supreme Court following Bulger, so you always
24 leave before then. If we should grant in either of those
25 cases, wouldn't the wise thing be to simply hold this case

1 till those are decided?

2 MR. MORAN: That may well be a wise course of
3 action -- action, Justice Ginsburg.

4 I should point out that Mr. Casey, when he filed
5 the response to the Bulger cert petition, brought this
6 Court's attention to the fact that this underlying
7 litigation was proceeding in a case that was then called
8 Tesmer v. Granholm. And so he brought to this Court's
9 attention that we had already prevailed in Federal
10 district court in Tesmer v. Granholm as a suggestion as to
11 why this Court did not need to grant cert in the Bulger
12 case, and so this Court did not grant cert. I don't know,
13 of course -- I don't know why this Court did not grant
14 cert in Bulger.

15 JUSTICE GINSBURG: But he said now he's not
16 taking that position in the Halbert case.

17 MR. MORAN: But I can be confident that if there
18 are any procedural hurdles to this Court's exercise of
19 jurisdiction in any of the State cases, Mr. Casey will
20 alert this Court of them. And there may well be. For
21 example, in the Melody Harris case, the Michigan Supreme
22 Court remanded for further -- remanded for her to then
23 file an application for leave to appeal on her underlying
24 plea and sentencing issues without the assistance of
25 counsel. Was the Michigan Supreme Court's order a final

1 order? I don't know. This Court would obviously have to
2 resolve that. But I can be confident that Mr. Casey will
3 certainly bring up any procedural hurdles.

4 And of course, this Court cannot exercise
5 jurisdiction it does not have in a case just because it
6 would be more convenient to do so. This Court does have
7 jurisdiction in this case.

8 The petitioners never challenged prudential
9 standing at any point in this litigation -- they -- they
10 challenged only article III standing, injury in fact --
11 until this Court. And so part of the reason we don't have
12 a better record is because this came on a motion to
13 dismiss. This Court recognized in Lujan that a motion to
14 dismiss is different than a summary judgment, requires a
15 -- a different procedural posture. It requires the
16 assumption of facts being true.

17 JUSTICE SCALIA: But -- but no facts -- no
18 additional facts would -- would affect the central point
19 that -- that we've been devoting most of this discussion
20 to, which is whether there is an impediment or not to --
21 to the -- the actual individuals whose rights your clients
22 are asserting raising their own rights. No additional
23 facts bear upon that it seems to me.

24 MR. MORAN: I agree with you on that, Justice
25 Scalia.

1 JUSTICE STEVENS: Then what case holds that
2 there must be an impediment for the third party? I keep
3 coming back to Craig against Boren. They could have filed
4 another class action and say that they filed a class
5 action and had standing. Would we have suddenly decided
6 we won't decide the merits even though it's been argued
7 and both sides have had their day in court?

8 MR. MORAN: I agree with you, Justice Stevens.

9 JUSTICE STEVENS: What is the source of the
10 requirement there must be an impediment to the third party
11 suit?

12 MR. MORAN: Well, this Court has said so many
13 times, and Powers v. Ohio, for example, noted the
14 impediment to the --

15 JUSTICE STEVENS: That -- where they granted
16 standing.

17 MR. MORAN: That's right.

18 JUSTICE STEVENS: Have they ever denied
19 standing on the ground that there was no impediment to the
20 third party suit? I don't think we have.

21 MR. MORAN: I don't believe in all of the cases
22 that both parties cited that there are any cases in which
23 this Court has said that there was no impediment to the
24 third party. It is -- it is certainly not the standard --

25 CHIEF JUSTICE REHNQUIST: Well, do you think

1 that was just idle observation then?

2 MR. MORAN: Not at all, Mr. Chief Justice. I
3 didn't mean to be light about that.

4 JUSTICE STEVENS: It doesn't have to be idle to
5 be dicta, though, does it?

6 MR. MORAN: There -- we -- we fully concede
7 there need to be an impediment, but what it does not
8 require is the showing that it is impossible for someone
9 to get here. What is a showing is that for most -- for
10 the average person in the class, just like the average
11 grand juror in Campbell v. Louisiana, or the average
12 venire person in Powers v. Ohio, there are impediments to
13 getting here.

14 JUSTICE STEVENS: Do you fully concede there
15 must be an impediment even though the Court has never so
16 held?

17 MR. MORAN: I'm willing to concede that because
18 it is so clear to me that there is, that there is an
19 impediment that trying to get into Federal court, trying
20 to get here, for that matter, trying to get into Federal
21 district court -- for an indigent, a typical person who is
22 very likely -- someone like Mr. Carter, functionally
23 illiterate, poorly educated, completely unaware of his
24 rights, to try and navigate the -- the procedural hurdles
25 of the Michigan system to get all the way through the

1 Michigan system and then into Federal court, that is a
2 daunting hurdle. And that's *Evitts v. Lucey*. This Court
3 has recognized time and time again in -- in plea cases,
4 *Roe v. -- Roe v. Flores-Ortega*. This Court has recognized
5 time and time again in *Peguero* that even in a plea case a
6 typical indigent is completely incapable of getting his or
7 her case held -- heard, especially if you have to go
8 through multiple layers of appeal without a counsel for
9 the first tier. And that is the problem here.

10 On the merits, I certainly would like to correct
11 Mr. Casey's representations about the -- the nature of the
12 Michigan system. The -- a properly filed application for
13 leave to appeal is invariably denied for lack of merit in
14 the grounds presented. I certainly urge this Court to
15 look at each and every one of the cases that Mr. Casey has
16 cited for the proposition that that is not a determination
17 on the merits because not one of them says that. Not one
18 of them specifically says that a order denying leave for
19 lack of merit on the grounds presented is not a decision
20 on the merits.

21 JUSTICE KENNEDY: Could -- could you give me an
22 example, just from your experience in practice, where
23 there's an important issue raised after a guilty plea that
24 requires an appeal where it's not one of the statutory
25 exceptions?

1 MR. MORAN: Many, many.

2 JUSTICE KENNEDY: Most -- what are -- what are
3 those cases?

4 MR. MORAN: Improper denial of jail credit,
5 making -- improper denial of jail credit.

6 JUSTICE KENNEDY: That's not sentencing?

7 MR. MORAN: That is a sentencing error.

8 JUSTICE KENNEDY: Okay, but that's covered by
9 the statute.

10 MR. MORAN: No, it's not. The statute -- the
11 only exceptions in the statute are for guidelines
12 departures --

13 JUSTICE KENNEDY: Okay.

14 MR. MORAN: -- and for -- and then if the
15 indigent gets the appeal granted, but that's putting --
16 that's after the indigent has had to file an application
17 identifying his or her own issues without any assistance
18 of counsel.

19 Double jeopardy issues. Double jeopardy issues
20 arise in Michigan all the time; whether sentences should
21 be consecutive or concurrent; whether there's been a
22 breach of the plea bargain. All of these issues arise in
23 Michigan courts every day, and while we are --

24 JUSTICE KENNEDY: Are there instances where
25 Michigan has denied the right to appeal when those claims

1 are raised?

2 MR. MORAN: The problem, Your Honor, is that an
3 indigent can't raise -- a typical indigent would be
4 completely incapable of identifying this -- these sorts of
5 issues.

6 JUSTICE SCALIA: His counsel will have raised
7 them. And -- and most, if not all, of those have to have
8 been raised by counsel.

9 MR. MORAN: Your Honor, Michigan requires that
10 ineffective assistance of counsel claims be raised on
11 direct appeal. So if counsel has not raised the issue,
12 then the indigent would have to recognize that by -- by
13 himself, and then raise that issue, the ineffective
14 assistance of counsel, on direct appeal.

15 Further, even if counsel has recognized it, what
16 we typically would have would be an oral objection at a
17 sentencing hearing. For example, Your Honor, I think
18 these sentences should be concurrent, and the judge says,
19 no, I'm going to make them consecutive. That's an oral
20 objection. The indigent will have to be able to get the
21 transcripts, get the register of actions, get all the
22 necessary documents, realize that that's a winning issue,
23 that it does not put him at additional risk. That's
24 another factor. One of the -- one of the points that a
25 counsel can help with is tell an indigent, you don't want

1 to take this appeal because success may result in
2 revocation of the plea bargain and an additional risk --
3 will have to realize that this is in my best interest to
4 go ahead with this appeal. This is my issue. Find the
5 cases, find the controlling authority.

6 And even issues as complex as a Blakely issue,
7 which this Court, of course, will be dealing with this
8 afternoon, that is an open issue of Michigan law right
9 now. Is -- are the Michigan sentencing guidelines
10 unconstitutional or at least the application of them as a
11 result of this Court's decision in Blakely? Right now, as
12 a result of the order in Melody Harris, a typical Michigan
13 indigent will have to raise that complex issue of Sixth
14 Amendment law by herself or by himself, and that's simply
15 an impossible burden, or the issue will be lost forever.
16 And that is -- that is a burden that no indigent can meet.

17 And so I would hope that this Court would not
18 get hung up on the standing issue because this issue is so
19 important right now, as a result of the Michigan Supreme
20 Court's order. Right now these issues are happening and
21 right now Michigan indigents are being denied the
22 assistance of counsel. Unique in the Nation. And so this
23 case has been adversely argued. That's the point of
24 prudential standing. The petitioners waived the
25 prudential standing issues below. They challenged only

1 article III standing. And so there is every reason for
2 this Court not to wait for a perfect case that may never
3 come.

4 JUSTICE GINSBURG: Are you familiar with the
5 Halbert case? You mentioned that there might be a
6 finality problem in Harris.

7 MR. MORAN: I'm not familiar with that case,
8 Your Honor. I just became aware of it by letter a few
9 days ago and I have not had a chance to find out anything
10 more about it. I have not seen the cert petition in that
11 case. I'm not aware of the underlying -- excuse me -- the
12 underlying order from the Michigan courts in that case.

13 But there may never be a perfect case, but this
14 case is adverse and that meets all the -- all the
15 requirements for prudential standing. Article III
16 standing is clearly met in this case, and I hope this
17 Court will affirm the decision of the Sixth Circuit.

18 If this Court has no further questions.

19 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Moran.

20 Mr. Casey, you have 3 minutes left.

21 REBUTTAL ARGUMENT OF THOMAS L. CASEY

22 ON BEHALF OF THE PETITIONERS

23 JUSTICE KENNEDY: Did you waive the objection to
24 prudential standing --

25 MR. CASEY: We did not waive any of the standing

1 claims in this case. We've discussed that in our reply
2 brief. I've cited pages of the briefs where these issues
3 were discussed. And the overriding fact is that the
4 district court, the three-judge panel in the court of
5 appeals, and the en banc Sixth Circuit all decided these
6 issues. They have been properly raised and preserved and
7 they're before the Court.

8 JUSTICE GINSBURG: Did you file a brief in
9 opposition in Halbert?

10 MR. CASEY: Yes, I did. I filed that about a
11 month ago.

12 JUSTICE GINSBURG: And does that have any
13 procedural impediments?

14 MR. CASEY: Not to my knowledge. That
15 individual was convicted in pleas, asked for counsel
16 citing the Federal litigation in this Kowalski v. Tesmer
17 case. It was denied. He filed a pro se application for
18 leave to appeal challenging the denial of counsel and
19 raising his sentencing issues --

20 JUSTICE GINSBURG: So what was the basis for
21 your opposition to cert?

22 MR. CASEY: That the Court need not grant cert
23 in that case because the issue is pending in this case.
24 If -- if this case goes away, then I suspect we will agree
25 that that would be an appropriate vehicle to decide the

constitutional issue. As long as this case is pending in which the issue is raised, I suggested that the Court need not grant cert in that case to decide the issue. If the issue is not going to be decided in this case, then that would be an appropriate vehicle to raise and decide the issue.

On the standing point, if the plaintiffs here are given standing, it would be a significant expansion of this Court's standing doctrine. This Court has never found third party standing when a litigant is not directly affected by a statute and there is no close existing relationship with the third party and there is no hindrance. We've discussed many cases in which some of these factors are present and others are distinguishing factors. This -- this case is, in some respects, unlike all of them. There would be a significant expansion of the doctrine.

On the merits of the issue, a constitutional right to appointed counsel, under the Michigan system, please read the cases I've cited in my brief, particularly the Bobenal decision, which I've cited in my principal brief. In a footnote in my brief, I quote the orders that the court of appeals was considering. They have the same language that is at issue here. Controlling Michigan precedent says that applications for leave to appeal are

1 not decisions on the merits. All an inmate has to do is
2 identify the issues. That can be done. It has been done,
3 as seen by the two pending petitions for cert.

4 If the Court has no further questions.

5 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Casey.

6 The case is submitted.

7 (Whereupon, at 12:01 p.m., the case in the
8 above-entitled matter was submitted.)
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