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 OF *AMICI CURIAE* NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND NATIONAL ASSOCIATION OF FEDERAL DEFENDERS IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE* [1]

The National Association of Criminal Defense Lawyers (NACDL) is a nonprofit corporation and the only national bar association working in the interest of public and private criminal defense attorneys and their clients. Founded in 1958, NACDL's mission is to ensure justice and due process for the accused; to foster the integrity, independence, and expertise of the criminal defense profession; and to promote the proper and fair administration of justice. NACDL has more than 12,000 members nationwide—joined by 90 state, local, and international affiliate organizations with another 35,000 members—including private criminal defense lawyers, public defenders, and law professors committed to preserving fairness within America's criminal justice system. The American Bar Association recognizes NACDL as an affiliate organization and awards it full representation in the ABA's House of Delegates.

The National Association of Federal Defenders (NAFD) was formed in 1995 to enhance the representation provided under the Criminal Justice Act, 18 U.S.C. § 3006A, and the Sixth Amendment to the United States Constitution. NAFD is a nationwide, non-profit, volunteer organization whose membership includes attorneys and support staff of Federal Defender offices. One of the guiding principles of NAFD is to promote the fair administration of justice by appearing as *amicus curiae* in litigation relating to criminal law issues, particularly issues affecting indigent defendants.

In this case, NACDL and NAFD are concerned that Michigan is denying appellate counsel to indigent defendants who plead guilty or nolo contendere, requiring these defendants—most of whom are functionally illiterate—to identify and brief complicated sentencing and other errors in their first and only appeal on the merits.

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1. No counsel for a party authored this brief in whole or in part. No person or entity other than NACDL, NAFD, and their counsel made a monetary contribution to the preparation or submission of this brief. Both Petitioner and Respondent have consented to the filing of this brief, and pursuant to Rule 37.3(a), NACDL and NAFD have filed the letters of consent with the Clerk of the Court.

SUMMARY OF ARGUMENT

I. It is remarkable that over forty years after this Court's landmark decisions in *Gideon v. Wainwright* and *Douglas v. California*, a State would seek to deprive counsel to the poor at a critical stage in the criminal justice process. As Petitioner aptly has demonstrated, Michigan's system falls squarely under *Douglas*, and the deprivation of counsel to indigent defendants under Michigan Compiled Laws (MCL) § 770.3a violates both due process and equal protection. But this case transcends the constitutional principles underlying *Douglas*.

Michigan's appellate "Application" process for indigents who plead guilty constitutes a "critical stage" of criminal proceedings covered by the Sixth Amendment's right to counsel under *Gideon*. Because of uniform adherence to *Douglas*, this Court never has needed to address whether a State's post-conviction proceedings for reviewing errors, like Michigan's, constitute a "critical stage." But the Michigan Application for leave to appeal process is every bit as critical as other stages. As Petitioner's case illustrates, the Application is the first and only stage to raise and preserve errors concerning the effectiveness of trial counsel, the government's conduct during the plea process, and the propriety of the sentence, serving as a needed check to ensure pre- and post-conviction constitutional rights are fulfilled. Issues not raised in the Application are waived. Mich. Ct. R. (MCR) 7.205(D)(4). In other post-conviction proceedings where similar interests are at stake, such as sentencing, this Court has held that counsel is required under the Sixth Amendment. *Mempa v. Rhay*, 389 U.S. 128, 134-37 (1967); *Gardner v. Florida*, 430 U.S. 349, 358 (1977) (plurality opinion). This Court has noted that *Gideon*'s right to counsel in critical stages should apply "when new contexts appear presenting the same dangers that gave birth initially to the right [to counsel] itself." *United States v. Ash*, 413 U.S. 300, 311 (1973). Michigan's system is exactly that. Accordingly, even if Michigan was correct that its unprecedented new system for

indigents who plead guilty evades the dictates of *Douglas* (which it does not), the Michigan system runs afoul of the Sixth Amendment.

Beyond the Sixth Amendment, Michigan's scheme departs from the traditional practice in all states of providing counsel to indigent defendants on their first, and only, opportunity to have a lawyer cull the record, analyze the law, and identify potential errors in the defendants' convictions and sentences. The abrogation of that practice itself constitutes an independent violation of due process. *See Cooper v. Oklahoma*, 517 U.S. 348, 362 (1996). Since this Court's March 18, 1963 watershed decisions in *Gideon* and *Douglas*, no jurisdiction other than Michigan—not one—has denied an indigent defendant the assistance of counsel in an initial error-correcting appeal, regardless of whether the first appeal was by leave or as of right. MCL § 770.3a thus offends "a principle of justice that is deeply 'rooted in the traditions and conscience of our people,'" and correspondingly violates due process. *Id.* (quotation source omitted).

II. Michigan defends MCL § 770.3a on the ground that indigent defendants can adequately protect their own rights on first appeal because the State provides them transcripts and a "nontechnical and easily understood" form Application to appeal. *See* Opp. Cert. 20. That position ignores both the abilities of indigent appellants and the real world complexity of guilty plea appeals.

Indigent defendants who plead guilty are the poorest, least educated, least literate members of our society. National literacy studies show that these defendants, most of whom are incarcerated, lack the skills necessary to write a note disputing an improper charge on a credit card bill, much less meet the substantive and procedural requirements of perfecting and litigating an appeal. Moreover, while involving fewer issues than appeals after trial, appeals following guilty pleas are equally complex. Guilty plea appeals typically involve errors under the notoriously difficult Michigan Sentencing Guidelines and are

subject to unforgiving procedural requirements under the Michigan Court Rules.

Reflecting the complexity of the issues—and contrary to the myth that most appeals following guilty pleas are frivolous—the success rate of these appeals is relatively high. Indeed, an examination of a typical indigent appeal in Michigan confirms, "[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." *Evitts v. Lucey*, 469 U.S. 387, 396 (1985). No matter how many "user-friendly" forms Michigan creates or how many unskilled jailhouse lawyers help indigent defendants like Petitioner stumble along, there is no substitute for the guiding hand of counsel.

In short, Michigan's system under MCL § 770.3a is so fundamentally flawed—so contrary to the principles underlying the right to counsel—that unconstitutionality permeates the entire scheme.

ARGUMENT

I. Michigan's Deprivation of Counsel to Indigent Appellants Violates Constitutional Principles Independent from Those Underlying *Douglas*

As Petitioner has demonstrated, Michigan's deprivation of appellate counsel under MCL § 770.3a violates both due process and equal protection under the Fourteenth Amendment. *Douglas v. California*, 372 U.S. 353 (1963); *accord Evitts v. Lucey*, 469 U.S. 387 (1985); *Ross v. Moffitt*, 417 U.S. 600 (1974). Appeals following guilty pleas[2] in Michigan are not truly "discretionary," and the Constitution would mandate the appointment of counsel even if they were. The Court need go no further than *Douglas* and its progeny to strike down the Michigan system as

2. MCL § 770.3a applies to defendants who plead guilty, guilty but mentally ill, or nolo contendere. *Id.* § 770.3a(1). For convenience, this brief will refer only to "guilty pleas," though our discussion will apply to all three types of convictions covered by the statute.

unconstitutional. But putting *Douglas* aside, Michigan's scheme independently violates the Constitution.

A. Michigan's Appellate "Application" Process Is a "Critical Stage" Requiring Counsel Under *Gideon*

On March 18, 1963, this Court issued both *Gideon* and *Douglas*. *Gideon*, of course, held that the right to counsel under the Sixth Amendment is "so fundamental and essential to a fair trial, and so, to due process of law, that it is made obligatory upon the States by the Fourteenth Amendment." *Gideon*, 372 U.S. at 340 (quotation omitted). For its part, *Douglas*—relying not on the Sixth Amendment, but on due process and equal protection grounds—held that an indigent defendant must be provided counsel for a first appeal as of right. *Douglas*, 372 U.S. at 357-58.

In the four decades since, this Court further defined the parameters of *Gideon* and *Douglas*. Expanding on *Gideon*, this Court deemed the Sixth Amendment's right to counsel so fundamental that it applies not only at trial, but to "all 'critical stages' of the criminal process." *Iowa v. Tovar*, 124 S. Ct. 1379, 1387 (2004). Critical stages include "every stage of a criminal proceeding where substantial rights of a criminal accused may be affected." *Mempa v. Rhay*, 389 U.S. 128, 134 (1967); *accord Bell v. Cone*, 535 U.S. 685, 695-96 (2002) (critical stage "denote[s] a step of a criminal proceeding, such as arraignment, that held significant consequences for the accused."). They are those stages involving "trial-like confrontations," such as where a defendant would need assistance to confront either his adversary or a State's intricate procedural system. *See United States v. Ash*, 413 U.S. 300, 312 (1973). Accordingly, this Court has extended the right to counsel to steps in the criminal process that occur before and after trial and conviction, including sentencing. *See Hamilton v. Alabama*, 368 U.S. 52, 53-54 (1961) (arraignment is a critical stage); *United States v. Wade*, 388 U.S. 218, 236-37 (1967) (post-indictment line-up is a critical stage); *Mempa*, 389 U.S. at 137 (sentencing is a critical stage); *Gardner*

v. Florida, 430 U.S. 349, 358 (1977) (sentencing is a critical stage) (plurality opinion).

Until now, every jurisdiction in the United States has required the appointment of counsel on first appeal under *Douglas*. Thus, this Court never has needed to address whether a post-sentencing proceeding like Michigan's appellate "Application"[3] process for plea-based convictions is a "critical stage" covered by *Gideon*. Michigan's system, however, easily meets the requirements of a critical stage.

First, Michigan's Application process for those who plead guilty is a step "where substantial rights of a criminal accused may be affected." *Mempa*, 389 U.S. at 134. Unlike truly "discretionary" second-tier appeals or collateral proceedings,[4] Michigan's appellate Application process is the first and only procedure aimed at correcting error. It provides a vital check on the government's conduct during pleas and presents one of the few opportunities to prevent other constitutional violations that typically are identified and raised only post-conviction, such as errors in sentencing.

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3. Michigan has fractured guilty-plea appeals into two steps, the first being an Application for leave to appeal, *see* MCR 7.205(B), and if that is granted, the second being an appeal. MCR 7.205(D)(3).

4. As this Court distinguished in *Ross*:

> We are fortified in this conclusion by our understanding of the function served by discretionary review in the North Carolina Supreme Court. The critical issue in that court, as we perceive it, is not whether there has been "a correct adjudication of guilt" in every individual case, but rather whether "the subject matter of the appeal has significant public interest". . . . The Supreme Court may deny certiorari even though it believes that the decision of the Court of Appeals was incorrect.

417 U.S. at 615 (citations omitted); *accord Brecht v. Abrahamson*, 507 U.S. 619, 633 (1993) ("When the process of direct review . . . comes to an end, a presumption of finality and legality attaches to the conviction and sentence. The role of federal habeas proceedings, while important in assuring that constitutional rights are observed, is secondary and limited. . . .").

Further, the risk of waiving the right to challenge these violations alone renders Michigan's procedure a critical stage. In *Mempa*, for instance, the Court deemed sentencing a critical stage because the absence of counsel could result in the waiver of appellate rights. *See id.* at 135 ("Even more important in a case such as this is the fact that certain legal rights may be lost if not exercised at this stage."); *see also Hamilton*, 368 U.S. at 54-55 (arraignment is critical stage because rights may be waived without counsel). In Michigan, the indigent defendant's failure to raise an error in his *pro se* Application constitutes waiver, even if the error involves the deprivation of constitutional rights. Indeed, such risks already have come to fruition under Michigan's system. In *People v. Plaza*, 617 N.W.2d 687 (Mich. 2000), the Michigan Supreme Court summarily denied review of a case involving the State's purported failure to provide an indigent defendant a transcript to assist his *pro se* appeal. In her concurrence, Justice Corrigan based the denial on the ground that the issue had been waived because the indigent defendant failed to raise the error in his *pro se* Application. *Id.* at 687 (Corrigan, J., concurring). In her dissent, however, Justice Kelly cogently recognized that the case illustrated a fundamental flaw in Michigan's system:

> The concurrence points out that defendant failed to raise the issue in his application to the Court of Appeals. Defendant, untrained in law, may have been unaware of the consequences of failing to raise it. If so, this case illustrates why indigent defendants need the assistance of appointed appellate counsel, even when they have pleaded guilty. There is a distinct possibility that defendant was wrongly sentenced in this case. He is being denied a reasonable hearing because, lacking legal counsel, he did not follow the procedural requirements of appellate review.

Id. at 688 (Kelly, J., dissenting). As *Plaza* demonstrates, Michigan's process presents the very real risk that substantial

constitutional rights—many of which could not have been protected by trial counsel—can be lost in the *pro se* Application process.

Second, Michigan's process is a "critical stage" because it requires a defendant to confront a State's intricate procedural system. *See Ash*, 413 U.S. at 311-12. Michigan's procedures for guilty plea appeals are no less formidable than the procedures for appeals following trial. As discussed in detail below, an appeal following a guilty plea in Michigan follows the customary process for any appeal. To seek leave to appeal, the indigent must timely invoke the appellate process; follow other procedural requirements to perfect the appeal; read, understand, and analyze the record; identify legal issues cognizable on appeal; locate, read, and understand case decisions, statutes, rules, and other authorities; and support contentions with legal authorities and specific references to the record. Just because the appeal follows a guilty plea, "[t]he need for forceful advocacy does not come to an abrupt halt as the legal proceeding moves from the trial to the appellate stage. Both stages ... require careful advocacy to ensure that rights are not forgone and that substantial legal and factual arguments are not inadvertently passed over." *Penson v. Ohio*, 488 U.S. 75, 85 (1988).

To be sure, this Court has not yet recognized a constitutional right to appeal. And in other contexts, the Court has stated that the right to counsel on appeal is generally covered by the Fourteenth, as opposed to the Sixth, Amendment. *See Martinez v. Court of Appeal of Cal.*, 528 U.S. 152, 160 (2000). As a threshold matter, however, under the critical stage analysis, the right to counsel applies based upon the significance of the proceeding, not whether the accused has a right to the proceeding in the first instance.

So, for example, an accused has a right to counsel at a preliminary hearing, even if he has no right to a preliminary hearing;[5] during a lineup, even if he has no right to appear in a lineup;[6] during a guilty or no contest plea proceeding, even if he has no right to plead guilty or no contest.[7]

As for the constitutional underpinnings of the doctrine, because of uniform adherence to *Douglas* in every state, this Court never has needed to directly apply the "critical stage" analysis where appellate rights are involved. Where the *Gideon* and *Douglas* lines of cases have intersected, however, this Court has recognized that the Sixth Amendment is implicated post-conviction. Specifically, in *Evitts v. Lucey*, this Court determined that the right to effective assistance of counsel under the Sixth Amendment—traditionally applied only to "critical stages"—applies to a defendant's first appeal of right. 469 U.S. at 396. Later in *Penson v. Ohio*, this Court applied the critical stage "presumption of prejudice" standard for ineffective assistance of counsel to defendants denied counsel on a first appeal:

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5. *Coleman v. Alabama*, 399 U.S. 1, 8-9 (1970).

6. *See Wade*, 388 U.S. at 237-38 (1967) ("[T]here can be little doubt that for Wade the postindictment lineup was a critical stage of the prosecution at which he was as much entitled to such aid (of counsel) as at the trial itself.") (internal quotation marks and alterations omitted); *United States v. Poe*, 462 F.2d 195, 198 (5th Cir. 1972) ("There is no right to a lineup.").

7. *Iowa*, 124 S. Ct. at 1383 ("The entry of a guilty plea, whether to a misdemeanor or a felony charge, ranks as a 'critical stage' at which the right to counsel adheres.") (citations omitted); *Santobello v. New York*, 404 U.S. 257, 262 (1971) ("A court may reject a plea in exercise of sound judicial discretion.").

> [T]he presumption that counsel's assistance is essential requires us to conclude that a trial is unfair if the accused is denied counsel at a critical stage of his trial. . . . Because the fundamental importance of the assistance of counsel does not cease as the prosecutorial process moves from the trial to the appellate stage, the presumption of prejudice must extend as well to the denial of counsel on appeal.

488 U.S. at 88 (citations omitted); *see also Roe v. Flores-Ortega*, 528 U.S. 470, 483 (2000) ("The presumption that counsel's assistance is essential requires us to conclude that a trial is unfair if the accused is denied counsel at a critical stage. The same is true on appeal.") (citations omitted); *cf. Arsenault v. Massachusetts*, 393 U.S. 5, 6 (1968) (per curiam) ("The right to counsel at the trial, on appeal, and at the other 'critical' stages of the criminal proceedings have all been made retroactive, since the 'denial of the right must almost invariably deny a fair trial.'") (citations omitted).

Regardless, nothing prevents the application of *Gideon* and the Sixth Amendment here. This Court repeatedly has recognized that the "critical stage" doctrine warrants application "when new contexts appear presenting the same dangers that gave birth to the right [to counsel] itself." *Ash*, 413 U.S. at 311; *see also Wade*, 388 U.S. at 224-26. Michigan's system of denying appointment of counsel in the first and only proceeding aimed at correcting errors is one of those new contexts. Thus, even if Michigan's unprecedented denial of appellate counsel for indigent defendants who plead guilty can be said to evade the dictates of *Douglas* (which it does not), the deprivation of counsel runs afoul of the Constitution.

B. Michigan's Scheme Unconstitutionally Abrogates a Traditional, Firmly Rooted Practice of Providing Indigents Counsel in Their First Appeal on the Merits

Citing *Smith v. Robbins*, 528 U.S. 259 (2000), Michigan argues that the denial of counsel to those who plead guilty is permissible because Michigan is free "to experiment with procedures for handling criminal appeals." Opp. Cert. 26. In *Smith*, the Court recognized that states are free to adopt different procedures concerning appointed counsel's ability to decline to pursue a frivolous appeal so long as the procedures adequately safeguard a defendant's right to counsel. 528 U.S. at 265. The Court, however, distinguished between procedures that protect the *effectiveness* of counsel versus those that deny counsel in the first instance. *Id.* at 286. Michigan's system does the latter, denying counsel outright.

In any event, even when viewed purely as a procedural issue, the "procedure" under MCL § 770.3a—which abrogates a traditional practice employed in every state—violates due process. In recent years, this Court has recognized that departures from traditional procedures independently may violate due process if the change "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Cooper v. Oklahoma*, 517 U.S. 348, 367 (1996) (citation omitted); *Medina v. California*, 505 U.S. 437, 445 (1992) (citations omitted). In *Cooper*, for instance, Oklahoma adopted a procedure that presumed a criminal defendant to be competent unless the defendant proved incompetence by clear and convincing evidence. 517 U.S. at 350. Because of a longstanding and "near-uniform application" of a preponderance of the evidence standard by federal and state courts, this Court determined that Oklahoma's departure violated due process. *Id.* at 361-62.

To determine whether a state's procedure offends a deeply rooted fundamental principle of justice, this Court has compared the practice to those employed at common law, *Medina*, 505 U.S. at 445-46, and to contemporary practice, *see Cooper*, 517 U.S. at 360 ("Contemporary practice demonstrates that the vast majority of jurisdictions remain persuaded that the heightened standard of proof imposed on the accused in Oklahoma is not necessary to vindicate the State's interest. . . ."). Here, the relevant starting point is March 18, 1963, the day this Court decided *Gideon* and *Douglas*. Such decisions are counted among the few "watershed rules of criminal procedure" that "are implicit in the concept of ordered liberty" so as to have retroactive effect. *Beard v. Banks*, 124 S. Ct. 2504, 2513-14 (2004) (right to counsel under *Gideon* retroactive under *Teague* exception because it altered "understanding of the bedrock procedural elements"); *accord Adams v. Illinois*, 405 U.S. 278, 280-81 (1972) (plurality) (recognizing the retroactive effect of the right to counsel rules under both *Gideon* and *Douglas*).[8]

Since *Douglas* was decided, no other jurisdiction—not one—has deprived an indigent defendant the appointment of counsel on a first appeal on the merits, even when the state permits the first appeal only by leave. *See Bundy v. Wilson*, 815 F.2d 125, 136-42 (1st Cir. 1987) (describing appellate systems in all U.S. jurisdictions); Pet. Br. 24-25 (noting that only two states do not allow a first appeal of right and all require appointment of counsel for the first appeal). Over thirty years ago, a Michigan federal court explicitly rejected the notion that a so-called "discretionary" first appeal permits the deprivation of counsel. *Mata v.*

8. *See also Williams v. United States*, 401 U.S. 646, 653 n.6 (1971) (plurality) (same); *Smith v. Crouse*, 378 U.S. 584, 584 (1964) (per curiam) (summarily reversing state supreme court judgment that *Douglas* rule was not retroactively applicable); *Daegele v. Kansas*, 375 U.S. 1, 1 (1963) (per curiam) (similar).

Egeler, 383 F. Supp. 1091, 1093-94 (E.D. Mich. 1974). Most notable, in *Ross v. Moffitt*, this Court held that due process did not require appointment of counsel in second-tier, truly "discretionary" direct appeals based in part on the assumption that in all first-tier appeals an indigent's "claims had 'once been presented by a lawyer and passed upon by an appellate court.'" 417 U.S. at 615.

Courts, scholars, counsel, and defendants likewise assume that from the initiation of charges through the first appeal "lawyers in criminal courts are necessities, not luxuries." *Gideon*, 372 U.S. at 344. Accordingly, independent of the due process and equal protection principles in *Douglas*, or the Sixth Amendment protections of *Gideon*, Michigan's scheme violates the Constitution.

II. Indigent Defendants Lack the Education and Literacy Skills to Represent Themselves Meaningfully on First Appeal

Michigan defends MCL § 770.3a on the ground that indigent defendants can adequately protect their rights on first appeal because the State provides them transcripts and a "nontechnical and easily understood" form Application to appeal. *See* Opp. Cert. 20. Michigan ignores the capabilities of indigent appellants, downplays the complexity of appeals following guilty pleas, and minimizes the vital interests at stake.

A. Profile of an Indigent Appellant: An Incarcerated High School Dropout Lacking Even Basic Literacy Skills

This Court long has recognized the inability of laymen to represent themselves effectively at critical stages in the criminal justice process, including a defendant's first appeal as of right. *E.g.*, *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932) ("The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by

counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law."); *Gideon*, 372 U.S. at 344-45 (quoting same); *accord Johnson v. Zerbst*, 304 U.S. 458, 462-63 (1938) (noting "a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself"); *Argersinger v. Hamlin*, 407 U.S. 25, 32 n.3 (1972) ("That which is simple, orderly and necessary to the lawyer—to the untrained layman—may appear intricate, complex, and mysterious.") (citation omitted); *Evitts*, 469 U.S. at 393 ("[T]he services of a lawyer will for virtually every layman be necessary to present an appeal in a form suitable for appellate consideration on the merits.") (citation omitted). Michigan's statute, however, does not target the average layperson. It denies counsel to indigent defendants who plead guilty. As a group, these individuals are the poorest, least educated, and least literate members of our society.

According to Justice Department statistics, about 80% of state felony defendants use court-appointed lawyers. *See* Caroline Wolf Harlow, U.S. Dep't of Justice, *Defense Counsel in Criminal Cases* 1, 5 (2000), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/dccc.pdf (analyzing data on felony defendants in state courts in 75 largest counties). The typical indigent defendant—like Petitioner Halbert—pleads guilty or nolo contendere and is incarcerated. *See id.* at 6, tbls.10-11 (71% of indigent defendants plead guilty and 71.3% of convicted indigent defendants are incarcerated); *accord Michigan Supreme Court 2003 Annual Report, Circuit Court Statistical Supplement* 3, *available at* http://www.courts.michigan.gov/scao/resources/publications/statistics/2003/circuitcaseload report2003.pdf (last visited Feb. 16, 2005) (52,913 felony criminal cases disposed of by verdict or by plea in 2003; 49,833 were by guilty plea).

The incarcerated indigent, like the rest of the inmate population, is more likely to be young, male, and a member

of a minority group. *See* Bureau of Justice Statistics, U.S. Dep't of Justice, *Additional Corr. Facts at a Glance, at* http://www.ojp.usdoj.gov/bjs/gcorpop.htm (last revised May 28, 2004); *accord* Mich. Dep't of Corr., *2002 Annual Report* 21, *available at* http://www.state.mi.us/mdoc/jobs/pdfs/2002Annual Report2.pdf (last visited Feb. 16, 2005) (average age of Michigan state male prisoner in 2002 was 35 years old; 57.7% of prison population were members of minority groups). Odds are, like 68% of the prison population, he is a high school dropout or received no high school education at all. *See* Caroline Wolf Harlow, U.S. Dep't of Justice, *Educ. & Corr. Populations* 1 (2003), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/ecp.pdf.[9]

Further, there is an extraordinarily high probability that he is functionally illiterate. *See generally* U.S. Dep't of Educ., *Literacy Behind Prison Walls* (1994), *available at* http://nces.ed.gov/pubs94/94102.pdf [hereinafter Literacy Report];[10] *accord Kowalski v. Tesmer*, 125 S. Ct. 564, 574

9. This report analyzed data showing that 68% of inmates in state prisons have not completed high school, compared to 18% of the general population. *Educ. & Corr. Populations, supra*, at 1. The report also found that 14.2% of state inmates had an eighth-grade education or less. *Id.* at 2, tbl.1. While comparable data is not generally available concerning Michigan inmates, available statistics reflect that most of the participants in Michigan correctional educational services are enrolled in programs that teach Adult Basic Education (0 to 8th grade). *See* Mich. Dep't of Corr., *2002 Statistical Report* F-9-F-11, *available at* http://www.michigan.gov/documents/2002Stat_114829_7.pdf (last visited Feb. 16, 2005). Conversely, not one inmate enrolled in the prison education program in 2002 was receiving college level training. *Id.*

10. The Literacy Report, by the National Center for Education Statistics, determined that 7 out of 10 inmates are functionally illiterate. *See* Literacy Report at xviii, 10, 17. Specifically, relying on data from the National Literacy Survey, the report evaluated the

(Cont'd)

(2004) (Ginsburg, J., dissenting) (discussing Literacy Report). This means that while the indigent defendant may have some minimal reading and writing abilities, he cannot perform a wide range of routine tasks. According to the leading literacy study, for instance, he likely lacks the ability to:

- enter information on an application for a social security card, Literacy Report at 10, 17;
- use a bus schedule, *id.* at 10, 17;
- write a letter explaining an error on a credit card bill, *id.* at 10, 17;
- determine the difference in price between two tickets, *id.* at 10, 17; and
- identify information in a bar graph.

Id. at 10, 17.

Beyond education and literacy, the indigent defendant is more likely to be hindered by mental health problems. Nationwide studies show that about 16% of all state inmates are identified as mentally ill and one in ten receives psychotropic medication. Allen J. Beck & Laura M. Maruschak, U.S. Dep't of Justice, *Mental Health Treatment in State Prisons, 2000* 3-4 (July 2001), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/mhtsp00.pdf. According to

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(Cont'd)

abilities of the nation's inmate population in three areas of literacy: prose, document, and quantitative literacy. *Id.* at 15-16. Participants were rated on a scale of 1 to 5 on their capabilities within each of these three categories. *Id.* at 9 & fig.1. The study showed that approximately 70% of inmates fell into the two lowest levels (Levels 1 and 2) for each literacy category. *Id.* at 17. Approximately one-third of inmates, for instance, scored at only Level 1 in all categories. *Id.* at 20. The average proficiency level for all inmates was Level 2, the second-to-bottom level for each literacy category. *Id.* at 19, tbl.2.3. Conversely, fewer than 1% of inmates performed at the top of the literacy scale. *Id.* at 19-20.

the Michigan Department of Corrections, 5.9% of the total prison population were being treated for serious mental illness in 2002. Michigan Dep't of Corrections, *Prisoner Mental Health Servs., available at* http://www.michigan.gov/corrections/0,1607,7-119-9741_9744—,00.html (last visited Feb. 17, 2005).

In many ways, the typical indigent appellant is the picture of Petitioner Antonio Halbert: a poor, special education student with learning disabilities and mental impairments. *See* JA 61-62. It is such individuals who Michigan claims can represent themselves meaningfully on their first and only appeal on the merits following their pleas. That position, particularly when considered in light of Michigan's complex sentencing laws and appellate procedures, defies reality.

B. Portrait of an Appeal Following a Guilty Plea: Complicated Errors and Procedural Pitfalls

Contrary to the myth that appeals following guilty pleas are frivolous (*see* Opp. Cert. 26), the success rate of these appeals is relatively high. *See* Mara Matuszak, Note, *Limiting Michigan's Guilty and Nolo Contendere Plea Appeals*, 73 U. Det. Mercy L. Rev. 431, 440-41, 443 (1996); *see also* Robert K. Calhoun, *Waiver of the Right to Appeal*, 23 Hastings Const. L.Q. 127, 190-91 (1995) (discussing success rates of criminal appeals and 1992-93 study of two appellate courts which found that 24% of appeals after pleas received some form of relief). By some accounts, anywhere from 12% to 47% of Michigan appeals following guilty pleas result in some form of relief. Matuszak, *supra*, at 443 (discussing 1994 report that set forth studies by the Michigan State Appellate Defenders Office and the Michigan Appellate Assigned Counsel System of appeals taken before MCL § 770.3a took effect).

It also is untrue that these appeals are simple. Appeals following guilty pleas involve complex and vital issues and protect both the individual appellants and the system at large.

As recent events make clear, sentencing issues are common on appeal. *See generally Blakely v. Washington*, 124 S. Ct. 2531 (2004); *see also United States v. Booker*, 125 S. Ct. 738 (2005); National Center for State Courts, *Understanding Reversible Error in Criminal Appeals* 18-19 (1989) (study of appeals in five state appellate courts finding high rate of sentencing issues on appeal);[11] Matuszak, *supra*, at 438-39 (discussing report finding that the majority of appeals following guilty pleas in Michigan involve sentencing issues). Sentencing guidelines, like Michigan's, "are often so bewilderingly complex as to virtually guarantee appellate issues in a high percentage of sentencing decisions." Calhoun, *supra*, at 184. Moreover, unlike most other states, Michigan requires a criminal defendant to raise complex issues such as ineffective assistance of counsel as part of the first, direct appeal.[12]

Thus, an effective system for first appeals provides a vital check on criminal justice proceedings, particularly the integrity of the plea and sentencing process. Michigan's scheme leaves this safeguard largely in the hands of unrepresented indigents on the premise that they can fend

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11. According to the National Center for State Courts's study:

> Sentencing issues are raised in one-quarter of the appeals, and it appears that sentencing issues are not simply "add-on" issues to appeals that would otherwise have been filed; a great number of appeals are filed raising only sentencing issues. In addition, sentencing issues have a high error rate. In fact, when sentencing is raised, the courts find error 25 percent of the time.

National Center for State Courts, *supra*, at 18-19. Similarly, one survey found that 65% of federal criminal appeals in 1994-95 involved sentencing issues. *See* Kevin R. Reitz, *Sentencing Guideline Systems and Sentence Appeals: A Comparison of Federal and State Experiences*, 91 Nw. U. L. Rev. 1441, 1491 (1997).

12. *See generally People v Ginther*, 212 N.W.2d 922 (Mich. 1973).

for themselves. A brief review of what that means, however, shatters this notion.

1. Finding and Arguing a Point of Error

The indigent defendant who pleads guilty has only twenty-one days to file a timely "Application for Leave to Appeal," which identifies and argues all points of error. MCR 7.205(A). Issues not raised by the indigent defendant are waived. MCR 7.205(D)(4). On his own, therefore, the indigent defendant quickly will have to analyze an array of potential errors, including: What issues were lost as the result of the plea?[13] Did the government explicitly or implicitly violate the plea agreement?[14] Did the judge meet all statutory and procedural requirements to ensure the plea was voluntary?[15] Were there any scoring or other errors under the Michigan Sentencing Guidelines?[16] Did the trial court rely on inaccurate information in sentencing?[17] Did the State fulfill its obligations in providing a transcript or other

13. *See, e.g., Guilty Pleas*, 91 Geo. L.J. 362, 372-79 (2003) (reviewing rights retained and lost as result of guilty plea); *see also People v. Bulger*, 614 N.W.2d 103, 133-34 (Mich. 2000) (Cavanagh, J., dissenting) (discussing errors that survive guilty plea in Michigan).

14. *See, e.g., People v. Nixten*, 454 N.W.2d 160, 161 (Mich. Ct. App. 1990) (finding error where government explicitly failed to fulfill agreed sentence recommendation); *United States v. Gonczy*, 357 F.3d 50, 54 (1st Cir. 2004) (finding error where government implicitly failed to fulfill agreed sentence recommendation by making statements undercutting recommended sentence).

15. *See* MCR 6.302(B) (providing information court must give defendant who pleads guilty); MCR 6.425(E) (providing information court must give defendant at sentencing).

16. *See, e.g., People v. Knolton*, No. 237796, 2003 WL 1343001, at *4 n.28 (Mich. Ct. App. Mar. 11, 2003) (remanding for resentencing for guidelines error).

17. *See, e.g., People v. Baker*, 327 N.W.2d 403, 409 (Mich. Ct. App. 1982) (remanding for reconsideration of sentence where trial court may have relied on inaccurate information).

materials required by law?[18] And did counsel provide effective assistance in the plea and sentencing process?[19] This task must be accomplished in less than a month by an individual who typically cannot "[l]ocate two features of information in [a] sports article." Literacy Report, *supra*, at 10 (identifying abilities of individuals in prose literacy Level 2, the average proficiency level for inmates).

Simply determining whether a sentencing error exists would give most lawyers pause. To identify such an error, an indigent defendant would have to wander alone[20] through Michigan's comprehensive statutory scheme, which includes

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18. *See People v. Plaza*, 617 N.W.2d 687, 688 (Mich. 2000) (Kelly, J., dissenting) (noting that court should have remanded because indigent was denied transcript); *see id.* at 687 (Corrigan, J., concurring) (noting that remand unnecessary because indigent failed to raise issue in *pro se* application for appeal).

19. *See, e.g.*, *Tollett v. Henderson*, 411 U.S. 258, 266-67 (1973) (plea does not foreclose ineffective assistance of counsel claims).

20. While MCL § 770.3a provides an indigent defendant with appellate counsel when a sentence exceeds the guideline range, it does not require counsel for other errors, such as an "error in scoring the sentencing guidelines or inaccurate information relied upon in determining the defendant's sentence." MCL § 769.34(10); *see also id.* § 770.3a(2)(b) (requiring counsel where sentence exceeds guidelines range); *id.* § 770.3a(3) (permitting but not requiring appointment of counsel for some sentencing errors). If the sentence exceeds the guidelines range, the court must advise the defendant that he is entitled to court appointed counsel. MCR 6.425(E)(2)(b)(i). The court also must state the reasons for the departure on the record, MCL § 769.34(3), and advise the defendant orally and in writing that he may appeal the sentence on the basis of the departure. *See* MCR 6.425(E)(4). That process assumes, however, that the court itself is aware that the sentence exceeded the guidelines, which is not always the case given the complexity of the system. *See Knolton*, 2003 WL 1343001, at *4 n.28 (remanding for resentencing when trial court failed to realize that sentence was outside guidelines range and thus failed to follow procedures for guidelines departures).

nearly fifty provisions identifying Offense Variables, MCL §§ 777.31 to 777.49a, Prior Record Variables, MCL §§ 777.50 to 777.57, and multiple sentencing grids, MCL §§ 777.61-777.69. He also would have to ensure he is using the guidelines in effect at the time of his offense. *See* MCL § 769.34(2). This task will not be easy given the frequent changes to Michigan's sentencing laws. *See* Sheila Robertson Deming, *Michigan's Sentencing Guidelines*, 79 Mich. Bar J. Online 6 (2000) (noting legislative amendments to guidelines in ten different 1999 public acts with five different effective dates), *available at* http://www.michbar.org/journal/article.cfm?articleID=92&volumeID =8&viewType=archive; *see also People v. Babcock*, 666 N.W.2d 231, 235-37 (Mich. 2003) (providing background of Michigan's replacement of judicial sentencing guidelines with statutory guidelines).

To help tackle the difficult statutory scheme, the indigent defendant may turn to the State Court Administrative Office's "Guidelines Manual." *See* Mich. Sentencing Guidelines Manual (2005), *available at* http://courts.michigan.gov/mji/resources/sentencing-guidelines/sg.htm. That the "user-friendly" guide is over one hundred seventy pages long, contains seven pages of instructions, four pages of definitions, and an array of grids and offense charts, reflects the daunting task facing a lawyer reviewing the propriety of a sentence, let alone someone who typically cannot understand a bar graph or solve basic math problems. *See* Literacy Report, *supra*, at 10 (identifying abilities of individuals in document literacy Levels 2 and 3 and quantitative literacy Level 3, levels at or above the average inmate). Petitioner's improper sentence reflects that even those versed in the guidelines, including probation officials, counsel, and trial judges, are prone to error. *See* Pet. Br. 35-36 (discussing errors in Petitioner's sentence under the guidelines).

After making his way through the Manual, the indigent defendant would have to research judicial interpretations of the guidelines. In the last few years, the Michigan Supreme Court had to clarify "unfamiliar or confusing" guideline requirements, *People v. Stauffer*, 640 N.W.2d 869, 871 (Mich. 2002), and even included a twelve paragraph appendix to one of its decisions to aid practitioners on Michigan's intricate sentencing procedures. *Babcock*, 666 N.W.2d at 244-45. Though the Michigan Supreme Court summarily found in dicta that the State's guidelines are unaffected by *Blakely*, the court is somewhat divided on the issue,[21] and has yet to fully address *Blakely* or the implications of *Booker*. Surely, an indigent defendant cannot seriously be expected to develop *Blakely* and *Booker*-related arguments given the complexity of the issues.

Assuming, however, that the indigent defendant could in fact identify an error in sentencing—to say nothing of the many other potential errors hidden from the untrained eye[22]—he would then need to decide *whether* to appeal. For instance,

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21. In *People v. Claypool*, 684 N.W.2d 278 (Mich. 2004), the Michigan Supreme Court concluded in a footnote that "the Michigan system is unaffected by the holding in *Blakely*. . . ." *Id.* at 286 n.14. The statement was in response to Chief Justice Corrigan's opinion concurring in part and dissenting in part, which expressed concern that "the majority's sweeping language regarding judicial powers to effect departures (not limited to downward departures) will invite challenges to Michigan's scheme; it appears to conflict with principles set out in *Blakely*." *Id.* at 287 (Corrigan, C.J., concurring in part and dissenting in part). *See also id.* at 296 (Kelly, J., concurring in part and dissenting in part) ("I do not believe the Court should take a position on the application of *Blakely v. Washington* to Michigan's sentencing scheme. The issue was neither raised nor briefed in this case.").

22. *See Bulger*, 614 N.W.2d at 134-35 (Cavanagh, J., dissenting) (providing samples of actual Michigan guilty plea appeals reflecting complex issues in addition to sentencing).

he likely will be unaware that if he succeeds in having his sentence overturned, he may be subject to longer incarceration upon resentencing. Without the advice of counsel to explain the risks, the indigent defendant likely will proceed with an appeal that may be contrary to his interests. If he does proceed on his own, he will face his next hurdle: articulating the error in writing and meeting all Michigan procedural requirements to perfect the appeal.

2. Complying with Michigan's Appellate Rules

The right to counsel on the first merits appeal is important not only to identify and present the substantive legal grounds, but also for "a different, albeit related, aspect of counsel's role, that of expert professional whose assistance is necessary in a legal system governed by complex rules and procedures for the defendant to obtain a decision at all—much less a favorable decision—on the merits of the case." *Evitts*, 469 U.S. at 394 n.6. Like most states, Michigan's appellate procedures are complex. The procedures for perfecting appeals following guilty pleas are no exception.

Under MCR 7.205, the indigent defendant's so-called "Application" for appeal must be filed within twenty-one days from entry of the judgment, MCR 7.205(A), though the court may accept an untimely filing up to one year after judgment. *See* MCR 7.205(F)(1)-(4). Any issue not raised in the Application is waived, both in state court actions,[23] and in subsequent federal habeas corpus proceedings. *See O'Sullivan v. Boerckel*, 526 U.S. 838, 848 (1999).

To meet the filing requirements, the indigent defendant must submit five copies of his Application, "stating the date and nature of the judgment or order appealed from; concisely

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23. MCR 7.205(D)(4); *Plaza*, 617 N.W.2d at 687 (Corrigan, J., concurring) (indigent's failure to raise issue in *pro se* application for appeal justified Michigan Supreme Court's denial of review of claimed erroneous deprivation of transcript).

reciting the appellant's allegations of error and the relief sought; [and] setting forth a concise argument, conforming to MCR 7.212(C). . . ." MCR 7.205(B)(1). MCR 7.212(C), in turn, sets forth the required contents of appellate briefs. Specifically, the indigent's appeal from a plea-based conviction must, using the specific format required under the rule, include a statement of jurisdiction, the standard of review, record citations, the relevant statutes or constitutional provisions, a statement of the issues, and a legal argument. MCR 7.212(C)(4)-(7).

The indigent defendant also must obtain and file multiple copies of several documents, including the judgment, docket entries, and certain transcripts, *see* MCR 7.205(B), and must either tender a $375 filing fee or submit a motion to waive fees and an affidavit of indigency. *See* MCL § 600.321(1)(a); MCR 2.002.

Unlike defendants with financial resources, most indigent defendants who plead guilty will not have a lawyer-like Application and supporting brief. Nor will they have counsel's insights regarding the issues that should be raised and the risks of not raising a particular issue. Instead, Michigan law provides defendants who plead guilty a three-page form Application created by the State Court Administrative Office. MCR 6.425(E)(2)(d); *see* JA 66-71 (Petitioner's Application).[24]

Perhaps recognizing that few unrepresented indigents will meet the twenty-one day filing deadline, the form begins with a "Statement of Delay" section for the defendant to explain why the filing is untimely. *See* JA 66. The form also requires entry of information such as "Charge Codes, MCL citation/PACC Code," JA 67, and includes a detailed instruction sheet concerning all of the documents needed to

24. The current version of the form is available at http://courts.michigan.gov/scao/courtforms/appeals/cc405.pdf (last visited Feb. 16, 2005).

accompany the filing. Although following these directions might not pose a major challenge for a college graduate, the average indigent inmate has very low "document literacy" skills, and typically cannot complete an application for a social security card or enter information on an automobile maintenance record form. Literacy Report, *supra*, at 10, 17.

Aside from these procedural formalities, the form requires the indigent defendant to set forth each of the following: the questions presented for appeal, the statement of the facts, the arguments, and the relief requested. JA 68-71. Regarding the legal argument section, the indigent defendant is advised to "state the law that supports your position and explain how the law applies to the facts of your case." JA 69. That is the extent of guidance the indigent defendant is provided on making his substantive case for appeal.[25]

The procedural hoops only become more difficult if the indigent defendant has an ineffective assistance of trial counsel claim. As a prerequisite to appellate review, the defendant typically must raise an ineffective assistance of counsel claim in a motion to withdraw his plea. *People v. Ginther*, 212 N.W.2d 922, 925 (Mich. 1973); *accord People v. Johnson*, 373 N.W.2d 263, 266 (Mich. Ct. App. 1985) (per curiam). This motion must be filed within twenty-one days of judgment. MCR 6.311(A); *see also* MCR 7.205(A). Or, the indigent defendant can take his chances that leave to

25. In this regard, the "simplicity" of the instructions can in fact be a roadmap to waiver, given some of the heightened preservation requirements for later review. *See, e.g., Howell v. Mississippi*, 125 S. Ct. 856, 859 (2005) (per curiam) (preservation of federal claim in this Court or on federal habeas corpus requires defendant to identify with specificity doctrinal basis for claim); *Baldwin v. Reese*, 124 S. Ct. 1347, 1350 (2004) (reference to "ineffective assistance" of counsel in state court filing insufficient to preserve federal ineffective assistance of counsel claim).

appeal will be granted. If it is, a defendant may file a motion to withdraw a plea within fifty-six days "after the commencement of the time for filing the defendant-appellant's brief." MCR 7.208(B)(1).

In addition to the written motion, the indigent defendant must present "a testimonial record at the trial court level . . . which evidentially supports his claim and which excludes reasonable hypotheses consistent with the view that his trial lawyer represented him adequately." *Ginther*, 212 N.W.2d at 925 (citation omitted). Typically, this burden requires an indigent defendant to seek an evidentiary hearing on the ineffective assistance claim. *Id.* Thus, the indigent defendant must file a motion for an evidentiary hearing with the trial court. *Id.*; *see also People v. Mitchell*, 560 N.W.2d 600, 612 (Mich. 1997) (noting trial counsel is "necessary witness" at ineffective assistance of counsel hearing). Failure to comply with these procedural steps can waive the ineffective assistance claim. *People v. Marji*, 447 N.W.2d 835, 839 (Mich. Ct. App. 1989) (finding defendant waived ineffective assistance of trial counsel claim by failing to move for a new trial or evidentiary hearing before the trial court); *People v. Lawson*, 335 N.W.2d 43, 44 (Mich. Ct. App. 1983) (per curiam) ("[T]his Court will not review a claim for ineffective assistance of counsel based on allegations not supported by the record where no motion for a new trial or for an evidentiary hearing or a motion for remand has been filed.") (citation omitted).

Here, for example, Petitioner filed "a handwritten motion to withdraw pleas . . . prepared by another prisoner without benefit of the trial record." JA 61. Although Petitioner managed to file this motion within the allotted twenty-one days, he did not include his ineffective assistance claim. JA 43. The court incorrectly denied his motion as "not timely." JA 43. The court likely based its decision on Petitioner's failure to demonstrate "good cause" to withdraw

his plea, which could have been satisfied had the ineffective assistance claim been presented properly.

Petitioner claims that trial counsel was ineffective in part for failing to object to the trial court's erroneous sentencing determination. Counsel's decision to object at sentencing is "typically viewed as a tactical decision." *People v. Miller*, No. 221852, 2001 WL 718585, at *2 (Mich. Ct. App. June 26, 2001) (per curiam) (reversing for new sentence based on ineffective assistance claim where trial counsel failed to object to trial court's scoring error). A decision on tactics necessitates trial counsel's testimony at a *Ginther* hearing—something wholly outside the competence of an indigent defendant (or jailhouse lawyer).

Appellate counsel thus serves an essential function—providing a professional second-look at trial counsel's performance, at the government's conduct, and at sentences that may be improperly based—hardly simple or trivial issues.

C. The "Protections" Provided Under Michigan's Scheme Are Unrealistic and No Substitute for Counsel

Michigan suggests that a poor defendant will be able to overcome the obstacles above because he "will have sufficient materials available to permit him to present his claims fairly and thus receive a meaningful appeal." Opp. Cert. 20. The flaw with this, of course, is that "[t]he right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial." *Glasser v. United States*, 315 U.S. 60, 76 (1942), *superseded on other grounds by statute as recognized in Bourjaily v. United States*, 483 U.S. 171, 181 (1987). In any event, the materials and resources available to indigent appellants in Michigan are scarcely better than no assistance at all.

Michigan stresses that indigent defendants receive free court documents and transcripts and the "nontechnical and easily understood" form Application for appeal discussed above. Opp. Cert. 20. This Court previously has recognized that such materials are no substitute for having a lawyer cull the record, identify errors, and craft an appellate brief. *See Swenson v. Bosler*, 386 U.S. 258 (1967) (per curiam). In *Swenson*, Missouri argued that no counsel was necessary to indigents on first appeal of right because the State provided the indigent defendant a free transcript and trial counsel had filed a "motion for new trial which specifically designated the issues which could be considered on direct appeal." *Id.* at 259. This Court rejected the argument, concluding that "[t]he assistance of appellate counsel in preparing and submitting a brief to the appellate court which defines the legal principles upon which the claims of error are based and which designates and interprets the relevant portions of the trial transcript" are benefits that cannot be denied to a defendant simply because he is poor. *Id.*; *see also Evitts*, 469 U.S. at 394 (citing *Swenson* for importance of preparation of brief by attorney in first appeal of right). Nor will an indigent defendant, as reflected in Petitioner's case, in most cases have the assistance of written motions. And in the few cases where motions exist, the papers likely will not adequately address appellate issues. *See Bulger*, 614 N.W.2d at 139-40 (Cavanagh, J., dissenting) (discussing why motions are inadequate substitutes for an appellate brief).

Given their limited abilities and the minimal materials available to assist, many indigent defendants will, as Petitioner did, turn to jailhouse lawyers or use briefs of other parties that circulate around the prison. That hardly provides a meaningful appeal. "It is indisputable that prison 'writ writers' . . . are sometimes a menace to prison discipline and that their petition[s] are often so unskillful as to be a burden on the courts which receive them." *Johnson v. Avery*, 393

U.S. 483, 488 (1969); *see also id.* at 499-500 (White, J. dissenting) (discussing burdens on courts and prisons from jailhouse lawyers and risks to "clients" of prisoners acting as counsel). Though the inmate who assisted Petitioner managed to identify the right to counsel issue in this appeal, that was only after the issue was well-known and fully briefed in *Kowalski*. Other errors will not be so easily identifiable, nor will briefing be so readily available to use as a guide. Indeed, the inmate who helped Petitioner omitted several meritorious claims. *See* Pet. Br. 36-37.

Even when briefs of others are available, this Court has rejected arguments that the briefs of other defendants are sufficient to protect the right to counsel. In *Penson v. Ohio*, for example, the Court rejected Ohio's argument that a defendant who received no appellate counsel was adequately protected by briefs filed by co-defendants: "One party's right to representation on appeal is not satisfied by simply relying on representation provided to another party. . . . A criminal appellant is entitled to a single-minded advocacy for which the mere possibility of a coincidence of interest with a represented codefendant is an inadequate proxy." 488 U.S. at 86-87.

Some indigent defendants, of course, may find a real lawyer willing to take their appeals *pro bono*. Despite *pro bono* work being done in record numbers throughout this country, the bar simply cannot meet the needs of indigent criminal defendants on a voluntary basis. *Cf.* Simran Bindra & Pedram Ben-Cohen, *Public Civil Defenders: A Right To Counsel for Indigent Civil Defendants*, 10 Geo. J. on Poverty L. & Pol'y 1, 6 (2003). For example, despite the fact that Maine has the "highest pro bono rate in the country amongst its lawyers, a study showed that it was impossible for the State's lawyers to volunteer enough time to meet the legal needs of its indigents." Katja Cerovsek & Kathleen Kerr, *Opening the Doors To Justice: Overcoming The Problem of*

Inadequate Representation for the Indigent, 17 Geo. J. Legal Ethics 697, 697-98 (2004) (citation omitted); *see also id.* at 697 (noting that there is "only one lawyer for every 9,000 Americans whose low income would qualify for civil legal aid"). The inability of *pro bono* to fill this gap may be even greater in the criminal context given the complexity of the law and the understandable reluctance of those untrained in this field to take on a case where they lack the experience or background to do so effectively. *Cf.* Robert J. Martin & Walter Kowalski, *"A Matter of Simple Justice": Enactment of New Jersey's Municipal Public Defender Act*, 51 Rutgers L. Rev. 637, 651-52 (1999) (discussing limitations of using *pro bono* counsel for criminal cases).

In sum, even the simplified example above confirms that "[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." *Evitts*, 469 U.S. at 396. All the more so to the poor, functionally illiterate defendants targeted by MCL § 770.3a.

CONCLUSION

The judgment of the Michigan Court of Appeals should be reversed.

Respectfully submitted,

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