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. :

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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.

C O N T E N T S

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.

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

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

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

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

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

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

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

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

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

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

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

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

individuals now before this Court in this case --

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

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

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

JUSTICE O'CONNOR: There were three named indigents.

MR. CASEY: Correct.

JUSTICE O'CONNOR: They were?

MR. CASEY: They were denied counsel.

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

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

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

MR. CASEY: Yes.

JUSTICE GINSBURG: -- with respect to the --

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

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

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

The Sixth Circuit recently issued an opinion not --

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

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

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

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

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

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

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

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

MR. CASEY: That is correct.

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

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

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

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

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

MR. CASEY: There was a petition in Bulger.

JUSTICE GINSBURG: And it was denied.

MR. CASEY: It was denied.

In -- in addition --

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

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

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

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

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

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

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

JUSTICE O'CONNOR: Yes.

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

State supreme court and the Federal court of appeals.

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

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

JUSTICE SCALIA: Do they have lawyers in those cases?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

JUSTICE SOUTER: Well, why --

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

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

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

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

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

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

MR. CASEY: That is not in --

JUSTICE STEVENS: -- on direct appeal?

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

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

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

JUSTICE STEVENS: Well, it just would seem to me

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

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

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

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

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

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

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

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

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

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

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

pending petitions for certiorari that we've mentioned.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

JUSTICE KENNEDY: Can you give me an example of

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

MR. CASEY: If -- if --

JUSTICE KENNEDY: -- such as incorrect sentencing?

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

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

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

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

categories where you a -- a right to?

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

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

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

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

used in their State court appeals.

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

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

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

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

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

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

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

MR. CASEY: Well, the --

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

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

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

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

decisions on the merits.

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

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

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

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

I'd like to reserve my remaining time.

CHIEF JUSTICE REHNQUIST: Very well, Mr. Casey.

Mr. Moran, we'll hear from you.

ORAL ARGUMENT OF DAVID A. MORAN

ON BEHALF OF THE RESPONDENTS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

JUSTICE SOUTER: Right.

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

JUSTICE SOUTER: Absolutely.

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

JUSTICE O'CONNOR: Well, which -- which indigent 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

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

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

MR. MORAN: Present and future defendants.

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

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

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

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

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

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

MR. MORAN: That's --

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

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

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

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

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

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

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

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

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

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

MR. MORAN: That's right.

JUSTICE GINSBURG: -- only the schools.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

JUSTICE SOUTER: Okay.

MR. MORAN: They routinely --

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

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

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

here for.

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

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

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

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

JUSTICE SCALIA: It's at least an argument.

JUSTICE SOUTER: It's an argument.

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

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

JUSTICE SCALIA: Who's paying them for this

lawsuit?

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

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

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

JUSTICE SOUTER: Without being paid if they lose --

MR. MORAN: -- in this litigation.

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

MR. MORAN: And --

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

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

at getting paid using this other method.

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

JUSTICE SOUTER: Why will they get more appointments?

MR. MORAN: Because --

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

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

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

MR. MORAN: Correct. Far more.

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

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

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

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

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

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

MR. MORAN: No.

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

MR. MORAN: Your --

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

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

JUSTICE BREYER: Because?

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

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

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

JUSTICE SCALIA: -- have the same result? Suppose there's a change in -- in the antitrust law and -- and the person says this change -- this change has the -- the effect of -- of denying me equal protection of the law. That's the claim that the -- that the client would have. But there's a lawyer who says, my goodness, this change will mean there are many -- many fewer antitrust suits. I can demonstrate that. That's my specialty, antitrust law. I'm going to lose a lot of business. Why wouldn't he have the right to raise the equal protection claim of the prospective client?

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

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

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

significant hindrance to filing their claims themselves.

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

MR. MORAN: But I think --

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

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

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

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

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

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

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

till those are decided?

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

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

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

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

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

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

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

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

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

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

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

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

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

JUSTICE STEVENS: That -- where they granted standing.

MR. MORAN: That's right.

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

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

CHIEF JUSTICE REHNQUIST: Well, do you think

that was just idle observation then?

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

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

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

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

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

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

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

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

MR. MORAN: Many, many.

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

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

JUSTICE KENNEDY: That's not sentencing?

MR. MORAN: That is a sentencing error.

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

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

JUSTICE KENNEDY: Okay.

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

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

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

are raised?

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

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

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

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

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

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

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

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

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

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

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

If this Court has no further questions.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Moran.

Mr. Casey, you have 3 minutes left.

REBUTTAL ARGUMENT OF THOMAS L. CASEY

ON BEHALF OF THE PETITIONERS

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

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

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

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

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

JUSTICE GINSBURG: And does that have any procedural impediments?

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

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

MR. CASEY: That the Court need not grant cert in that case because the issue is pending in this case. If -- if this case goes away, then I suspect we will agree 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

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

If the Court has no further questions.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Casey.

The case is submitted.

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