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UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

John Clifford Tesmer; Charles Carter; and Alois Schnell, on behalf of all similarly situated individuals; Arthur M. Fitzgerald; and Michael D. Vogler, *Plaintiffs-Appellees,* *v.* Jennifer M. Granholm, Attorney General, *Defendant,* Judge John F. Kowalski; Judge William A. Crane; and Judge Lynda L. Heathscott, in their official capacities, individually and as representatives of a class of similarly situated circuit court judges, *Defendants-Appellants* *(00-1824),* Judge Dennis C. Kolenda, *Appellant (00-1845).*	Nos. 00-1824/1845

Appeal from the United States District Court

for the Eastern District of Michigan at Bay City.

No. 00-10082--Victoria A. Roberts, District Judge.

Argued: December 11, 2002

Decided and Filed: June 17, 2003

Before: MARTIN, Chief Circuit Judge; BOGGS, NORRIS, SILER, BATCHELDER, DAUGHTREY, MOORE, COLE, CLAY, GILMAN, GIBBONS, and ROGERS, Circuit Judges.

COUNSEL

ARGUED: Thomas L. Casey, OFFICE OF THE ATTORNEY GENERAL, Lansing, Michigan, Judy E. Bregman, BREGMAN & WELCH, Grand Haven, Michigan, for Appellants. David A. Moran, WAYNE STATE UNIVERSITY LAW SCHOOL, Detroit, Michigan, for Appellees. **ON BRIEF:** Thomas L. Casey, OFFICE OF THE ATTORNEY GENERAL, Lansing, Michigan, Judy E. Bregman, BREGMAN & WELCH, Grand Haven, Michigan, for Appellants. David A. Moran, WAYNE STATE UNIVERSITY LAW SCHOOL, Detroit, Michigan, Mark Granzotto, Royal Oak, Michigan, for Appellees.

MARTIN, C. J., delivered the opinion of the court, in which BOGGS, DAUGHTREY, MOORE, COLE, CLAY, and GILMAN, JJ., joined. ROGERS, J. (pp. 35-47), delivered a separate opinion concurring in part and dissenting in part, in which SILER, BATCHELDER, and GIBBONS, JJ., joined. NORRIS, J. (pp. 48-56), delivered a separate dissenting opinion, in which SILER, BATCHELDER, and GIBBONS, JJ., joined.

OPINION

BOYCE F. MARTIN, JR., Chief Circuit Judge. In 1994, Michigan's voters passed an amendment to the Michigan constitution precluding criminal defendants who plead guilty, guilty but mentally ill, or nolo contendre from receiving an appeal of right. Rather, these defendants may appeal only by leave of the Michigan Court of Appeals. Several Michigan state judges began to deny appointed appellate counsel to indigent defendants who pled guilty or nolo contendre, a practice that the state legislature codified. Three indigent defendants who were denied appointed appellate counsel brought an action in the Eastern District of Michigan under 42 U.S.C. Section 1983, alleging that the practice and the statute violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution. The group of plaintiffs also included two attorneys who accept appointments in criminal proceedings. The defendants in this action were three Michigan circuit court judges who had denied the indigent plaintiffs appointed appellate counsel and the state attorney general.

After a hearing on motions, the district court found that the plaintiff attorneys had third-party standing and that the court should abstain from hearing indigent Tesmer's claims. The court further declared the challenged statute and practice unconstitutional, but issued no separate judgment or decree. After defendant Judge Lynda Heathscott and non-party Judge Dennis Kolenda refused to appoint

appellate counsel for non-party indigents, plaintiffs sought injunctive relief and class certification. The district court entered an injunction against Heathscott and Kolenda, denied certification of a class of judge-defendants, and bound all Michigan state judges to the injunction.

We dismissed an earlier appeal by defendants after their notice of appeal misidentified the March 31 opinion and order. We denied the subsequent petition for rehearing on the ground that the district court's order was not a final judgment. The defendants again appealed after issuance of the injunction, and a panel of this court heard the appeal. A majority of judges of this court elected to rehear the appeal en banc. We now AFFIRM the district court in part and REVERSE in part, holding that *Younger* abstention applies to the indigents but that the attorney-plaintiffs have third-party standing. We agree that the statute and practice are unconstitutional, but we hold that the injunction was improper with respect to Judge Kolenda and all non-party Michigan state judges.

I. BACKGROUND

In 1994, Michigan voters amended the state constitution to eliminate appeals as of right for criminal defendants who plead guilty, guilty but mentally ill or nolo contendre.(1) Mich. Const. Art I, §20. Such defendants must file petitions for appeal, and the Michigan Court of Appeals may grant leave to appeal after review of the petitions.

Several state judges began to deny appointed appellate counsel to those indigents who pled guilty. Judges John F. Kowalski, William A. Crane, and Lynda Heathscott denied appointed appellate counsel to indigent plaintiffs John C. Tesmer, Charles Carter, and Alois Schnell after these plaintiffs pled guilty in criminal proceedings.

The practice was later codified by Michigan's legislature in 2000. The statute provides that those who plead guilty generally "shall not have appellate counsel appointed for review of the defendant's conviction or sentence." Mich. Comp. Laws Ann. § 770.3(a)(1).

The statute provides exceptions to this general prohibition. The court *must* appoint counsel to aid in review of the conviction or sentence when one of four situations occurs: 1) the prosecution seeks appeal, 2) the sentence exceeds the upper end of the guidelines range, 3) the defendant's petition for appeal is granted, or 4) the defendant has entered a conditional plea. Mich. Comp. Laws. § 770.3(a)(2).

The court also has the discretion to appoint counsel if three situations all occur related to sentencing: 1) the defendant alleges that the sentence was based on improper scoring of the offense or prior record, 2) the defendant objected to the scoring or preserved the matter for appeal, and 3) the sentence was an upward departure from the upper limit of the range that the defendant alleges should have been scored. Mich. Comp. Laws Ann.§770.3(a)(3).

The effect of the statute is that most indigent defendants who plead guilty will be denied appointed counsel when applying for leave to appeal. Only very limited circumstances will require appointed counsel to help with a petition for appeal.

Together with two attorneys who accept appointments as criminal defense counsel, Arthur M. Fitzgerald and Michael D. Vogler, the indigents brought an action on March 20, 2000, against the three judges and the state attorney general in federal district court under 42 U.S.C. § 1983. The state attorney general was later found to be an improper party and is not part of this appeal. The indigents alleged that both the statute and practice of denying appointed appellate counsel after guilty pleas violated their Fourteenth Amendment rights to Due Process and Equal Protection. The attorney-plaintiffs allege that

the statute violated their rights by denying them the opportunity to represent indigents in seeking leave to appeal. The plaintiffs sought declaratory relief, as well as permanent and preliminary injunctions.

The district court on March 31, 2000, issued an order and opinion after a hearing, finding that the attorney-plaintiffs had third-party standing to represent the rights of indigents and that the indigents had standing. *Tesmer v. Granholm*, 114 F. Supp. 2d 603 (E.D. Mich. 2000). The court decided to abstain from hearing Tesmer's claim because of a pending state court action involving Tesmer. The court ultimately granted declaratory relief, ruling that the statute and practice were both unconstitutional under the Equal Protection and Due Process Clauses. The court would not impose an injunction against the judges, reasoning that Section 1983 forbids injunctive relief against judges for acts or omissions in their judicial capacity, unless they violated a declaratory decree or declaratory relief was unavailable.

The judges appealed on April 10, 2000, under a case numbered 00-1405. A panel of this court, however, dismissed the appeal on July 13. The judges had mistakenly based their appeal upon the issuance of a final decree, which we ruled was not actually a final judgment ripe for appeal.

Meanwhile, on May 9, after Judge Heathscott denied appellate counsel to a non-party indigent defendant and after non-party state Judge Kolenda had denied appointed appellate counsel in several cases, the plaintiffs moved for injunctive relief against those two judicial defendants. The district court enjoined Judges Heathscott and Kolenda from denying appointed counsel. *Tesmer v. Kowalski*, 114 F. Supp. 2d 622, 629 (E.D. Mich. 2000). Expanding this injunction, however, the district court held that the earlier ruling that the statute and practice were unconstitutional bound all Michigan state judges. Though plaintiffs had requested certification of a class of judges similarly situated to the named defendants, the district court denied certification and simply expanded the reach of its injunction.

The three named judges in the initial suit and Judge Kolenda appealed from the June 30 order. A panel of this court held that abstention barred review of any of the named indigents' claims and that the attorneys had third-party standing. It reversed the district court and held that the denial of appointed appellate counsel did not violate the United States Constitution.

We granted rehearing en banc. We agree with the district court that the attorney-plaintiffs have third-party standing but hold that none of the indigents' claims may be heard under abstention principles. We also uphold the district court in finding that denial of appointed appellate counsel following guilty pleas is unconstitutional. Finally, we hold that the district court could not enjoin Judge Kolenda or all Michigan state judges who were non-parties to the suit.

II. ANALYSIS

The judges argue that the district court should have abstained because ongoing proceedings in Michigan state courts gave the indigent plaintiffs adequate opportunity to bring their constitutional claims. They also urge us to hold that the attorney-plaintiffs did not have third-party standing.

Abstention

In *Younger v. Harris*, 401 U.S. 37 (1971), the Supreme Court advised federal courts to abstain from deciding a matter that would be properly before them but for the pendency of state criminal proceedings in the matter. *Id.* at 43-45. Such deference to state proceedings is essential to the doctrine of "Our Federalism." *Id.* at 44. In a companion case, the Court held that the rule in *Younger*, which applies to an action seeking injunctive relief, applies as well to prohibit an action seeking declaratory relief when a state criminal prosecution is pending. *Samuels v. Mackell*, 401 U.S. 66, 73 (1971).

We look at three factors to determine if *Younger* abstention is warranted: (1) whether the underlying proceedings constitute an ongoing state judicial proceeding, (2) whether the proceedings implicate important state interests, and (3) whether there is an adequate opportunity in the state proceedings to raise a constitutional challenge. *Tindall v. Wayne County Friend of the Court*, 269 F.3d 533, 538 (6th Cir. 2001); *see also Cooper v. Parrish*, 203 F.3d 937, 954 (6th Cir. 2000); *Zalman v. Armstrong*, 802 F.2d 199, 201-02 (6th Cir. 1986). We review the district court decision regarding abstention de novo. *Tindall*, 269 F.3d at 538.

First, when determining if state court proceedings involving the plaintiffs are pending, we look to see if the state court proceeding was pending at the time the federal complaint was filed. *Zalman*, 802 F.2d at 204. It remains pending until a litigant has exhausted his state appellate remedies. *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 609 (1975); *Foster v. Kassulke*, 898 F.2d 1144, 1146 (6th Cir. 1990). Finally, if state habeas corpus relief is available, a claim may be considered pending in state court for the purpose of analyzing abstention. *Foster*, 898 F.2d at 1146.

The parties agree that abstention applies only to the indigent plaintiffs and not to the attorney-plaintiffs. Tesmer pled guilty to a home invasion charge, then requested appellate counsel to assist in preparing an application for leave to appeal, a request denied on September 7, 1999. The district court abstained from adjudicating Tesmer's claim because he was a party to a pending state court action, had an adequate opportunity to raise constitutional challenges in the state court proceeding, and no extraordinary circumstances justified interference in the state court proceedings. Appellees do not challenge this decision.

Carter is also party to a proceeding in state court, but the district court found abstention inappropriate as to him because he lacked the opportunity to bring a constitutional challenge, the third factor.

Finally, the district court found that Schnell had no pending state action, as his application for leave to appeal and request for rehearing were denied. Under Michigan's procedural rules, Schnell had fifty-six days to file a delayed application for leave to appeal with the Michigan Supreme Court. The district court found that Schnell's state action was completed at the time the federal complaint was filed, so abstention was not warranted as to him.

We disagree. Our holding in *Foster* allows abstention where a litigant has abandoned pursuit of state court relief. 898 F.2d at 1146. In *Foster*, the plaintiff filed a Section 1983 complaint challenging both a Kentucky statute that limited the amount of compensation her appointed counsel could receive and the practice of not providing a trial transcript. *Id.* at 1145. When she filed her federal suit, her claims had been denied in state court. We said, however, that she could pursue claims on direct appeal and, if unsuccessful, could resort to state habeas relief. *Id.* at 1146-47. By seeking injunctive relief in a Section 1983 action, she was attempting to obtain federal review of state procedures in a criminal case before the state court could decide them fully. *Id.* Similarly, in *Huffman*, the plaintiff chose not to appeal an adverse trial outcome and filed suit in federal court. 420 U.S. at 598. The plaintiff argued that abstention should not apply because the state proceedings had ended. *Id.* at 608. The Court disagreed, stating that "a party . . . must exhaust his state appellate remedies before seeking relief in the District Court." *Id.* Schnell's failure to pursue his claim by filing a delayed application for leave to appeal in the Michigan Supreme Court or by filing a state habeas corpus action equates to a failure to exhaust state court remedies.

Thus, we conclude that each of the indigent plaintiffs had ongoing state court proceedings at the time the federal complaint in this action was filed. We turn next to the third factor, whether plaintiffs had an adequate opportunity to raise constitutional claims in state court.

A federal plaintiff arguing that he had an inadequate opportunity to raise constitutional claims in state court "has the burden to show that state procedural law barred presentation of [its] claims." *Armco, Inc. v. United Steelworkers of Am.*, 280 F.3d 669, 682 (6th Cir. 2002) (alteration in original). If the plaintiff had an opportunity to present his federal claim in state court proceedings, a federal court should not exercise jurisdiction over the claim. *Moore v. Sims*, 442 U.S. 415, 425 (1979). On the other hand, if authority clearly shows that state law barred the presentation of the constitutional claims in state court, abstention is not appropriate. *Id.* at 425-26; *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1 (1987).

We agree with the district court's finding that Tesmer had an adequate opportunity to present his federal claims in state court because he filed a "lawyerly brief" seeking a delayed application for leave to appeal. The district court found that Carter did not have an adequate opportunity because he had no attorney and no knowledge of law. We disagree, for if Tesmer could raise the claim, Carter could also present his claims. Whether he had the legal sophistication to succeed in his application for leave to appeal or needed counsel to assist does not address the abstention issues, but instead addresses the merits of the constitutional claim. Furthermore, a state supreme court case that was ongoing during this appeal constituted an example of the opportunity to raise the constitutional issues in a state proceeding. *See People v. Bulger*, 614 N.W.2d 103 (Mich. 2000), *cert. denied*, 531 U.S. 994 (2000). In that case, an indigent defendant appealed from the denial of his motion for appointed appellate counsel following a guilty plea for cocaine and marijuana possession. *Id.* at 105-06. During the pendency of *Bulger*, the statute in question here was enacted; thus, it did not apply to defendant Bulger. The Michigan Supreme Court expressly stated that it was not considering the constitutionality of the statute. *Id.* at 107. After finding no authority, either state or federal, mandating appointment of counsel following a guilty plea and finding that indigents do have meaningful access to appeals, the court remanded to the trial court so that Bulger could pursue an application for leave to appeal his convictions. *Id.* at 114-15.

Our conclusion that the district court should have abstained does not foreclose any appeal by the indigents. Once state proceedings are concluded, a litigant may choose to pursue a constitutional claim in a federal forum, and the federal court may choose to exercise jurisdiction. *See Huffman*, 420 U.S. at 606. Finally, as the district court did with respect to Tesmer, we consider whether extraordinary circumstances would allow federal jurisdiction despite the strong case for abstention. We analyze the circumstances of all three indigent plaintiffs together, however, because of the similarity of their situations.

In *Younger* the Court stated that federal interference with state proceedings may be allowed where irreparable injury is "great and immediate;" where state law flagrantly and patently violates express constitutional prohibitions; or where parties make a showing of bad faith, harassment, or unusual circumstances that require equitable relief to remedy. 401 U.S. at 46, 53-54. The district court concluded, as do we, that plaintiffs did not demonstrate any such extraordinary circumstances.

We conclude that the district court should have abstained from hearing the claims of all three indigent plaintiffs, and we reverse its decision that only Tesmer's claims warranted abstention.

Third-Party Standing

The state judges contend that the two attorney-plaintiffs do not have standing to raise the constitutional challenge to the statute because they are asserting the rights of third parties and have not suffered an injury in fact. The attorney-plaintiffs alleged in their complaint that they receive income when they accept appointments as appellate counsel for criminal defendants and that the statute will reduce the number of cases in which they would receive such appointments, thus reducing the income they receive.

The district court found that the doctrine of *jus tertii,* or third-party standing, applies to the attorney-plaintiffs. We agree.

Ordinarily a plaintiff "must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Warth v. Seldin*, 422 U.S. 490, 499 (1976). The Court, however, has allowed the rule to be disregarded when plaintiffs meet certain requirements, articulating the requirements in *Powers v. Ohio*, 499 U.S. 400 (1991). In allowing a criminal defendant to bring suit on behalf of black citizens who had been struck from a jury , the Court permitted a litigant to bring suit on behalf of a third party if 1) the litigant has stated an injury in fact, 2) the litigant has a close relation to the third party, and 3) the third party's ability to assert his own interests is hindered. *Id.* at 410-11.

The Court's analysis in *Singleton v. Wulff*, 428 U.S. 106 (1976), guides our conclusion. In *Singleton*, two physicians challenged restrictions on government funding for abortions performed on patients eligible for Medicaid. The Court found that the physicians had stated an injury when they alleged that they would receive payments from the state for performing these abortions if the relief they sought were granted. 428 U.S. at 113. A plurality explained that the second condition is met when "the enjoyment of the right is inextricably bound up with the activity the litigant wishes to pursue" and when the litigant "is fully, or very nearly, as effective a proponent of the right as the latter." *Id.* at 114-15. As to the third condition, the Court did not demand that asserting a right be impossible for a third party but that a "genuine obstacle" to assertion exist. *Id.* at 116. Then, "the third party's absence from court loses its tendency to suggest that his right is not truly at stake, or truly important to him, and the party who is in court becomes by default the right's best available proponent." *Id.*

Applying these tests to the facts before us, we agree with the district court's analysis of third-party standing. The attorney-plaintiffs, like the physicians in *Singleton*, stand to lose income if the challenged statute remains in force. This constitutes an actual injury. The relationship between indigent defendants who seek appointed appellate counsel and attorneys whose appellate representation is denied is a close one . Judge Rogers's dissent in this case questions neither the existence of actual injury nor the closeness of the relationship between indigent defendants and appellate counsel. Rather, he would deny standing to the attorney-plaintiffs based on the third prong of the *Powers* requirements, that of significant obstacles to bringing suit to enforce one's own rights.

In *Singleton*, the Court recognized that a suit brought by the women was not an impossibility; for example, the pregnant women could file suit under pseudonyms to protect privacy. 428 U.S. at 117; *see also id.* at 116 n.6 (discussing potential routes around obstacles in earlier third-party standing cases). The Court, however, reasoned that third-party standing is permissible even where a prospective litigant may be able to bring suit, because a genuine obstacle is all that is necessary satisfy the third prong of the *Powers* requirements. *Id.* at 116. Yet, the dissent seeks to stretch this third prong from a showing of a hindrance to asserting one's own rights to a requirement of impossibility, a stretch the Court disavowed in *Singleton*.

Federal courts have permitted third-party standing frequently in the context of racially suspect peremptory challenges during jury selection, identifying as obstacles the procedural burdens prospective jurors face of having no chance to be heard at their exclusion or no real ability to obtain declaratory or injunctive relief at that time, as well as the practical burdens of economic costs and small financial gain. *See e.g. Powers*, 499 U.S. at 410-11; *United States v. Ovalle*, 136 F.3d 1092, 1102 (6th Cir. 1998). Privacy and anonymity concerns have also been noted as hindrances to individuals enforcing their rights. *Singleton*, 428 U.S. at 116; *Pa. Psychiatric Soc. v. Green Spring Health Servs., Inc.*, 280 F.3d 278, 290 (3d Cir. 2002) (discussing stigma that could deter mental health patients from pursuing litigation). While stigma is an unlikely hindrance to an indigent defendant asserting his right to counsel after pleading guilty, economic and procedural burdens are obstacles for convicted indigents.

An indigent seeking appointed counsel does not have the economic means to pursue a lawsuit to enforce his rights or appeal the denial of them. As the Court has noted, almost every layperson would need the help of counsel to present an appeal. *Evitts v. Lucey*, 469 U.S. 387, 393 (1985). Indeed, in the similar state case upon which the dissent relies to show that an indigent was able to assert his rights, the indigent had appointed counsel. *Bulger*, 614 N.W.2d at 105. For reasons unstated, the Michigan Supreme Court, after electing not to assert superintending control over Bulger's appeal on the merits, granted Bulger time to move for appointed appellate counsel. *Id.* The Michigan Supreme Court ordered the trial court to appoint counsel to argue the motion for appointed appellate counsel; thus, appointed counsel for this issue represented Bulger throughout his unsuccessful attempt to obtain appointed appellate counsel. *Id.* The Michigan Supreme Court apparently recognized that an indigent would have difficulty pursuing the right to counsel as a *pro se* plaintiff. The dissent speculates that the indigents would have no difficulty obtaining a lawyer to represent them, primarily evidenced by its unsupported assumption that if the attorney-plaintiffs have the wherewithal to bring suit as parties, they ought to be just as willing to represent the indigents.

An indigent defendant also faces procedural burdens, confronting a situation in which assertion of the right to counsel would be effectively precluded by events transpiring between his plea and the first time he could pursue the matter in federal court. Following a guilty plea, a defendant could move, as Bulger did, for appointment of counsel to prepare an application for leave to appeal. *See* 614 N.W.2d at 105. The defendant would lose in this proceeding, for Michigan will be bound by its precedent. The indigent would be unable to assert his right to appointed counsel in federal court because of, as the dissent correctly notes, abstention doctrines. Upon reaching the conclusion of his unassisted attempts to appeal on the merits, the indigent would then be unable to bring a constitutional challenge to lack of appointed counsel in federal court that would gain him relief in the form of appointed appellate counsel. As we recently held in *Dotson v. Wilkinson*, __ F.3d. __ (2003), a prisoner could raise a Section 1983 claim to vindicate due process rights if the suit "does not *necessarily* implicate the invalidity of his continued confinement." While *Dotson* involved parole procedures, we drew upon *Heck v. Humphrey*, 512 U.S. 477, 487 (1994), for its holding that in a Section 1983 suit alleging unlawful investigation and arrest, Heck was actually testing the legality of his conviction despite seeking only damages. *Dotson*, ___ F.3d at ___ (citing *Heck*, 512 U.S. at 481-82). Many courts would find that a Section 1983 action alleging that denial of appointed appellate counsel violated rights would similarly be a test of the underlying conviction. In such a situation, the indigent would have to pursue a petition for habeas corpus, including a claim that the lack of appointed counsel prejudiced him, but only after exhausting state remedies. *See* 28 U.S.C. § 2254(b), (c). Though an indigent could pursue a petition for habeas corpus on a ground such as involuntariness of his plea and perhaps invalidate his conviction as a result, the likelihood he could ever obtain similar relief in a successful petition asserting his right to appointed appellate counsel is virtually impossible. Even respecting principles of comity and federalism, we find that an indigent defendant would likely be foreclosed from any meaningful challenge to the lack of appointed counsel to prepare an application for leave to appeal.

The Supreme Court has, on at least two occasions, held that attorneys have third-party standing to assert constitutional rights of clients when a right to representation by counsel was affected by government action. *United States v. Triplett*, 494 U.S. 715, 720-21 (1990); *Caplin & Drysdale Chartered v. United States*, 491 U.S. 617, 623- 624 n.3 (1989). In *Triplett*, the Court found third-party standing where Department of Labor regulations imposed restrictions on attorney's fees in black lung benefit cases, allowing an attorney to invoke the rights of black lung claimants because the fee restriction deprived prospective clients of the right to obtain legal representation. 494 U.S. at 720. The Court observed that it has found third-party standing when "enforcement of a restriction against the litigant prevents a third party from entering into a relationship with the litigant (typically a contractual relationship, to which relationship the third party has a legal entitlement (typically a constitutional entitlement)." *Id.* Though this restriction was against the litigant, the Court did not limit its holding to

this alignment of parties. *See id.* Here, the statute does not restrict the attorneys or the indigents, but takes away the indigents' entitlement to appointed counsel, effectively placing the restriction on the state by prohibiting it from providing counsel in certain cases.

In *Caplin & Drysdale*, the Court held that a law firm had third-party standing to challenge a criminal forfeiture statute that required its criminal client to relinquish all his assets, leaving nothing for payment of legal fees. 491 U.S. at 624 n.3. The law firm contested the constitutionality of the statute as infringing upon defendants' Sixth Amendment right to counsel of choice. *Id.* The dissent notes that the client in *Caplin & Drysdale* forfeited his property to obtain a plea agreement, and the plea-bargaining pressure to forgo the defense attorney's fee claims by relinquishing assets, according to the dissent, constitutes an obstacle of the type contemplated by *Powers*. The indigents here faced the plea-bargaining process, and part of that process is informing them of the state's prohibition on appointed appellate counsel as a consequence. If facing the choice of relinquishing assets to enter into a plea bargain or going to trial is an obstacle, then too is the similar choice of giving up appointed counsel as a result of a plea.

The dissent cites three cases in which courts refused to grant third-party standing to attorneys. In the first, *Conn v. Gabbert*, 526 U.S. 286 (1999), an attorney representing a witness in the well-known murder trial of the Menendez brothers was searched by police for a letter sent from one brother to his client. *Id.* at 288. At the same time, the witness was called to testify before the grand jury without the attorney present, because he was being searched. *Id.* at 289. The attorney brought suit under Section 1983 to enforce his own right to practice law, and further argued the timing of the search interfered with his client's right to have him available for consultation. *Id.* at 292. The Court declined to address whether his client had such a right, declaring he had no standing to enforce it; however, the Court did not discuss any of the factors required to obtain standing in making its conclusion. *Id.* at 292-93.

Illustrating its point that attorneys should not have third-party standing to challenge any statute that could affect their livelihood, the dissent refers to *Alexander v. Whitman*, 114 F.3d 1392, 1408-09 (3d Cir. 1997), for its holding that a law firm had no standing to challenge a statute forbidding wrongful death actions on behalf of stillborn fetuses. The suit arose when Alexander had a stillborn child and wished to bring a wrongful death action against the hospital and medical personnel, but was barred by the statute. *Id.* at 1396-97. Alexander brought her own challenge, in which the attorneys asserted their claims. The Third Circuit stated it was unaware of a constitutional right allowing the attorneys to sue "under the circumstances involved here" and affirmed the district court's conclusion that the mother was best suited to challenge the statute. *Id.* at 1409. In questioning the law firm's challenge to the denial of standing, the court preceded that observation by commenting that "whatever loss" the lawyers would suffer "is reduced to such insignificance (if not absurdity) by Ms. Alexander's tragic loss." *Id.* at 1410. The Third Circuit did not apply the facts of the case to the requirements articulated in Supreme Court standing precedent, appearing to dismiss the third-party claim as a meaningless extreme.

The third case is *Lambert v. Turner*, 525 F.2d 1101 (6th Cir. 1975) (per curiam), in which we rejected third-party standing for a legal services attorney to bring suit on behalf of all legal services attorneys against a state juvenile court judge for an injunction to prohibit the judge from failing to enforce rights of indigents to counsel and from retaliating against defendants represented by legal services. *Id.* at 1102. Our affirmance of the district court's decision, however, rested partly upon the fact that the parties entered into a consent injunction, thus eliminating any case or controversy between the parties. *Id.* Furthermore, the suit had named not one juvenile involved in an active case before the judge and sought to vindicate the rights of "potential juvenile clients." *Id.*

The prohibition against third-party standing would, in Judge Rogers's view, apply strongly where legal service providers wish to require procedures that increase demand for their services. The "paradigm case" he mentions, however, is a hypothetical situation the Court used to illustrate how, under

the Administrative Procedure Act, 5 U.S.C. Section 702, a party seeking judicial review of a federal agency action must establish that his injury "falls within the 'zone of interests' sought to be protected by the statutory provision whose violation forms the basis of his complaint." *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 883 (1990). In the Court's hypothetical, a legal transcription company would not be "adversely affected within the meaning" of a statute requiring an agency to conduct "on the record" hearings, because the statute was enacted to protect parties to the hearings. *Id.* The *Lujan* case involved not a constitutional right like access to counsel, but a complaint by an environmental group against the Department of the Interior and Bureau of Land Management for violations of environmental and public land management statutes in decisions to reclassify public lands or return them to public domain, thus opening the lands up to mining. *Id.* at 879. The example used happens to be a legal services provider, but bears little relation to the ultimate issue here, the ability of indigent criminal defendants to assert a constitutional right to counsel.

Inmate access to the legal system is an important right, one that has been recognized in cases enforcing the ability of prisoners to have access to law libraries and legal assistance. *See Lewis v. Casey*, 518 U.S. 343 (1996); *Wilson v. Iowa*, 636 F.2d 1166, 1167 (8th Cir. 1981) (stating that inmates acting as "jailhouse lawyers" have standing to contest official action that prevents them from assisting fellow inmates). In *Lewis*, the Court wrote: "When any inmate . . . shows that an actionable claim of [challenge to sentences or conditions of confinement] which he desired to bring has been lost or rejected, or that presentation of such a claim is currently being prevented, because this capability of filing suit has not been provided," that inmate can show the state did not furnish adequate access to law libraries or legal assistance. 518 U.S. at 356. In citing these cases, we point to the significance attached to the ability of inmates to pursue actionable claims, and reason that if pursuit of actionable claims is an important right of inmates, but a burden prevents such pursuit, then surely the burden qualifies as the type of hindrance significant enough to satisfy the third prong of the *Powers* test.

In their brief, the indigents and attorney-plaintiffs cite numerous cases to support their abstention argument in which federal district courts have rejected abstention where controlling state authority "makes submitting those same constitutional issues to a state forum futile." *W.P. v. Poritz*, 931 F. Supp. 1187, 1195 (D.N.J. 1996); *see also McKinstry v. Genessee County Circuit Judges*, 669 F. Supp. 801, 806-07 (E.D. Mich. 1987). While these district courts asserted jurisdiction by rejecting abstention, we believe the rationale behind their decision is pertinent to the third-party standing issue here. Asserting the constitutional issue here in Michigan's courts would appear to be a similarly futile exercise for the indigent, which does not decrease in difficulty once he or she exhausts state relief. We hold that significant obstacles of indigency and procedural processes challenge the indigents in contesting the statute, thus satisfying the third prong in analyzing third-party standing for the attorney-plaintiffs.

Constitutionality of the Statute

A defendant who pleads guilty in Michigan state court must now seek leave for appeal from the state court of appeals, rather than having an appeal of right, as we have in the federal system. Under most circumstances, the Michigan statute at issue operates to deny indigent defendants appointed counsel to assist in the preparation of petitions for appeal.

The United States Supreme Court has expanded the right to counsel to allow appointed appellate counsel in certain circumstances. The judge-appellants are correct in stating that the Supreme Court has never held that a constitutional right to appointed counsel exists on all first appeals. The Court has yet to address the situation the statute presents, that of a discretionary first appeal. In addressing the issue of the right to appointed appellate counsel, the Court has ruled on first appeals as of right and second, discretionary appeals, but not the discretionary first appeal at issue here. We are left to fill in this gap.