State Notes

TOPICS OF LEGISLATIVE INTEREST

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Prohibition Against Assigned Appellate Counsel Overturned
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The November/December 2004 issue of *State Notes: Topics of Legislative Interest* reported on a development in the legal challenge to Public Act 200 of 1999, a Michigan law prohibiting appointed appellate counsel for review of the conviction or sentence of a defendant who pleads guilty, guilty but mentally ill (GBMI), or nolo contendere (no contest). This prohibition applies to the appointment of counsel to assist defendants in applying for leave to appeal. (If leave to appeal is granted, or if other exceptions apply, the court is required to appoint counsel for an indigent defendant.)

The earlier article ("Assigned Appellate Counsel for Plea-Based Convictions") focused on the United States Supreme Court's 6-3 opinion in *Kowalski* v *Tesmer* (Docket No. 03-407, 12-13-04), which involved a challenge to Public Act 200 and the practice of some Michigan courts, even before Public Act 200 took effect, to refuse to appoint appellate counsel to defendants who pleaded guilty, GBMI, or no contest. (Judges in some Michigan circuits began denying appointed appellate counsel to indigents who pleaded guilty or no contest after the State's voters approved Proposal B of 1994, which amended the State Constitution to specify that an appeal by an accused who pleads guilty or no contest is by leave of the court, rather than by right.)

In *Kowalski*, the U.S. Supreme Court did not reach the issue of the Michigan statute's constitutionality because it ruled that the attorneys who brought the action lacked standing to challenge the law on behalf of indigent criminal defendants. The decision effectively reinstated the Michigan law, which had been ruled unconstitutional after a review by the full U.S. Court of Appeals for the Sixth Circuit. The earlier article indicated that the U.S. Supreme Court would have another opportunity to rule on the constitutionality of Michigan's law, however, because it had accepted for review a case in which the Michigan Court of Appeals had denied appointed appellate counsel in a plea-based conviction and the Michigan Supreme Court had denied leave to appeal.

This article will examine that case, *Halbert* v *Michigan*, in which a 6-3 majority of the U.S. Supreme Court recently overturned Michigan's prohibition against assigned appellate counsel and held that "…the Due Process and Equal Protection Clauses require the appointment of counsel for defendants, convicted on their pleas, who seek access to first-tier review in the Michigan Court of Appeals" (Docket No. 03-10198, 6-23-05).

Background

Although the U.S. Supreme Court, in *Kowalski*, did not rule on the constitutionality of the prohibition against appointed counsel for defendants who plead guilty or no contest, the Michigan Supreme Court ruled in 2002 in *People* v *Bulger* (462 Mich 495) that the denial of appointed appellate counsel was constitutional. (The *Bulger* Court did not address Public Act 200 specifically, as the case involved a court's denial of appointed counsel before Public Act 200 took effect.) Subsequent to that ruling, the Michigan Supreme Court denied leave to appeal in similar cases, including *Halbert* v *Michigan*.

Petitioner Antonio Dwayne Halbert had pleaded no contest to two counts of second-degree criminal sexual conduct. At his sentencing hearing, Halbert's attorney requested concurrent sentencing, but the court imposed consecutive sentences. The day after sentencing, Halbert attempted to withdraw his plea in a handwritten motion submitted to the trial court. The trial court informed Halbert that his proper remedy was to appeal the sentence to the Michigan Court of Appeals.

On two occasions, Halbert requested the trial court to appoint counsel to assist him in preparing an application for leave to appeal, claiming sentencing scoring errors and mental impairment due to learning disabilities that had required him to receive special education. The trial court denied those motions, citing the Michigan Supreme Court's decision in *Bulger* that a defendant who pleads guilty or no contest does not have a constitutional right to appointed appellate counsel to pursue an appeal.

Using a form supplied by the State Court Administrative Office, and acting pro se (without a lawyer), Halbert filed an application for leave to appeal based on sentencing errors and ineffective assistance of counsel and asked for remand for appointment of appellate counsel and resentencing. The Michigan Court of Appeals denied the application for lack of merit. The Michigan Supreme Court also denied Halbert's application for leave to appeal, based on its decision in *Bulger*.

Supreme Court Opinion

The U.S. Supreme Court agreed to consider whether the denial of appointed appellate counsel to indigent defendants violates the U.S. Constitution. The question before the Court was whether the *Halbert* case should be decided in line with the 1963 case of *Douglas* v *California* (372 U.S. 353) or a 1974 case, *Ross* v *Moffitt* (417 U.S. 600).

The *Douglas* Court held that, in first appeals as of right, a state must appoint appellate counsel to represent indigent defendants. The *Halbert* Court cited two considerations that were key to the *Douglas* decision: first, that such an appeal involves an adjudication of the case on its merits, and second, that a "first-tier review differs from subsequent appellate stages 'at which the claims have once been presented by [appellate counsel] and passed upon by an appellate court'".

The *Ross* Court held that the ruling in *Douglas* does not extend to the appointment of appellate counsel for an indigent who seeks a second-tier discretionary appeal to the state supreme court or review in the U.S. Supreme Court because appeals to those courts are not limited to error correction. Rather, the principal criteria for review in those courts include whether a subject matter of the appeal involves a significant public interest or legal principles of major significance, and whether a lower court's decision is in probable conflict with precedent. In addition, the *Ross* Court pointed out that a defendant seeking appeal to the state or U.S. Supreme Court already has benefited from the aid of appellate counsel in a first-tier review and would have a transcript or other record of those proceedings, an appellate brief filed by an attorney on his or her behalf, and in many cases an appeals court decision disposing of the case.

In the *Halbert* case, the State of Michigan contended that since Proposal B specified that an appeal of a plea-based conviction was by leave, and not by right, an appeal to the Michigan Court of Appeals was discretionary and, therefore, the *Ross* decision should apply to the question of whether appointed appellate counsel was required. Indeed, in *Bulger*, the Michigan Supreme Court held that "the federal constitution does not require the appointment of appellate counsel on discretionary review".

The U.S. Supreme Court was not persuaded by Michigan's argument, however, and held that *Douglas* was the controlling case. The Court cited two aspects of the Michigan appeals process that led it to this conclusion: first, that the Michigan Court of Appeals "looks to the merits of the claims made in the application", and second, that "indigent defendants pursuing first-tier review…are generally ill equipped to represent themselves".

Unlike the situation in *Ross*, the *Halbert* Court held, a first-tier appeal to the Michigan Court of Appeals seeks to correct claimed errors, rather than settle a matter of public policy or jurisprudence, and an appellant has not benefited from previous appeals motions, briefs, proceedings, and rulings. In fact, the Court opined that "the Court of Appeals' ruling on a plea-convicted defendant's claims provides the first, and likely the only, direct review the defendant's conviction and sentence will receive" and that appellants denied appointed counsel "are disarmed in their endeavor to gain first-tier review". Moreover, although the Michigan Supreme Court concluded in *Bulger* that a defendant has the benefit of the trial court transcript and ruling and the trial counsel's framing of the issues, the *Halbert* Court cited *Swenson* v *Bosler*, 386 U.S. 258 (1967), in which the U.S. Supreme Court held that "comparable materials prepared by trial counsel are no substitute for an appellate lawyer's aid". The Court also pointed out that Michigan's "procedures for seeking leave to appeal after sentencing on a plea…may intimidate the uncounseled" and concluded, "Navigating the appellate process without a lawyer's assistance is a perilous endeavor for a layperson, and well beyond the competence of individuals, like Halbert, who have little education, learning disabilities, and mental impairments."

The *Halbert* Court relied on the *Bosler* case, which held that, pursuant to *Douglas*, "assistance of appellate counsel…may well be of substantial benefit to the defendant [and] may not be denied…solely because of his indigency". The Court vacated the judgment of the Michigan Court of Appeals and remanded the *Halbert* case for further proceedings not inconsistent with its opinion.

Impact of *Halbert*

The impact that the *Halbert* decision will have on the courts and indigent appeals is speculative, but could be significant. Although courts apparently continued to appoint appellate counsel in about 90% of plea-based convictions in which the defendant requested counsel to apply for leave to appeal, appointed counsel reportedly was denied in at least 1,600 plea-based convictions since 1995 (after Proposal B was approved). Since some circuit courts have not reported their denials over that period, and some defendants may have proceeded without legal representation or with privately hired counsel, the number of cases reasonably could be expected to approach 2,000. In addition, there is no way to estimate the number of defendants convicted on a plea who chose not to request appellate

counsel because the court instructed them (wrongly, in light of *Halbert*) that they were not entitled to appointed appellate counsel.

It is unclear whether all of those past defendants now must be located and given the correct instruction, and, if so, how many of them then will choose to request counsel and proceed with an appeal. (Historically, defendants have sought appeal in about 10% to 12% of all plea-based convictions, almost always on questions of sentencing.) Prospectively, appellate counsel appointments could be expected to increase by about 250 per year, based on the 10% of cases in recent years in which counsel has been denied.

The casework necessary to process those appeals, and to research past cases in which appointment was denied and flawed instructions were given, would be the responsibility of the State Appellate Defender Office (SADO) or private attorneys appointed by circuit courts through the Michigan Appellate Assigned Counsel System (MAACS). The SADO, which is funded by the State, historically has handled about 25% of cases involving assigned appellate counsel, while the MAACS, which is funded by the court funding units (counties), historically has handled about 75% of cases involving assigned appellate counsel.

Although the *Halbert* decision may increase the number of appeals and the judiciary's workload, it also may make the courts' job easier. The U.S. Supreme Court pointed out that "….providing indigents with appellate counsel will yield applications easier to comprehend", and the Michigan Supreme Court stated in *Bulger*, "No one questions that the appointment of appellate counsel at state expense would be more efficient and helpful not only to defendants, but also to the appellate courts."