

NO COURT ASSIGNED COUNSEL FOR PLEA-BASED CONVICTIONS

**House Bill 4625 as enrolled
Public Act 200 of 1999
First Analysis (4-18-00)**

**Sponsor: Rep. Judson Gilbert II
House Committee: Criminal Law and
Corrections
Senate Committee: Judiciary**

THE APPARENT PROBLEM:

Ballot Proposal B, approved by a wide margin in the November 1994 election, amended the state constitution to limit the right to appeal convictions and sentences for people who plead guilty or nolo contendere ("no contest"). Prior to the constitutional amendment made by the ballot proposal approved by the voters, the constitution guaranteed an appeal as a matter of right from any conviction, including those cases where the defendant either admitted guilt under a guilty plea or had not contested the charges against him or her by entering a "no contest" plea. Under the 1994 constitutional amendment and subsequent implementation by state law (Public Acts 375 and 375 of 1994), a convicted person who has pled guilty or nolo contendere has a limited right to an appeal, but only by leave of the court, and not as a constitutional right. (See BACKGROUND INFORMATION.)

As the appeals court said in 1998 (in *People v. Najjar*), the enactment of Proposal B didn't change the language in the constitution regarding the right to reasonable legal assistance in appeals, but neither the constitution nor state law says anything about whether or not there is a right to court-appointed legal help in applying for permission to appeal a plea-based conviction. Consequently, the Michigan Supreme Court amended the court rule regarding the appointment of lawyers (MCR 625) on an interim basis, so that as of December 30, 1994 (7 days after the laws enacting Proposal B took effect), courts are required to "liberally grant" timely requests (that is, those made within the 42 day period specified) for appointed counsel in cases involving a conviction following a plea of guilty or no contest. However, the proper application of this court rule was not clear, and requests for court-appointed

counsel by indigent defendants seeking leave to appeal following a plea-based conviction met with inconsistent responses from trial courts across the state. Some trial courts continued to appoint counsel upon request, while others took a narrower view and apparently came close to routinely denying such requests.

The governor strongly feels that the continued automatic appointment of appellate counsel at taxpayer expense to pursue frivolous appeals is a vast waste of scarce judicial resources and thwarts the will of the overwhelming majority of Michigan citizens. Legislation has been introduced to address this issue.

THE CONTENT OF THE BILL:

The bill would add a new section to Chapter X (New Trials, Writs of Error and Bills of Exception) of the Code of Criminal Procedure to prohibit the court appointment of appellate counsel at public expense for review of a defendant's conviction or sentence where the defendant had pled guilty, guilty but mentally ill, or nolo contendere (no contest), unless the defendant were indigent and certain specified conditions applied.

Required court appointment of appellant counsel. The trial court would be *required* to appoint appellant counsel for an indigent defendant who pled guilty, guilty but mentally ill, or nolo contendere if *any* of the following conditions were met:

- (a) The prosecuting attorney sought leave to appeal;
- (b) The indigent defendant's sentence exceeded the upper limit of the minimum sentence range of the applicable sentencing guidelines;

(c) The court of appeals or the supreme court granted the indigent defendant's application for leave to appeal; or

(d) The indigent defendant sought leave to appeal a conditional plea under Michigan court rule 6.301(c)(2), which allows a defendant, with the consent of the court, to enter a "conditional" plea of no contest, guilty but mentally ill, or not guilty by reason of insanity. A conditional plea preserves for appeal a specified pretrial ruling and entitles the defendant to withdraw the plea if a specified pretrial ruling is overturned on appeal.

Permissible appointment of appellant counsel. The trial court would be *allowed* to appoint appellate counsel for an indigent defendant who pled guilty, guilty but mentally ill, or nolo contendere if *all* of the following conditions were met:

(a) The indigent defendant sought leave to appeal a sentence based on an alleged improper scoring of an offense variable or a prior record variable;

(b) The indigent defendant objected to the scoring or otherwise preserved the matter for appeal; and

(c) The sentence imposed by the court constituted an upward departure from the upper limit of the minimum sentence range that the indigent defendant alleged should have been scored.

Required waiver warning. Pleas of guilty, guilty but mentally ill, or nolo contendere must, under Michigan court rule (6.302) must be established as having been made "understandingly and voluntarily." (See BACKGROUND INFORMATION.) The bill would require the court to advise defendants of the bill's provisions before accepting such pleas. That is, at the time such a plea was being established as required under court rule, the court would have to advise the defendant that he or she would waive the right to have a publicly appointed attorney to assist either in filing an application of leave to appeal or with other postconviction remedies except as allowed under the bill's provisions. The court also would have to determine whether the defendant understood the waiver.

"Do-it-yourself" leave to appeal form. Upon sentencing, the court would be required to furnish the defendant with a form (that would be developed by the state court administrative office and that would be "nontechnical and easily understood) that the defendant

could complete and file as an application for leave to appeal.

Effective date. The bill would take effect on April 1, 2000.

MCL 777.3a

BACKGROUND INFORMATION:

1994 Proposal B limitation of criminal appeals. As the House Legislative Analysis Section analysis of 1994 Ballot Proposal B (dated 10-14-94) explains, Article I, Section 20 of the Michigan constitution guarantees the accused in every criminal prosecution an appeal as a matter of right. At the constitutional convention for the drafting of the 1963 constitution, the Committee on Declaration of Rights, Suffrage, and Election issued an official comment with its proposal to extend an appeal as a matter of right in every criminal prosecution, saying that it believed that the "guarantee of a categorical right of appeal in criminal cases . . . [was] consistent with the recent trend of opinion in the federal courts, and, in any event, [was a] sound and fair procedural practice." The committee, while expressing its desire to grant the status of a constitutional right to at least one appeal in a criminal case, also noted that it did "not intend to restrict the legislature in its power to provide by law for additional appeals."

There apparently was disagreement, however, over whether this constitutional provision guaranteed the right to appeal in cases where a defendant pleaded guilty or nolo contendere ("no contest"). In 1977, the state supreme court settled this question (in *People v. Smith*, 402 Mich 72) by holding that the constitutional language did guarantee "an appeal as a matter of right from a plea-based conviction." Many people, however, objected to allowing such appeals for a number of reasons (see the House Legislative Analysis Section analysis). In April 1992, the governor called for the abolishment of "wasteful 'guilty plea' appeals" as one of his proposals to combat crime, and a State Bar of Michigan Task Force on the Appellate Courts recommended restrictions on the right to appeal from guilty pleas as a means of alleviating the large backlog of cases in the court of appeals. However, the state bar recommended limiting the right to appeal only in those cases where the court informed the defendant, before his or her guilty plea, of the exact sentence to be imposed (and where that sentence actually was imposed). In cases where coercion, duress, or mistake were alleged, however, the state bar recommended that the defendant continue to be given the categorical right

to challenge either the plea or the sentence. In both kinds of cases, however, the state bar still envisaged that a defendant would keep the right to legal counsel and to a transcript of the proceeding, and that the prosecution also would waive its right to appeal if it had not objected when a defendant's sentence was announced.

Public Acts 374 and 375 of 1994 put Proposal B into statute, eliminating the right to appeal by people who pled guilty or nolo contendere and instead allowing appeals only by leave of the appellate court. The laws took effect on December 23, 1994, and applied to criminal prosecutions for crimes committed on or after that date.

Pleas of guilty or no contest. Under Michigan court rule 6.302, a court cannot accept a plea of guilty or no contest (a plea of nolo contendere does not entail admission of guilt), unless the court is convinced that the plea is "understanding, voluntary, and accurate." The determination of these three factors involves a specified set of procedures that a court must follow before allowing such a plea, and even if all of these procedures are followed, the court is not required to grant such a plea.

FISCAL IMPLICATIONS:

According to the House Fiscal Agency, the bill would have an indeterminate impact on state and local government. The numbers of appeals in which counsel was appointed from pleas declined from about 3,800 in 1992 to about 2,300 in 1998. About one-quarter of the cases are handled by the State Appellate Defender Office, while the remainder are handled by private attorneys who are reimbursed by the county. The State Appellate Defender Office estimates that it takes about three or four attorneys at a cost of roughly \$300,0000 to manage its portion of the cases. Costs of the remainder are borne by counties, whose rates paid to appointed counsel vary greatly. Although the bill could generate cost savings in terms of attorney salaries and fees, these savings could be offset to some extent by increased costs of incarceration, if loss of appointed counsel in some cases led to prison terms that otherwise would have been averted through reversal of trial court error. (9-20-99)

ARGUMENTS:

For:

The bill would close a loophole that has allowed defendants to obtain court-appointed counsel, at public

expense, to seek leave to appeal following a plea-based conviction. It would, therefore, cut down on needless taxpayer expense, since the vast majority of appeals from plea-based convictions are without merit, while those that do result in either reversal of the plea-based conviction or sentence modification are rare. The people of Michigan decided in 1994, by approving Proposal B, that defendants who plead guilty or no contest should not have a right to appeal their cases, thereby eliminating this expense from the court system. Since, implementation of Proposal B, however, there has been confusion over whether or not such defendants, even though they no longer have a constitutional right to appeal still have the right to court-appointed counsel to help them in their applications to the courts for permission to appeal. Since neither the Michigan constitution nor Michigan law addresses this issue, it has been decided by the courts on the basis of Michigan court rules that require courts to "liberally grant" such requests for court-appointed assistance in applying for leave to appeal, with results apparently varying from court to court. Some courts reportedly have granted almost all such requests, while others apparently have denied virtually all such requests.

As the *Najar* decision notes, no decision of the United States Supreme Court requires a state, as a matter of federal constitutional law, to provide a convicted indigent defendant with the assistance of counsel in pursuing discretionary appellate relief. So in the absence of a Michigan statute on this subject, the right to counsel for an indigent defendant following a plea-based conviction is governed by Michigan court rule, which, while allowing for such requests – and in fact requiring courts to "liberally grant" such requests – nevertheless does not require the appointment of counsel.

In addition to bringing some consistency into the judicial system, the bill would eliminate wasting taxpayers' money on the routine appointment of appellate counsel for defendants who don't even have the right to appeal. At the same time, however, the bill also would ensure that indigent defendants still would have access to court-appointed counsel in post-conviction proceedings under certain specified conditions.

Against:

The bill is unconstitutional, as the federal 6th Circuit Court ruled on April 7, 2000 (*Tesmer v Granholm*, Case Number: 00-10082). The court says that "The practice of the Judges and other similarly situated State of Michigan circuit court judges, of denying appointed

counsel to aid indigents seeking leave to appeal their plea-base felony conviction or nolo contendres, is declared to be in violation of equal protection and due process requirements of the United States Constitution; and P. A. 1999, No. 200 [that is, enrolled House Bill 4625], which codifies the above practice, is declared to be in violation of equal protection and due process requirements of the United States Constitution.”

Analyst: S. Ekstrom

■ This analysis was prepared by nonpartisan House staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.