In the Supreme Court of Ohio

STATE OF OHIO,	}	
	}	CASE NO. 2023-1149
Plaintiff-Appellee,	}	
	}	ON APPEAL FROM THE CUYAHOGA
v.	}	COUNTY COURT OF APPEALS
	}	EIGHTH APPELLATE DISTRICT
MICHAEL RILEY,	}	
	}	COURT OF APPEALS CASE NO. 112302
Defendant-Appellant.	}	

MERIT BRIEF OF *AMICUS CURIAE* OHIO ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF APPELLANT

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STATEMENT OF INTEREST OF AMICUS

The Ohio Association of Criminal Defense Lawyers is an organization of approximately 700 dues-paying attorney members. Its mission is to defend the rights secured by law of persons accused of the commission of a criminal offense; to foster, maintain and encourage the integrity, independence and expertise of criminal defense lawyers through the presentation of accredited Continuing Legal Education programs; to educate the public as to the role of the criminal defense lawyer in the justice system, as it relates to the protection of the Bill of Rights and individual liberties; and to provide periodic meetings for the exchange of information and research regarding the administration of criminal justice.

STATEMENT OF THE CASE AND THE FACTS

Amicus concurs in the Statement of the Case and the Facts presented in the Merit Brief of Appellee.

LAW AND ARGUMENT

Overview and Summary of Argument. The adversarial system is central to American system of criminal justice. Essential to that system is the concept of party presentation: that the parties will present their respective claims to a neutral arbiter.

This goal is not achieved when the arbiter's decision is based on the submission of only one party, without the opportunity of the other party to respond. Because of the highly deferential standard of reviewing a trial court's order, appellate review is not sufficient to cure the lack of party presentation of an appellant's claim at the trial court order. The appropriate remedy is to reverse the decision of the court of appeals and remand the case to the trial court for full presentation of both parties' claims.

AMICUS PROPOSITION OF LAW NO 1: A trial court commits error when it adopts a proposed judgement entry of one party verbatim without affording the other party a meaningful opportunity to respond to the entry.

1. The adversarial system and the concept of party presentation. The adversarial system of justice so endemic to the American legal system is not of recent origin. The rudiments of the system can be traced as far back as 11th-century England. *See* Landsman, *Adversary System*, at 8. https://www.aei.org/research-products/book/the-adversary-system-a-description-and-defense/. "From the 1640s onward the full range of adversarial mechanisms began to grow, and by the end of the 1700s the adversary system had become firmly established not only in England but in America, as well." *Id.* at 18-19; *see also, e.g., id.* at 1 (noting that the adversarial system has been in place in this country "[s]ince at least the time of the American Revolution"); Resnik, *Managerial Judges*, 96 Harv. L. Rev. 374, 380-81 (1982).

Actually, the adversarial system advanced faster in the American colonies than it did in England. While counsel in England was gradually allowed to take a greater role in trial – cross-examining witnesses, for example – it wasn't until 1836 that lawyers representing criminal defendants were permitted to exercise the full panoply of their skills. By contrast, in representing the British soldiers in the 1770 Boston Massacre, John Adams was given a complete role: presentation of witnesses, closing argument, and the like. Jonakait, The Rise of the American Adversary System: America Before England, Widener Law Review, Vol. 14, Issue 2 (2009), https://digitalcommons.nyls.edu/cgi/viewcontent.cgi?article=1748;context=fac_articles_chapters.

The system is more than a simple procedural model: "the adversary system represents far more than a simple model for resolving disputes. Rather, it consists of a core of basic rights that recognize and protect the dignity of the individual in a free society." Freedman, Our Constitutionalized Adversary System, Understanding Lawyers' Ethics, Matthew Bender (1998), https://www.chapman.edu/law/_files/publications/CLR-1-monroe-freedman.pdf. "The right of a criminal defendant to an adversary proceeding is fundamental to our system of justice." *United States v. Thompson*, 827 F.2d 1254, 1258 (9th Cir. 1987).

Central to the adversarial system is the concept of party presentation: that a neutral arbiter will arrive at a just resolution upon the competing claims of skilled advocates. As the Court explained in *Greenlaw v. United States*, 554 U.S. 237, 243, 128 S.Ct. 2559, 171 L.Ed.2d 399 (2008),

> In our adversary system, in both civil and criminal cases, in the first instance and on appeal, we follow the principle of party presentation. That is, we rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present.

See also United States v. Sineneng-Smith, ___ U.S. ___, 140 S.Ct. 1575, 1579, 206 L.Ed.2d 866 (2020) ("our system is designed around the premise that parties represented by competent counsel know what is best for them, and are responsible for advancing the facts and argument entitling them to relief").

2. The trial court did not follow the concept of party presentation. Both the trial and appellate court records in this case demonstrate that the concept of party presentation was little more than a rumor in this case. Riley filed his application for DNA testing on October 22, 2022. (T.r. 125.)[1] The State filed its brief in opposition on December 12, 2022. (T.r. 129). Without giving Riley an opportunity to respond, the court denied the application the following day. (T.r. 130.) The entry consisted of a single sentence: "Defendant's General Pleading Application for Post-Conviction DNA testing, dated 10/28/2022, is denied."

Twenty-seven days later, on January 9, 2023, Riley filed a notice of appeal from the trial court's decision. (T.R. 131.) At that point, nothing beyond the one-line entry had been provided, and certainly no explanation or reason given for the denial. Ordinarily, that failure would require reversal. *State v. Connor,* 2020-Ohio-4310, ¶14, 158 N.E.3d 162 (8th Dist.); *State v. Williamson*, 8th Dist. Cuyahoga No. 105320, 2017-Ohio-4192, ¶5 (unsupported order "insufficient").

Riley's notice of appeal was filed at 11:26 A.M. on January 9. Some five hours later, at 4:22 P.M., the State presented the trial court with proposed Findings of Fact and Conclusions of Law. (T.r. 132.) The record of the trial court proceedings were transmitted to the court of

[1] References to the trial record will be designated as (T.r. #). References to the appellate record will be designated as (A.r. #).

appeals on January 11, 2023. (A.r. 6.)

The following day, on January 12, 2023, the trial court filed an order adopting the State's proposed findings of fact and conclusions of law. The order was a rubber stamp: Wiley was given no meaningful opportunity to respond, and the order was a verbatim rendering of the State's proposal. (T.r. 133).

The case had been placed on the accelerated calendar, so Riley filed his appellate brief just twelve days after the record had been filed. At that point, as can be seen from the above time sequence, the record did not include the entry adopting the State's proposal. In fact, it was not until a week after that, on January 30, 2023 that the State sought to supplement the record with the January 12th entry. (A.r. 8.) The court rejected the motion to supplement the record on February 8, 2023, mistakenly believing that it had been filed by Riley. (A.r. 12). That same day, the State filed a motion for reconsideration (A.r. 13), which was granted on February 17, 2023. (A.r. 14.)

The State filed its appellate brief on February 27, 2023. (A.r. 20.) Normally, a party on the accelerated calendar is not given an opportunity to file a reply brief. Considering the circumstances, Riley filed for leave to file a reply brief, which was granted. (A.r. 20, 21, 22.) Riley filed his reply brief on March 13, 2023. (A.r. 23.) It was his only opportunity, at either the trial court or appellate level, to respond to the findings of fact and conclusions of law.

3. Appellate review will not adequately correct the failure of the trial court to permit party representation. It might be argued that whatever error occurs as a result of the trial court's failure to permit full advocacy can be cured by the party's briefing on appeal. Unfortunately, it does not, because the standard of review heavily disfavors a losing party in appeals in such cases. If the burden of proof is often outcome-determinative at the trial level, the

standard of review is often outcome-determinative at the appellate level. A court's denial of a petition for DNA testing is reviewed for abuse of discretion. *State v. Buehler*, 113 Ohio St.3d 114, 2007-Ohio-1246, 863 N.E.2d 124. (This is also the standard used for review of a decision denying a motion for new trial, *State v. Perkins*, 3rd Dist. Seneca No. 13-19-47, 2020-Ohio-2888, ¶11, a denial of motion for leave to file a motion for new trial, *State v. Powell*, 8th Dist. Cuyahoga No. 109897, 2021-Ohio-2440, ¶14, and the denial of a petition for post-conviction relief. *State v. Heckathorn*, 7th Dist. Columbiana No 19 CO 0004, 2020-Ohio-1107, ¶26.) Abuse of discretion is "the most deferential standard of review – next to no review at all." *State v. Roberts*, 8th Dist. Cuyahoga No. 104474, 2017-Ohio-9014, ¶34, quoting *In re D.T.*, 212 Ill.2d 347, 356, 818 Ill.2d 347, 356, 818 N.E.2d 1214 (2004).

In fact, problematic here is this Court's 40-year-old definition of abuse of discretion in *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983): that the term "connotes more than an error of law or judgment." This Court retreated from that formulation in *Johnson v. Abdullah*, 166 Ohio St.3d 427, 2021-Ohio-3304, ¶39, 187 N.E.3d 463, holding that "courts lack the discretion to make errors of law." Still, the *Blakemore* formulation has found its way into no fewer than 732 appellate decisions in the past five years.

Even if a court doesn't follow *Blakemore's* "more than an error of law" standard, the abuse of discretion standard substantially handicaps the losing party. The adversarial system and the concept of party presentation assume that the parties are on an equal footing in persuading the court to adopt its position. Once the case proceeds to the appellate level, that is no longer true: "abuse-of-discretion review is deferential and does not permit an appellate court to simply substitute its judgment for that of the trial court." *State v. Darmond*, 135 Ohio St.3d 343, 2013-Ohio-966, ¶34, 986 N.E.2d 971. The appellate court does not merely determine whether the trial

court was wrong; the decision must be "unreasonable, arbitrary, or unconscionable" to warrant reversal. *State v. Keenan*, 143 Ohio St.3d 397, 2015-Ohio-2484, ¶7, 38 N.E.3d 870.

4. The procedural posture of this case warrants reversal. Here, there was certainly substantive error in the trial court's decision, which are capably recited in Riley's Merit Brief in this Court at pages 8-11. This Court did not accept the two propositions of law dealing with those errors. That may well be proper; that would place the Court in the position of merely correcting error.

But it did accept the proposition of law that deals with the procedural aspect of this case, and the error in that aspect is far more critical. Under a functioning adversarial system, the position of the parties would have been presented to the trial court, with each party afforded the full opportunity to respond to the other. Instead, the trial court denied the application the day after the prosecution filed its opposing brief, and did not give any explanation for the denial of the application until after Riley filed his appeal. That explanation was nothing more than a rubberstamp of what the prosecutor had offered. Riley was never presented with that until after he filed his appellate brief, and his only opportunity to respond to that came in a reply brief, all to be considered under the most deferential standard possible to the trial court's decision. It was not merely the trial court's decision that was "unreasonable, arbitrary, or unconscionable" – it was the procedure that produced it.

Again, as recited in Riley's Merit Brief at pages 4-6, the courts, including this Court, have been critical of the practice of signing off on the presentation of only one party. Yet, in the experience of Amicus, that practice endures. It is time for this Court to announce that this practice is wholly inconsistent with the entire concept of an adversarial of justice, and that engaging in it will no longer be tolerated. Perhaps reversal will accomplish what admonition has

not.

CONCLUSION

For the foregoing reasons, *Amicus* respectfully prays the Court to reverse the decision of the Eight District Court of Appeals and remand the matter to the trial court for further proceedings, which will include allowing the full presentation of the issues and arguments of the parties.

Respectfully submitted,

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SERVICE

The undersigned hereby certifies that a copy of the foregoing Merit Brief of *Amicus Curiae* Ohio Association of Criminal Defense Lawyers was served upon all parties by email.

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