IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	
		Case No. 2023-1149
Appellee,	:	
		On Appeal from the Cuyahoga
v.	:	County Court of Appeals
		Eighth Appellate District
MICHAEL RILEY,	:	
		Court of Appeals
Appellant.	:	Case No. CA-23-112302

MERIT BRIEF OF AMICUS CURIAE OFFICE OF THE OHIO PUBLIC DEFENDER IN SUPPORT OF APPELLANT MICHAEL RILEY

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STATEMENT OF THE CASE AND FACTS

Amicus curiae adopts the statement of the case and facts set forth in the merit brief of Appellant Michael Riley.

STATEMENT OF INTEREST OF AMICUS CURIAE, OFFICE OF THE OHIO PUBLIC DEFENDER

The Office of the Ohio Public Defender (OPD) is a state agency that represents indigent criminal defendants and coordinates criminal-defense efforts throughout Ohio. The OPD also plays a key role in the promulgation of Ohio statutory law and procedural rules. A primary focus of the OPD is on the post-trial phase of criminal cases, including direct appeals and collateral attacks on convictions. The OPD protects and defends the rights of indigent persons by providing and supporting superior representation in the criminal and juvenile justice systems.

As amicus curiae, the OPD offers this court the perspective of experienced practitioners who routinely handle criminal cases in Ohio courts. This work includes representation at both the trial and appellate levels. The OPD has an interest in the present case because it involves a significant issue of first impression in this court, and the ruling herein will affect numerous current and future individuals engaged in postconviction litigation challenging the lawfulness of their convictions. The OPD urges this court to adopt the proposition of law set forth by the appellant in this case, or, in the alternative, to adopt the rule proposed herein concerning appellate review of postconviction decisions that were arrived at under the circumstances similar to those present herein.

INTRODUCTION

In this case, Appellant Michael Riley urges this court to create a rule stating that trial courts may not adopt, verbatim or substantially so, proposed findings of fact and conclusions of law submitted by a party in a postconviction proceeding. The OPD fully supports the creation of such

a rule. But the OPD also respectfully contends that if the practice of adopting findings of fact and conclusions of law prepared by a party to postconviction proceedings is not barred by this court at the conclusion of this case, then the standard of review on appeal in cases where there has been a wholesale adoption of a proposed findings of fact and conclusions of law should be altered.

More specifically, the deferential abuse-of-discretion standard for the review of postconviction rulings that this court has previously set forth in a unanimous opinion, makes sense when the trial court has assessed the merits of the postconviction claim, then has independently prepared and filed findings of fact and conclusions of law. *State v. Gondor*, 112 Ohio St.3d 377, 2006-Ohio-6679, 860 N.E.2d 77. The opinion in *Gondor*, at ¶ 45-58, thoroughly explains why this approach is appropriate when the trial court has actively engaged in the decision-making process and has explained the reasoning behind its ruling.

But when the findings of fact and conclusions of law are prepared by one of the adversaries in a postconviction proceeding, and then are simply adopted by the trial court, there is little—if any—reason to apply deference to the trial court's ruling on a given postconviction petition. The argument set forth below will endeavor to explain why that is so.

ARGUMENT

Proposition of Law of Amicus Curiae: If it is permissible for trial courts to adopt without modification a party's proposed findings of fact and conclusions of law, and the trial court does so in a given postconviction case, then the standard of review on appeal is de novo, not the deferential standard set forth in *State v. Gondor*.

The arguments made in support of the proposition of law in Mr. Riley's merit brief and in the amicus merit brief of the Ohio Association of Criminal Defense Lawyers warrant a ruling from this court that a trial court may not, when deciding a postconviction petition, simply adopt the proposed findings of fact and conclusions of law prepared by one of the adversaries in the case.

But in recognition of the fact that this court may set forth a different rule on that question than the one sought by Mr. Riley, the OPD respectfully contends that any postconviction ruling by a trial court that involves findings of fact and conclusions of law drafted by one of the parties should not be accorded deference on appellate review.

Before explaining why the OPD is putting forth the proposition of law asserted in this brief, a prefatory point must be made. In this particular case, the trial court issued the findings of fact and conclusions of law *after* the notice of appeal was filed by Mr. Riley, which notice signaled his intent to appeal the trial court's one-line entry denying his postconviction petition. But the absence of findings of fact and conclusions of law *in and of itself* has recently been deemed by this court to be an issue to be raised on appeal, when the trial court has issued a one-line entry denying postconviction relief. *State ex rel. Penland v. Dinkelacker*, 162 Ohio St.3d 59, 2020-Ohio-3774, 164 N.E.3d 336, ¶ 28 ("If a trial court errs by failing to issue statutorily required findings of fact and conclusions of law, the petitioner may obtain relief by raising that issue in an appeal from the trial court's judgment."). It is difficult to see how the trial court here issuing findings of fact and conclusions of law *after* the notice of appeal has been filed can be deemed to be an action by the trial court "in aid of the appeal," when the mere act of filing the findings of fact and conclusions of law after the notice of appeal has been filed directly impacts an issue that almost certainly will be raised on appeal, pursuant to *Penland*. *See, e.g*., *In re S.J*., 106 Ohio St.3d 11, 2005-Ohio-3215, 829 N.E.2d 1207, ¶ 9, citing *State ex rel. Special Prosecutors v. Judges, Court of Common Pleas*, 55 Ohio St.2d 94, 97, 9 O.O.3d 88, 378 N.E.2d 162 (1978) ("An appeal is perfected upon the filing of a written notice of appeal. R.C. 2505.04. Once a case has been appealed, the trial court loses jurisdiction except to take action in aid of the appeal."). Thus, the findings of fact and conclusions of law here could reasonably be deemed a nullity, which seemingly would preclude a reviewing

court from reaching the merits of Mr. Riley's postconviction claim. For purposes of this amicus merit brief, however, the OPD will proceed as though the trial court did not lack jurisdiction to issue the findings of fact and conclusions of law after the notice of appeal had been filed.

As noted above, the rule in *Gondor* regarding the abuse-of-discretion standard for appellate review of trial-court postconviction rulings makes sense, generally speaking.[1] As the *Gondor* court observed, when taking evidence regarding, for example, a typical Sixth Amendment claim in a postconviction petition,

> the trial judge holds a hearing and receives testimony on the very issue of ineffective assistance. The trial judge can delve into the motivation or reasoning of trial counsel through trial counsel's testimony. The court can hear the testimony of witnesses that were never called to testify at the original trial, and can determine the worth of their testimony as well as the witnesses' credibility. The trial judge can ask what the counsel knew, when he knew it, and whether a mistake was not strategic, but was instead careless. As here, in a postconviction hearing, a judge can hear testimony about what evidence was made available to trial counsel and when it was made available. A trial court in a postconviction proceeding thus plays a unique role in the consideration of ineffective assistance of counsel claims. It is the only court that actually hears testimony on that issue.

Gondor at ¶ 54. In other words, it is anticipated that the trial court will play an active role in assessing the merits of a postconviction petition, and that active role was a key consideration

[1] In postconviction proceedings requesting DNA testing, the appellate standard of review is also abuse of discretion. *State v. Scott*, 17 Ohio St.3d 651, 2022-Ohio-4277, 220 N.E.3d 668, ¶ 12.

underlying the holding in *Gondor* that it is appropriate to afford a trial court's postconviction decision considerable deference on appellate review.

But in *Gondor*, however, it was presumed that trial courts prepare their own findings of fact and conclusions of law, and this court did not have occasion to consider the question of whether it matters who drafted the findings of fact and conclusions of law that are filed by the trial court. And the OPD contends that that is a very important question.

Numerous reviewing courts across the country have had occasion to address the scenario that occurred here, where a trial court merely adopts verbatim the proposed findings submitted by one of the parties. And those courts have uniformly observed that it is highly undesirable for a trial court to rely on one of the parties appearing before the court to draft a substantive entry resolving a claim that has been presented to the court. One federal court of appeals, aptly calling such a practice "ghostwriting," stated that "[t]he quality of judicial decisionmaking suffers when a judge delegates the drafting of orders to a party; the writing process requires a judge to wrestle with the difficult issues before him and thereby leads to stronger, sounder judicial rulings." *In re Colony Square Co*., 819 F.2d 272, 275 (11th Cir.1987), citing *James v. Stockham Valves & Fittings Co*., 559 F.2d 310, 314 fn. 1 (5th Cir.1977); *Keystone Plastics, Inc. v. C & P Plastics, Inc*., 506 F.2d 960, 962 (5th Cir.1975); *Louis Dreyfus & Cie. v. Panama Canal Co*., 298 F.2d 733, 737 (5th Cir.1962).

And the United States Supreme Court has gone even further when criticizing that practice. In one case involving findings that were drafted by a party, after noting that findings "drawn with the insight of a disinterested mind are * * * more helpful to the appellate court," the court cited with approval language from a federal appellate court judge stating that ghostwritten findings have been "denounced" by the appellate courts, and constitute a practice that "abandon[s] * * * the duty

and the trust that has been placed in the judge." *United States v. El Paso Natural Gas Co*., 376 U.S. 651, 656 fn. 4, 84 S.Ct. 1044, 12 L.Ed.2d 12 (1964). In a similar vein, one federal court has stated that "[w]hen a judge issues an opinion, it is tangible evidence of the consideration that went into the decision. It provides assurance that an impartial third party analyzed the problem and independently came to a conclusion about the merits of the dispute," *In re Wisconsin Steel Co.*, 48 B.R. 753, 762 (Bankr.N.D.Ill.1985). That court concluded that judicial decisions which "are not the work of a neutral arbiter" are "the very antithesis of what they purport[] to be." *Id*.

The above concerns are even more pronounced when, as here, the postconviction trial-court judge was different from the judge who presided over the trial. (*Compare* Docket Entry 127, Nov. 14, 2022, Reassignment to Hagan, J., *with* Docket Entry 91, Mar. 30, 2018, Journal entry of sentencing, McClelland, J.) There is nothing in the record of this case that demonstrates that the trial judge who denied Mr. Riley's DNA postconviction petition familiarized herself with the case at all before denying the postconviction petition less than one month after being assigned to the case. Let alone is there anything to show that she made an engaged, independent decision, one premised in large part on a preexisting or later-acquired familiarity with the trial proceedings, as anticipated in *Gondor*. And, to state the obvious, wholesale adoption of proposed findings of fact and conclusions of law prepared by an adversarial party in the proceedings tends to suggest the possibility of minimal, if any, independent evaluation of the claims made in the postconviction petition.

In short, this case serves as an excellent example of why the deferential standard of review adopted in *Gondor* should not be applied to *all* rulings on postconviction petitions. When—as is usually the case—the record reflects that the trial court meaningfully engaged in the decision-making process, and generated its own work product when explaining why it ruled the way that it

did, then applying an abuse-of-discretion standard is entirely appropriate. But when—as here—a reviewing court cannot be confident that the trial judge actually familiarized herself with the facts and relevant procedural history of the case, and where the findings of fact and conclusions of law are not the work product of the judge, but instead are the work product of one of the parties to the proceedings, no appellate deference is warranted, and a de novo standard of review should be applied.

CONCLUSION

This court should adopt the proposition of law of Appellant Michael Riley and establish that trial courts may not merely adopt findings of fact and conclusions of law prepared by one of the adversaries in a postconviction proceeding. Alternatively, if such a practice is not deemed to be impermissible at the conclusion of this appeal, then Amicus Curiae Office of the Ohio Public Defender would urge this court to adopt the proposition of law set forth herein.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Merit Brief of Amicus Curiae Office of the Ohio Public Defender in Support of Appellant Michael Riley was forwarded by e-mail to Joseph C. Patituce, Counsel of Record for Appellant, attorney@patitucelaw.com, and Kristen Hatcher, Counsel of Record for Appellee, khatcher@prosecutor.cuyahogacounty.us, on this 1st day of April, 2024.

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