IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	Case No. 2024-1038
Plaintiff-Appellee,	:	
vs.	:	On Appeal from the Butler County Court of Appeals,
TREVOR FRALEY,	:	Twelfth Appellate District
Defendant-Appellant.	:	C.A. Case No. CA2023-12-125

MERIT BRIEF OF *AMICUS CURIAE* OFFICE OF THE OHIO PUBLIC DEFENDER IN SUPPORT OF APPELLANT TREVOR FRALEY

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INTRODUCTION

This case presents a critical question of first impression regarding the timeliness of post-conviction petitions when an appeal is reopened due to initial appellate counsel's failure to file trial transcripts. The current post-conviction statute, R.C. 2953.21(A)(2)(a), provides clear deadlines in only two scenarios: when transcripts are filed on direct appeal, and when no appeal is taken. But it leaves a significant gap—what happens when an initial appeal is taken but then dismissed (later to be reopened), precisely because transcripts are never filed due to initial appellate counsel's ineffectiveness?

This gap in the statutory framework has created a procedural conundrum with serious practical and constitutional implications. The Twelfth District's approach contradicts the plain language of App.R. 26(B)(7). It would force defendants whose appeals are reopened to choose between filing premature post-conviction petitions without crucial transcript evidence or losing their right to post-conviction review entirely. This approach serves no legitimate purpose and threatens to bar meaningful review of potential constitutional violations based solely on initial appellate counsel's failures. By most measures, this result is far from sensible.

This Court's intervention is necessary to resolve this statutory ambiguity and ensure that Ohio's post-conviction framework operates as intended—to provide one full and fair opportunity for review of claims that could not have been raised on direct appeal. The text of App.R. 26(B)(7), shared on-the-ground practical experience, and fundamental principles of basic procedural fairness point toward a clear and workable solution: when a direct appeal is reopened due to appellate counsel's failure to file transcripts, the post-conviction clock starts when those transcripts are finally filed with the court of appeals as part of the reopened direct appeal. In keeping with this Court's recent decision in *State v. Dudas*, supra, this Court should adopt that solution.

STATEMENT OF THE CASE AND FACTS

Amicus curiae adopts and incorporates the statement of the case and facts as set forth by Mr. Fraley in his merit brief.

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 law and procedural rules. A primary focus of the OPD is on the appellate phase of criminal cases, including direct appeals and collateral attacks on convictions. The OPD also keeps abreast of legislative developments affecting criminal defendants throughout the state. The mission of the OPD is to protect and defend 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 observe the lived experiences of incarcerated individuals in Ohio.

ARGUMENT

Appellant Trevor Fraley's Proposition of Law: Under the Plain Language of R.C. 2953.21(A)(2)(a) a Petition for Post-Conviction Relief following the "Delayed Re-Opening of an Appeal" within ninety (90) days of the Appeal being dismissed for Counsel's failure to timely file a transcript of proceedings is timely when filed no later than three hundred and sixty-five days after the date in which the trial transcript is filed in the Court of Appeals.

I. Ohio Revised Code 2953.21 and this Court's precedent fail to answer the postconviction timing question presented

Neither the postconviction statute nor this Court's prior decision address the factual scenario that played out in Mr. Fraley's case. As such, defendants and lower courts across Ohio need this Court's intervention and guidance in deciphering the timely postconviction deadline when an appeal is taken but transcripts are never filed.

Ohio's postconviction statute provides two timeframes for a postconviction petition to be timely filed in non-capital cases: (1) within 365 days of the *trial transcripts* being filed in the court of appeals on *direct appeal* of the conviction; and (2) *if no direct appeal is filed*, within 365 days of the expiration of the time to file a timely direct appeal. R.C. 2953.21(A)(2)(a).

In Mr. Fraley's case, neither of these timeframes are applicable based on the plain language of the statute. His trial transcripts were never filed in his direct appeal due to his appellate counsel's ineffectiveness, which ultimately resulted in his successfully reopened appeal; therefore, the first statutory timeframe does not apply to Mr. Fraley. *See* R.C. 2953.21(A)(2)(a). Further, Mr. Fraley did file an appeal, thus the plain language of the statute again makes clear that this second timeframe does not apply to him either. *See* R.C. 2953.21(A)(2)(a). For defendants in the same factual circumstance as Mr. Fraley, when is their petition considered timely filed?

As argued fully in Mr. Fraley's merit brief, this Court's prior decision in *Morgan v. Eads*, 2004-Ohio-6110, also does not address this timing question under R.C. 2953.21. *Morgan* simply established that the mechanism of an application to reopen per App.R. 26(B) is a collateral proceeding and not part of the direct appeal process. *Id*. at ¶ 9. *Morgan* expressly declined to answer the related question of what happens *after an application is granted*, which Mr. Fraley submits is governed by the plain language of App.R. 26(B)(7). *Id*. at ¶ 4. *Morgan* therefore does not resolve the R.C. 2953.21 timing issue presented in Mr. Fraley's case. Accepting the holding of *Morgan*, defendants and courts are still left to guess the timely filing deadline for a postconviction petition when an appeal was taken, but transcripts were never filed due to appellate counsel's ineffectiveness.

Moreover, this Court has recently dealt with an identical conundrum in the App.R. 5 delayed appeal context. *State v. Dudas*, 2024-Ohio-775. The exact same scenario unfolded in Mr. Fraley's case—neither of the postconviction timeframes apply to him. Thus, Mr. Fraley's case presents another blind spot in the postconviction statute that requires guidance from this Court. This Court should adhere to the same principles underlying its decision in *Dudas*, reverse the decision below, and adopt Mr. Fraley's proposition of law.

II. Trial transcripts are the lynchpin in R.C. 2953.21, both in terms of timing and substantive claims for relief

As a practical matter, the decision below is at odds with the realities of appellate and postconviction practice and procedure. R.C. 2953.21 relies upon the filing of the trial transcript to determine when a postconviction petition is timely filed, as well as whether the petitioner has set forth meritorious grounds for relief. This Court has previously established the significance of a trial transcript for postconviction petitions pursuant to R.C. 2953.21. *State v. Everette*, 2011-Ohio-2856, ¶ 27 (filing of the written transcript, rather than the filing of a video recording of the

proceedings, triggered the postconviction petition deadline); *State v. Dudas*, 2024-Ohio-775, ¶ 15 (a delayed appeal is a direct appeal such that the filing of the trial transcripts with the court of appeals is the applicable postconviction petition deadline). Thus, when an appeal is taken, it is the filing of the trial transcripts that is the deciding factor of whether a postconviction petition was timely filed.

Moreover, the reason *the Legislature* has made this determination is that the trial transcript is necessary to determine which claims must be presented on direct appeal versus postconviction. Without the trial transcript, defendants and defense counsel simply cannot ascertain whether there are meritorious claims for relief in the postconviction petition. Furthermore, to survive res judicata challenges, postconviction petitions must "rely on evidence outside the trial record to establish [a] claim for relief." *State v. Blanton*, 2022-Ohio-3985, ¶ 2. In order to know what evidence would fall "outside of the record," both courts and defendants necessarily need said record to make that determination. And, when a court is deciding whether to hold a hearing on the postconviction petition, the "court reporter's transcript" is indispensable to that determination. R.C. 2953.21(D).

In sum, a petitioner must have a copy of the transcript prior to applying for postconviction relief in order to: 1) determine what issues have already been addressed on the record and are, therefore, barred by res judicata; 2) develop assignments of error that are outside of the record; and 3) comply with the requirements of R.C. 2953.21(D). To expect a petitioner to file for postconviction relief without possessing and reviewing the trial transcript is tantamount to expecting someone to make a recipe without knowing the ingredients. Because the transcript is required to determine both when a postconviction petition is timely filed as well as whether there are substantive grounds for relief, it reasonably follows that the deadline for the filing of a postconviction petition should attach to the date the trial transcript is filed with the court of appeals.

III. The courts of appeals' gatekeeping function under App.R. 26(B) ensures adherence to statutory deadlines and limits the frequency of successfully reopened appeals

Further, jurisdiction and discretion over an application to reopen under App.R. 26(B) lies solely with the courts of appeals. App.R. 26(B)(1) ("An application for reopening shall be filed in the court of appeals where the appeal was decided[.]"); App.R. 26(B)(5)-(6) (the court of appeals retains the authority to grant or deny an application to reopen).

To grant an application to reopen that was timely filed, the court of appeals must find that the applicant presented a colorable claim of ineffective assistance of counsel. App.R. 26(B)(5). The applicant bears the burden of proving the existence of a colorable claim for relief. *State v. Meyers*, 2004-Ohio-3075, ¶ 9, citing *State v. Spivey*, 84 Ohio St.3d 24, 25 (1998). Additionally, when an application to reopen is not timely filed, the applicant must demonstrate "good cause" for the delayed filing. App.R. 26(B)(1). "The existence of good cause is a threshold issue that must be established before an appellate court may reach the merits of a claim of ineffective assistance of appellate counsel." *State v. Wogensthal*, 2024-Ohio-4714, ¶ 21.

The appellate courts' discretion under App.R. 26(B) is reflected in R.C. 2953.21(A)(2)(a). When an appellate court determines that there is a colorable claim of ineffective assistance of counsel and grants the application to reopen under App.R. 26(B)(5), then any subsequent postconviction petition would be due no later than 365 days after the date the trial transcript is filed with the court of appeals. R.C. 2953.21(A)(2)(a). The plain language of App.R. 26(B)(7), which explicitly sets forth the procedure of a successfully reopened appeal including the record filing requirements, further aligns with the procedure set forth in R.C. 2953.21(A)(2)(a). To hold otherwise would essentially strip the appellate courts of their gatekeeping function when faced

with meritorious claims of ineffective assistance of counsel to the detriment of criminal defendants across Ohio.

Moreover, appellate courts have shown no difficulty in using their discretion to deny applications to reopen when appropriate. *See e.g.*, *State v. Saleh*, 2022 Ohio App. Lexis 12221 (10th Dist. Apr. 14, 2022) (denied as untimely); *State v. Chandler*, 2022-Ohio-1391 (8th Dist.) (same); *State v. Byrd*, 2024-Ohio-5856 (7th Dist.) (denied as untimely and no colorable claim of ineffective assistance of counsel); *State v. Oliver*, 2023-Ohio-1353 (9th Dist.) (denied because applicant failed to present colorable claim of ineffective assistance of counsel); *State v. McGowan*, 2022-Ohio-4124 (6th Dist.) (same); *State v. Barner*, 2022-Ohio-432 (4th Dist.) (denied application to reopen appeal stemming from the denial of a postconviction petition because App.R. 26(B) only applies to direct appeals); s*ee also Wogensthal* at ¶ 14 (court of appeals' denial of application to reopen as untimely and barred by res judicata upheld).

Adopting Mr. Fraley's proposition of law would reaffirm the court of appeals' gatekeeping function under App.R. 26(B).

IV. The Twelfth District's ruling creates an arbitrary distinction, leading to absurd, untenable, and conceivably unconstitutional results

Following the Twelfth District's rule, by contrast, would create a cascade of absurd and untenable results that undermine both sound jurisprudence and the practical administration of justice. The law requires that this Court avoid them. R.C. 1.47; *State ex rel. Law Office of Montgomery Cty. Pub. Defender v. Rosencrans*, 2006-Ohio-5793, ¶ 23 (court rules are interpreted under the general principles of statutory construction); *State ex rel. Cincinnati Post v. Cincinnati*, 76 Ohio St.3d 540, 543 (1996) (statutory construction should avoid unreasonable or absurd results); *State ex rel. Saltsman v. Burton*, 154 Ohio St. 262, 268 (1950) ("'Statutes [and rules] must be construed, if possible, to operate sensibly and not to accomplish foolish results.'").

A. An arbitrary and illogical distinction that overlooks App.R. 26(B)'s plain text

First, the ruling below both rests on and creates an arbitrary distinction between delayed and reopened appeals that defies logical explanation. Both procedures serve identical purposes—providing court-authorized mechanisms for direct appellate review of the merits when defendants were prevented from pursuing their appeals through no fault of their own. Both require appellate-court permission to proceed, both function as direct appeals (once granted), and both necessitate the filing of the complete trial-court record, including most importantly, the trial court transcripts, for meaningful review. Both mechanisms are meant to obtain direct appellate review. The plain language of App.R. 26(B)(7) explicitly says so. Treating them disparately elevates form over substance in a way that serves no logical or legitimate procedural purpose.

B. Conflicting with this Court's prior decisions and basic truths about appellate practice and litigation

Second, this artificial distinction creates tension with this Court's wider jurisprudence, which soundly recognizes that meaningful appellate review requires access to the complete trial-court record. *Dudas*, 2024-Ohio-775, at ¶ 14-15; *State ex rel. Spirko v. Court of Appeals*, 27 Ohio St.3d 13, 17 (1986); *see also Bounds v. Smith*, 430 U.S. 817, 822 (1977) (holding that effective appellate review is "impossible without a trial transcript or adequate substitute"). This is also precisely why the Legislature has decided that the postconviction clock starts when *transcripts* are filed, rather than triggered by some other event. R.C. 2953.21; *see Everette*, 2011-Ohio-2856 at ¶ 9-15 (explaining the relationship between the postconviction deadline and App.R. 9); *see also generally Blanton*, 2022-Ohio-3985 at ¶ 58-60, *and State v. Bunch*, 2022-Ohio-4723, ¶ 35-36 (explaining that unlike direct appeal, which the court "has repeatedly held is not the appropriate place to consider allegations of ineffective assistance of trial counsel that turn on information that

is outside the record," postconviction claims of ineffective assistance afford courts "the ability to consider evidence outside the record and are not limited to mere speculation").

Simply put, trial transcripts are needed to determine whether a claim may be presented on direct appeal or must be reserved for postconviction litigation. And, if these basic truths apply to delayed appeals—where defendants simply missed a filing deadline—as this Court recognized in *Dudas*, then they apply with even greater force to appeals that are reopened because initial appellate counsel altogether failed to file necessary transcripts in the first place. It would be nonsensical and incoherent to hold that late-filed appeals reset deadlines but appeals reopened specifically to obtain missing transcripts do not.

C. Resulting in a catch-22 with sweeping repercussions for indirect-review

Third, the practical consequences of such a ruling would be equally problematic. As alluded to above, defendants whose appeals are reopened would face the impossible task of preparing postconviction petitions without access to the very transcripts their initial appellate attorney failed to file—transcripts so essential to review that their absence justified reopening the appeal in the first place. This creates an absurd catch-22: defendants must either file premature postconviction petitions based on incomplete information or forfeit their chance at postconviction relief entirely. From there, those who file inadequate petitions risk having claims dismissed on res judicata grounds, since courts may treat their premature and necessarily incomplete petitions as barring later, more developed claims. Or, courts may continue to insist from the outset (albeit wrongly) that those claims are barred because they could and should have been presented on direct appeal, even though they never were, because of initial appellate counsel's ineffectiveness.

The resulting systemic denial of state-court review would inevitably push defendants into the outer lands of federal habeas proceedings, where they would doubtless face procedural default

arguments based on their inability to properly develop claims in state court. *Draper v. Washington*, 372 U.S. 487, 499-500 (1963) (holding that the State must provide a "record of sufficient completeness" to permit proper consideration of their claims); *Jimenez v. Quarterman*, 555 U.S. 113, 121 (2009) (emphasizing importance of preserving meaningful state court review before federal habeas); *see also Shinn v. Ramirez*, 596 U.S. 366 (2022) (federal court review of a state petitioner's claims "based solely on the state-court record"), citing *Cullen v. Pinholster*, 563 U.S. 170, 183 (2011). Rather than allowing for full and fair consideration of appellate and postconviction claims based on complete records, adopting the ruling below would result in procedural barriers that collectively amounts to a systemic denial of meaningful review in any forum. At some point, there must be meaningful review.

D. Compounding in fundamental unfairness and foreseeably disparate treatment

Finally, such a rule would also create an abiding, fundamental unfairness in the administration of justice in Ohio. Defendants whose appellate counsel file timely appeals but fail to include transcripts would be in a worse position than those whose counsel miss appeal deadlines entirely. This impacts indigent defendants, who rely on appointed counsel and have no control over whether necessary transcripts are filed. The systemic result would be to deny meaningful review to defendants based on their initial appellate counsel's mistakes, rather than on any substantive assessment of their claims.

Rather than invite these consequences, the simpler and more coherent approach is to treat reopened appeals as App.R.26(B)(7) explicitly requires already—as initial appeals in all respects, including for purposes of postconviction timing. This straightforward reading is not only practical, but it is mandated by the rule's plain text. App.R. 26(B)(7)'s command that reopened appeals "shall proceed as on an initial appeal" provides a clear answer that avoids all these problems. There

is simply no textual, logical, or practical basis for carving out postconviction deadlines from this unambiguous directive.

CONCLUSION

This Court should reverse the Twelfth District's judgement below and hold that a petition for postconviction relief following a successful application to reopen under App.R. 26(B) is timely filed no later than 365 days after the date in which the trial transcript is filed with the court of appeals.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing **MERIT BRIEF OF *AMICUS CURIAE* OFFICE OF THE OHIO PUBLIC DEFENDER IN SUPPORT OF APPELLANT** was served by electronic mail to Butler County Assistant Prosecuting Attorney Willa Concannon, concannon@butlercountyohio.org, and to Attorney H. Louis Sirkin, hls@santenhughes.com, on this 20th day of December, 2024.

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