

# THE GHOST IN THE COURTROOM: WHEN OPINIONS ARE ADOPTED VERBATIM FROM PROSECUTORS

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## ABSTRACT

*Judicial opinions captivate the legal community, serving as a hub for teaching new lawyers and developing the law. These opinions also provide a method for the justice system to communicate with the people it serves—both the parties to the cases and the public. This communication should be well-reasoned and developed from a neutral standpoint. However, this ideal is being seriously threatened by ghostwriting, the practice of allowing a party to write the opinion. This is particularly troubling in criminal cases, where the very lawyers charged with prosecuting defendants are writing the opinions against them.*

*This Note proposes that opinions written by prosecutors should be subject to de novo appellate review. Additionally, states should pass legislation and revise ethics rules to require that judges critically review a proposed opinion, refrain from adopting it verbatim, give the opposing party an opportunity to reply, and write an original legal analysis section.*

*Change is necessary to ensure that opinions are not just a recitation of a prosecutor's argument, but a thoughtful product of an impartial judge. Left unchecked, ghostwriting will destroy the value of opinions and undermine the integrity of adjudication.*

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*I suggest to you strongly that you avoid as far as you possibly can simply signing what some lawyer puts under your nose. These lawyers, and properly so, in their zeal and advocacy and their enthusiasm are going to state the case for their side in these findings as strongly as they possibly can. When these findings get to the courts of appeals they won't be worth the paper they are written on as far as assisting the court of appeals in determining why the judge decided the case.*  
 – Judge J. Skelly Wright<sup>1</sup>

## INTRODUCTION

The judicial opinion is the “external manifestation of an internal deliberative process.”<sup>2</sup> An opinion not only informs both parties and appellate courts of the decision, but illuminates the judge’s thought process in reaching a conclusion as well. However, despite Judge Wright’s advice against the practice, judges often publish, as their own, opinions that were written entirely by a party in the case. In doing so, the insight of the judge is lost.

Ghostwriting, as it is called, is particularly dangerous in criminal cases. When a person’s freedom or life is on the line, allowing the prosecutor to write the opinion dismantles the foundational impartiality that undergirds the legitimacy of the justice system.

This issue was highlighted two years ago when Mr. Doyle Lee Hamm appealed his case to the Supreme Court.<sup>3</sup> In 1987, Hamm

1. *United States v. El Paso Nat. Gas Co.*, 376 U.S. 651, 656 n.4 (1964) (quoting Judge J. Skelly Wright, *Seminars for Newly Appointed United States District Judges* (1963)).

2. Jesse N. Panoff, *Why State Trial Court Judges Should Write Their Own Decisions: Transforming the Current System*, 51 S. TEX. L. REV. 307, 326 (2009).

3. For examples of the numerous articles spotlighting Doyle Lee Hamm’s case, see Radley Balko, *In Alabama Death Penalty Cases, Judges’ Opinions are Routinely Written by Prosecutors*, WASH. POST (June 23, 2016), <https://washingtonpost.com/news/the-watch/wp/2016/06/23/in-alabama-death-penalty-cases-judges-opinions-are-routinely-written-by-prosecutors/> [<https://perma.cc/E7ZC-B3AP>]; Andrew Cohen, *Letting Prosecutors Write the Law*, THE MARSHALL PROJECT (July 18, 2016), <https://themarshallproject.org/2016/07/18/letting-prosecutors-write-the-law> [<https://perma.cc/J2SA-T4QV>]; Andrew Cohen, *The Death Penalty Case Where Prosecutors Wrote the Judge’s ‘Opinion,’* THE MARSHALL PROJECT (June 19, 2016), <https://themarshallproject.org/2016/06/19/the-death-penalty-case-where-prosecutors-wrote-the-judge-s-opinion> [<https://perma.cc/7ZRW-ZKYC>]; Andrew Cohen, *When Prosecutors Write Opinions that Judges Sign Off On*, BRENNAN CTR. FOR JUST. (Nov. 13, 2014), <https://brennancenter.org/analysis/when-prosecutors-write-opinions-judges-sign> [<https://perma.cc/A6QV-3D6H>]; Debra Cassens Weiss, *Cert Petition Says Judge’s 89-Page Opinion was Ghostwritten by Prosecutors*, ABA J. (July 21, 2016, 7:00 AM),

received a death sentence in Alabama after his lawyer put on a mere nineteen minutes of mitigation evidence.<sup>4</sup> In 1991, Hamm filed a post-conviction motion, largely seeking relief for his trial counsel's failure to present evidence of Hamm's brain damage at sentencing.<sup>5</sup> When his post-conviction hearing was finally held eight years later, on December 3, 1999, the State submitted to the court an eighty-nine-page "Proposed Memorandum Opinion."<sup>6</sup> The court adopted this opinion verbatim on Monday, December 6, 1999.<sup>7</sup> In his haste to adopt the prosecutor's work, the judge even failed to remove the word "Proposed" from the signed opinion.<sup>8</sup>

When Hamm's case reached the Eleventh Circuit, Judge Adalberto Jordan expressed his disbelief:

I don't believe for a second that that judge went through 89 pages in a day and then filed that as his own. As if he had gone through everything, went through his notes, the transcript, the exhibits, and the like. It just can't be done! It just can't be done.<sup>9</sup>

However, working with a fairly restrictive standard of review—deference to the lower court's decision unless contrary to federal law<sup>10</sup>—the Eleventh Circuit demoted the ghostwriting issue to a footnote, calling the adoption of the prosecutor's proposed order a "procedural shortcut" that they "strongly criticize[d]," but upholding the order nonetheless.<sup>11</sup>

The uncritical adoption of a proposed opinion in Hamm's post-conviction hearing leaves doubt as to whether the trial judge properly reviewed a claim that could have saved Hamm's life. The Supreme

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[http://www.abajournal.com/news/article/cert\\_petition\\_says\\_judges\\_89\\_page\\_opinion\\_was\\_ghost\\_written\\_by\\_prosecutors](http://www.abajournal.com/news/article/cert_petition_says_judges_89_page_opinion_was_ghost_written_by_prosecutors) [<https://perma.cc/4E63-L365>] (all spotlighting Doyle Lee Hamm's case).

4. Petition for Writ of Certiorari at 3, Hamm v. Comm'r Ala. Dep't of Corr., 620 F. App'x 752 (2016) (No. 13-14376).

5. *Id.* at 6–8. Alabama Rule of Criminal Procedure 32 allows criminal defendants to file post-conviction motions in trial court. Ala. R. Crim. P. Rule 32.2(a)(1).

6. *Hamm*, 620 F. App'x at 756 n.3.

7. *Id.*

8. *Id.*

9. Petition for Writ of Certiorari, *supra* note 4, at 4 (quoting Oral Argument at 24:50–25:28).

10. *Hamm*, 620 F. App'x at 772.

11. *Id.* at 756 n.3. The court ultimately held that the practice did not affect Hamm's habeas appeal. *Id.*

Court denied certiorari in Hamm's case,<sup>12</sup> and Alabama unsuccessfully attempted to execute Hamm on February 22, 2018.<sup>13</sup>

Ghostwriting by prosecutors occurs across the country.<sup>14</sup> Because of its secretive nature, it is difficult to quantify just how pervasive ghostwriting is,<sup>15</sup> and this Note will not attempt to do so. Instead, this Note focuses on the problems created by ghostwritten opinions, particularly in criminal cases, and proposes the following solutions for curbing their impact.

Judicial opinions written by prosecutors should be subject to de novo review in appellate courts. De novo review should occur when there is evidence that the judge did not critically review a proposed opinion before adopting it, or when the judge did not give the defense an opportunity to reply to the proposed opinion. Additionally, states should set standards for judges reviewing proposed opinions through clear ethics rules or legislation. The standards should require the judge to critically review a proposed opinion, to refrain from adopting it verbatim, to give the opposing party an opportunity to reply, and to

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12. Hamm v. Allen, 137 S. Ct. 39 (2016).

13. Mr. Hamm has lymphatic cancer and carcinoma, which doctors warned would make finding a vein for lethal injection difficult. Nevertheless, the State attempted to execute him, continuing to puncture Mr. Hamm in his legs and groin for hours. The State even punctured his bladder, causing him extreme pain, before finally giving up with the midnight deadline looming. Hamm's legal team reached a private settlement with Alabama to stop all attempts at execution in exchange for a dismissal of all litigation in Hamm's case. Roger Cohen, *Death Penalty Madness in Alabama*, N.Y. TIMES (Feb. 27, 2018), <https://www.nytimes.com/2018/02/27/opinion/death-penalty-alabama-doyle-lee-hamm.html> [<https://perma.cc/34VH-NTKZ>]; Melissa Brown, *Alabama, Death Row Inmate Reach Settlement After Botched Execution*, MONTGOMERY ADVERTISER (Mar. 27, 2018, 10:13 AM), <https://www.montgomeryadvertiser.com/story/news/crime/2018/03/27/https-montgomeryadvertiser-story-news-local-solutions-journalism-2018-03-20-can-alabama-try/461862002/> [<https://perma.cc/UJZ5-SLWR>].

14. See, e.g., Fields v. Kentucky, No. 2013-SC-000231-TG, 2014 LEXIS 118, at \*12–14 (Ky. Sept. 18, 2014) (explaining how a judge adopted verbatim the prosecutor's proposed findings and conclusions in a post-conviction hearing). For additional instances, see Cohen, *Letting Prosecutors Write the Law*, *supra* note 3 (noting instances of ghostwriting by prosecutors in Georgia, Louisiana, Kentucky, South Carolina, Ohio, Texas, Pennsylvania, and Alabama). See generally Jefferson v. Upton, 560 U.S. 284 (2010) (reviewing an order written by the State and adopted verbatim by a judge in a capital habeas proceeding); Disciplinary Counsel v. Stuard, 901 N.E.2d 788 (Ohio 2009) (vacating death sentence and publicly reprimanding the trial-court judge after he asked an assistant county prosecutor to prepare a sentencing order via ex parte communications).

15. Judges sometimes have ex parte communications with prosecutors to ask them to write opinions, making it even harder to discover when the State has authored an opinion. See, e.g., Stuard, 901 N.E.2d at 790.

write an original legal analysis section. These changes will substantially mitigate the dangers of ghostwritten opinions.

Part I of this Note provides background on judicial opinions, ghostwriting, and the relevant case law. Part II describes the problems that ghostwritten opinions pose for the parties' individual case, future cases, and the wider legitimacy of the judicial system. Part III suggests solutions; specifically, to treat criminal cases differently and change judicial ethics rules.

## I. BACKGROUND

Before understanding the ills of ghostwritten opinions, it is important to explore the forces that produce them, especially the limited time and resources of trial-court judges.<sup>16</sup> This Part first explains when and how judicial opinions are typically written. A description of ghostwritten opinions follows. Finally, the Part concludes with a survey of the current case law surrounding opinions ghostwritten by a party.

### A. *Judicial Opinions*

Generally, a party to a case has no right to a judicial opinion.<sup>17</sup> Nevertheless, some state constitutions require that judges write opinions.<sup>18</sup> There are also circumstances in which federal judges are required to explain their decisions in writing.<sup>19</sup> For instance, in criminal trials without a jury, the Federal Rules of Criminal Procedure require the court to state its findings in open court or to write an opinion.<sup>20</sup> This requirement reflects a policy preference for written explanations of judicial outcomes.

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16. Ghostwriting appears to occur more often in state courts. Cohen, *Letting Prosecutors Write the Law*, *supra* note 3. However, understanding the full extent of the problem, at both federal and state levels, would require extensive empirical research.

17. Mathilde Cohen, *When Judges Have Reasons Not to Give Reasons: A Comparative Law Approach*, 72 WASH. & LEE L. REV. 483, 525 (2015) ("Legal scholars have observed that there has never been a common law duty for judges to give reasons . . ." (citation omitted)) [hereinafter Cohen, *When Judges Have Reasons*].

18. *See id.* at 526 n.252 (citing various statutes to support the proposition that "[a] number of state constitutions currently provide constitutional requirements for judges to give reasons, write opinions, or both" and that "[t]hese state requirements usually apply only to the state Supreme Court, but a few also apply generally to all the courts of the state").

19. *See id.* at 526 ("A few statutory and doctrinal mechanisms exist to constrain federal judges' reason-giving, but they do not amount to a universal duty to give reasons.").

20. FED. R. CRIM. P. 23(c).

Written explanations from lower courts assist appellate courts in properly reviewing decisions.<sup>21</sup> Appellate courts afford varying degrees of deference to trial court decisions depending on the issues presented by, and the posture of, the case.<sup>22</sup> Questions of law are reviewed de novo, meaning that there is no deference to the trial court.<sup>23</sup> Questions of fact are reviewed for clear error, so the appellate court will defer to the trial court absent a blatant mistake.<sup>24</sup> Mixed questions of law and fact are reviewed either de novo or for abuse of discretion.<sup>25</sup> Under the latter standard, the appellate court defers to trial court decisions that are not clearly unreasonable.<sup>26</sup>

Judicial opinions usually follow a familiar structure. A trial court's decision typically includes descriptions of the nature of the case, facts, issues, explanations of law and reasoning, and the holding.<sup>27</sup> The bulk of an opinion consists of the facts and legal reasoning. The facts drive the decision because the law applied is limited by the facts of the case.<sup>28</sup> Although facts themselves are objective, they can be emphasized, de-emphasized, omitted, or framed with adjectives intended to persuade the reader. The legal reasoning section, where pertinent law and analysis are presented,<sup>29</sup> is the judge's opportunity to describe his or her thought process for future readers and reviewers.

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21. See Cohen, *When Judges Have Reasons*, *supra* note 17, at 507.

22. See, e.g., *Sprint/United Mgmt. Co. v. Mendelsohn*, 552 U.S. 379, 384 (2008) (giving broad deference to a district court on evidentiary rulings because of "a district court's familiarity with the details of the case and its greater experience in evidentiary matters"); see also John F. Reif, *Standards of Review*, 79 OKLA. B.J. 34, 34 (2008) ("A standard of review is the legal scale to be used by an appellate court in weighing a claim of error." (citation omitted)).

23. See, e.g., *Ornelas v. United States*, 517 U.S. 690, 691 (1996) (holding that determinations of probable cause in a warrantless search should be reviewed de novo). See generally Daniel Solomon, *Identifying and Understanding Standards of Review*, The Writing Center at GULC (2013), <https://www.law.georgetown.edu/wp-content/uploads/2018/07/Standards-of-Review.pdf> [<https://perma.cc/CF8B-27GE>] (discussing various standards of appellate review).

24. See *Mercantile Mut. Ins. Co. of N.Y. v. Folsom*, 85 U.S. 237, 252 (1874) (explaining that findings of fact by the trial court cannot be reviewed by the Supreme Court); Solomon, *supra* note 23.

25. Solomon, *supra* note 23.

26. *Id.*

27. JOYCE J. GEORGE, *JUDICIAL OPINION WRITING HANDBOOK* 37 fig.6 (5th ed. 2007).

28. *Id.* at 162 ("The facts control the outcome of the case.").

29. *Id.* at 181.

### B. Ghostwriting Opinions

Some judges do not independently write the entirety of their opinions, instead delegating some or all of the work to the winning party of a case.<sup>30</sup> In some instances, judges will adopt just a party's findings of fact, while in others, a judge will adopt an entire proposed opinion, including the legal analysis.<sup>31</sup> Most disconcertingly, judges occasionally adopt proposed opinions verbatim.<sup>32</sup> These instances should be distinguished from ones where the judge makes grammatical and substantive edits.<sup>33</sup> Those cases at least indicate some review of the proposal. Judges sometimes announce a decision from the bench and then request proposed findings.<sup>34</sup> Judges may ask both parties for

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30. See *Ghostwrite*, MERRIAM-WEBSTER.COM, <https://www.merriam-webster.com/dictionary/ghostwriting> [https://perma.cc/YG2M-8T5H] (defining “ghostwrite” as “to write for and in the name of another”). Scholars have thoroughly discussed the use of law clerks in judicial writing, which this Note does not address. See, e.g., Carol M. Bast & Linda B. Samuels, *Plagiarism and Legal Scholarship in the Age of Information Sharing: The Need for Intellectual Honesty*, 57 CATH. U. L. REV. 777, 800–01 (2008) (noting that judges frequently ask law clerks to draft the first or final version of the opinion); J. Daniel Mahoney, *Law Clerks: For Better or For Worse*, 54 BROOK. L. REV. 321, 332–34 (1988) (listing opinion writing as one of the law clerk’s tasks); Jeffrey S. Rosenthal & Albert H. Yoon, *Judicial Ghostwriting: Authorship on the Supreme Court*, 96 CORNELL L. REV. 1307, 1341 (2011) (concluding that there is “strong evidence that [Supreme Court] Justices are increasingly relying on their clerks when writing opinions”); Albert Yoon, *Law Clerks and the Institutional Design of the Federal Judiciary*, 98 MARQ. L. REV. 131, 132 (2014) (noting that “recent evidence suggests that judges—including Justices—increasingly rely on their clerks when writing opinions”).

31. *Compare* E.E.O.C. v. Fed. Reserve Bank of Richmond, 698 F.2d 633, 638 (4th Cir. 1983) (noting that the district court adopted one of the party’s findings and conclusions verbatim in a racial discrimination suit), *with* Keystone Plastics, Inc. v. C & P Plastics, Inc., 506 F.2d 960, 962 (5th Cir. 1975) (identifying that the trial court adopted one party’s proposed opinion without notification to opposing party in a patent case).

32. See, e.g., Hamm v. Comm’r, Ala. Dep’t of Corr., 620 F. App’x 752, 756 n.3 (11th Cir. 2015).

33. See, e.g., Bright v. Westmoreland Cty., 380 F.3d 729, 731 (3d Cir. 2004) (stating that the lower court made some grammatical and stylistic edits to the proposed opinion and made two minor substantive changes); Bingham v. Bingham, 628 S.W.2d 628, 629 (Ky. 1982) (noting that the trial judge “made several additions and corrections [to the proposed opinion] to reflect his decision”).

34. See, e.g., United States v. El Paso Nat. Gas Co., 376 U.S. 651, 656 (1964) (explaining that the court announced its decision and then requested findings from one party, which the court adopted verbatim); Holbrook v. Institutional Ins. Co. of Am., 369 F.2d 236, 242 (7th Cir. 1966) (same); Fields v. Kentucky, No. 2013-SC-000231-TG, 2014 LEXIS 118, at \*12 (Ky. Sept. 18, 2014) (noting that the judge made a ruling and then asked the prosecutor to submit proposed findings and conclusions).

proposed opinions.<sup>35</sup> In other instances, they may withhold judgment and request a proposed opinion from a single party before issuing a decision.<sup>36</sup>

There is no clear explanation for why judges employ certain ghostwriting practices over others.<sup>37</sup> But all ghostwriting likely occurs because of judges' lack of time and resources.<sup>38</sup> Many judges do not have law clerks.<sup>39</sup> This is especially true of state-court trial judges, whose dockets can be extensive.<sup>40</sup> In 2008, the median state court docket contained more than 1500 non-traffic cases per judge.<sup>41</sup> Writing an opinion takes time—a precious commodity for judges with heavy caseloads. The need for more resources in the justice system is a problem too large for this Note to address. However, additional judicial resources would likely reduce ghostwriting by parties significantly.

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35. See, e.g., *Prater v. Cabinet*, 954 S.W.2d 954, 956 (Ky. 1997) (noting that the trial court requested proposed findings from both parties before adopting one verbatim); *State v. Ahmed*, No. 05-BE-15, 2006 WL 3849862, at \*70 (Ohio Ct. App. Dec. 28, 2006) (noting that where the defense was provided with copies of the prosecution's findings, allowed to file objections, and provided with the opportunity to provide the court with its own findings).

36. See, e.g., *Disciplinary Counsel v. Stuard*, 901 N.E.2d 788, 790 (Ohio 2009) (explaining that the trial court asked an assistant county prosecutor to prepare a sentencing order via ex parte communications).

37. Variances are likely the result of differing cultures of courts and jurisdictions. See, e.g., Letter from David M. Toeper, Trumbull County Prosecuting Attorney, to Judges Peter J. Kontos, Andrew D. Logan, W. Wyatt McKay and John M. Stuard (Dec. 5, 2006), <https://www.themarshallproject.org/documents/2891965-2006-12-5-Letter-to-Trumbull-County-Judges> [<https://perma.cc/9UKK-PFX2>] (stating that “it has been the custom and practice of [the Trumbull County Criminal Division] to . . . draft[] entries at [judges'] request and direction”).

38. See Cohen, *Letting Prosecutors Write the Law*, *supra* note 3 (“The practical problem is that so many judges are so overworked and understaffed that they use ghostwriting by state attorneys to help move along cases that might otherwise take months or years to resolve.”).

39. There are approximately 30,000 state judges and 1,700 federal judges in the country, while there are only a little over 15,000 law clerks. UNIV. OF DENVER QUALITY JUDGES INITIATIVE, FAQs: JUDGES IN THE UNITED STATES 3; *Occupational Employment and Wages, May 2017: Judicial Law Clerks*, U.S. DEP'T OF LABOR BUREAU OF LAB. STAT., [https://www.bls.gov/oes/2017/may/oes231012.htm#\(1\)](https://www.bls.gov/oes/2017/may/oes231012.htm#(1)) [<https://perma.cc/QF67-Y84E>].

40. State courts handled 84.2 million cases in 2016. COURT STATISTICS PROJECT, TOTAL INCOMING CASES IN STATE COURTS, 2007-2016, [http://www.courtstatistics.org/~media/7F3DA5FEF1BF4BE1BE2BDE6BA0E86C60.ashx](http://www.courtstatistics.org/~/media/7F3DA5FEF1BF4BE1BE2BDE6BA0E86C60.ashx) [<https://perma.cc/JR2D-HMRL>].

41. R. LAFOUNTAIN, R. SCHAUFFLER, S. STRICKLAND, C. BROMAGE, S. GIBSON & A. MASON, COURT STATISTICS PROJECT, EXAMINING THE WORK OF STATE COURTS: AN ANALYSIS OF 2008 STATE COURT CASELOADS 21 (2010), <http://www.courtstatistics.org/~media/Microsites/Files/CSP/EWSC-2008-Online.ashx> [<https://perma.cc/UF6R-K5RP>] (showing 1,929 median incoming non-traffic cases for unified courts and 1585 for general jurisdiction courts).

Regardless, tasking a party—especially a prosecutor—to write the opinion is an inappropriate solution to inadequate resources. Delegation deprives stakeholders and the reviewing court of a written account of the judge’s decision and analysis—the very reason that written opinions are preferred at all. Ghostwriting by prosecutors appears to happen more frequently in some states than in others,<sup>42</sup> indicating that some courts manage to address similar resource scarcity without delegating opinion writing to the prosecution.<sup>43</sup> The solutions this Note offers would similarly allow judges to conserve resources—without sacrificing impartiality and written reasoning—by using proposed opinions from *both* parties to craft their own opinions.

### C. *Ambiguous Case Law*

1. *The Supreme Court has called into question the legitimacy of ghostwritten opinions.* The Supreme Court is no stranger to ghostwritten opinions. In a 1964 case, the Court decided that 130 findings of fact and one conclusion of law in a civil suit that were drafted by a party and adopted verbatim were still “formally” made by the judge.<sup>44</sup> However, the Court also noted that opinions “drawn with the insight of a disinterested mind are . . . more helpful to the appellate court.”<sup>45</sup> In subsequent cases, the Court more forcefully criticized verbatim adoptions, but ultimately accepted their legality nonetheless.

In the 1985 case *Anderson v. City of Bessemer City*,<sup>46</sup> the Court held that the Fourth Circuit erred in applying a stricter standard of review to a ghostwritten opinion.<sup>47</sup> In *Anderson*, after a two-day trial, the district court issued a brief memorandum finding for the plaintiff

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42. See Cohen, *Letting Prosecutors Write the Law*, *supra* note 3 (describing states where ghostwriting occurs).

43. This phenomenon cannot be attributed to an uneven distribution of work between the states. For example, California does not have documented prevalent ghostwriting, while Texas and Alabama do. Cohen, *Letting Prosecutors Write the Law*, *supra* note 3. Yet, California had an average of 2,157 incoming non-traffic cases per judge in 2008, whereas Texas and Alabama had a lower average of 1,982 and 1,570, respectively. LAFOUNTAIN ET AL., *supra* note 41, at 21.

44. *United States v. El Paso Nat. Gas Co.*, 376 U.S. 651, 656 (1964) (discussing a civil suit regarding § 7 of the Clayton Act, where the judge announced the judgment from the bench, then requested appellees to write the opinion).

45. *Id.* at 656–57 n.4 (citing Judge J. Skelly Wright, *Seminars for Newly Appointed United States District Judges* (1963)).

46. *Anderson v. City of Bessemer City*, 470 U.S. 564 (1985).

47. *Id.* at 571.

on a Title VII discrimination suit.<sup>48</sup> The memorandum explained the judge's rationale and requested that the plaintiff submit proposed findings of fact and conclusions of law as an expansion of the memorandum.<sup>49</sup> The plaintiff submitted proposed findings.<sup>50</sup> The court then asked the defendant to submit objections,<sup>51</sup> to which the plaintiff was allowed to respond.<sup>52</sup> These submissions in hand, the court adopted the plaintiff's proposed findings with some revisions.<sup>53</sup>

On appeal, the Fourth Circuit declined to analyze the district court's findings under the usual clear-error standard and instead subjected the adopted findings to a more demanding standard of review. The Fourth Circuit explained that "close scrutiny of the record in this case [was] justified by the manner in which the opinion was prepared."<sup>54</sup> The court noted that it had previously condemned "the practice of adopting the prevailing party's proposed findings of fact and conclusions of law" and the trial judge "violate[d] the intent of [these] earlier decisions" by adopting the substance of the proposed opinion.<sup>55</sup>

The Supreme Court reversed the Fourth Circuit for applying this stricter standard.<sup>56</sup> The Court criticized the verbatim adoption of findings of facts and acknowledged the potential for "overreaching and exaggeration" by attorneys writing these facts when they know they have won.<sup>57</sup> However, the Court ultimately held that, even when a "judge adopts proposed findings verbatim, the findings are those of the court."<sup>58</sup>

The Court then distinguished the case from potentially unacceptable practices, stating that "[u]nder *these* circumstances," the findings likely represented the judge's own conclusions and should not have been subject to stricter appellate review.<sup>59</sup> The Court noted that

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48. *Id.* at 568.

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.* at 571.

54. *Id.* (quoting *Anderson v. City of Bessemer City*, 717 F.2d 149, 156 (4th Cir. 1983) (alteration in original)).

55. *Anderson v. City of Bessemer City*, 717 F.2d 149, 156 (4th Cir. 1983).

56. *Anderson*, 470 U.S. at 566.

57. *Id.* at 572.

58. *Id.*

59. *Id.* at 573 (emphasis added).

the lower court: (1) did not “uncritically” accept the findings, (2) gave guidance through a “framework,” (3) gave the defendant an opportunity to reply, and (4) varied the final opinion considerably from the proposed findings.<sup>60</sup> *Anderson* restricted the ability of an appellate court to change the amount of deference it gives to a trial court’s decision without looking deeper into the circumstances of an adopted opinion.

Circuit courts have distinguished or adopted *Anderson* in various ways. The Supreme Court has not clarified *Anderson*’s limitations,<sup>61</sup> except somewhat in the habeas context. In 2010, in *Jefferson v. Upton*,<sup>62</sup> the Court acknowledged that *Anderson* did not address findings adopted from the prosecution after an ex parte request in the habeas setting.<sup>63</sup> The case was remanded, and the lower court conducted a de novo review of the habeas petition.<sup>64</sup> *Jefferson* is discussed more extensively in Part III.A.3.

2. *Circuit courts have interpreted the limitations of ghostwritten opinions differently.* Despite the Supreme Court’s guidance in *Anderson*, circuit courts have interpreted the appropriateness of ghostwriting differently. For example, the Eleventh Circuit has upheld ghostwriting’s legality but “strongly criticize[s]” it.<sup>65</sup> Meanwhile, the Ninth Circuit has created a carveout from adopting a party’s proposed opinion when that proposal is pulled from the party’s brief.<sup>66</sup> This variance shows that *Anderson* is a limited opinion that leaves room to curtail the practice. The circuits do have one thing in common: they consistently take the opportunity to criticize ghostwriting.

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60. *Id.* at 572–73.

61. *See* *Bright v. Westmoreland Cty.*, 380 F.3d 729, 731–32 (3d Cir. 2004) (reversing a dismissal because the district court adopted an opinion that was only slightly edited and “there is no authority in the federal courts that countenances the preparation of the opinion by the attorney for either side” (quoting *Chicopee Mfg. Corp. v. Kendall Co.*, 288 F.2d 719, 724 (4th Cir. 1961))); *Morrison v. Char*, 797 F.2d 752, 755 n.3 (9th Cir. 1986) (noting that “the situation here is different” from *Anderson* because “these findings of fact were proposed to justify a motion for summary judgment, not to accompany a judgment after a full trial”).

62. *Jefferson v. Upton*, 560 U.S. 284 (2010).

63. *Id.* at 294.

64. *Id.*; *Jefferson v. Sellers*, 250 F. Supp. 3d 1340, 1387 (N.D. Ga. 2017).

65. *Hamm v. Comm’r, Ala. Dep’t of Corr.*, 620 F. App’x 752, 756 n.3 (11th Cir. 2015).

66. *Morrison*, 797 F.2d at 755 n.3 (“But the situation here is different; these findings of fact were proposed to justify a motion for summary judgment, not to accompany a judgment after a full trial. As such, *City of Bessemer City* is inapposite.”).

As mentioned above, the Eleventh Circuit criticized ghostwritten opinions as recently as 2015 in Hamm’s case.<sup>67</sup> However, the circuit also showed its disapproval of ghostwriting back in 1987, two years after *Anderson*. In *Colony Square Co. v. Prudential Ins. Co. of Am.*,<sup>68</sup> the Eleventh Circuit reviewed an opinion by a Bankruptcy Court judge.<sup>69</sup> The opinion, ghostwritten by one of the parties, was adopted after some “minor typographical corrections.”<sup>70</sup> The Bankruptcy Court judge had contacted one party *ex parte*, outlined what the opinion should say, and requested that the party draft it.<sup>71</sup> The judge then adopted the opinion after some minor corrections.<sup>72</sup> The other party was not informed of this arrangement at the time,<sup>73</sup> but learned about it months later and filed a motion to have the opinion reviewed.<sup>74</sup>

The Northern District of Georgia required the judge to answer interrogatories, held a five-day evidentiary hearing on the merits of the original case, and asked the parties to submit briefs.<sup>75</sup> The district court then issued an opinion denying the motion for relief.<sup>76</sup>

On appeal, the appellant argued that this ghostwriting was a violation of due process,<sup>77</sup> but the Eleventh Circuit disagreed. Although frustrated by the practice, the court held that two factors—that the judge made a final decision before requesting the proposed opinion, and that the bankruptcy judge’s supervising district court conducted an independent review—satisfied due process.<sup>78</sup>

Despite holding that the ghostwritten opinion did not violate due process, the Eleventh Circuit dedicated an entire section of its opinion

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67. *Hamm*, 620 F. App’x at 756 n.3 (“[W]e take this opportunity to once again strongly criticize the practice of trial courts’ uncritical wholesale adoption of the proposed orders or opinions submitted by a prevailing party.” (citation omitted)).

68. *Colony Square Co. v. Prudential Ins. Co. of Am.* (*In re Colony Square Co.*), 819 F.2d 272 (11th Cir. 1987).

69. *Id.* at 273.

70. *Id.* at 274.

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. This Note does not dive into the constitutional argument that adopting proposed opinions violates due process. Instead, it focuses on the state of current case law and solutions within that framework. However, the due process argument has been made successfully in the Northern District Court of Georgia, discussed below in Part III.A.3.a.

78. *In re Colony Square Co.*, 819 F.2d at 276–77.

to condemning ghostwriting.<sup>79</sup> It criticized the court's verbatim adoption, failure to allow the other party the opportunity to respond, and ex parte communications.<sup>80</sup> It explained the dangers of allowing a party to draft an opinion, including "the temptation to overreach and exaggerate" as well as giving a party an additional opportunity to "brief and argue."<sup>81</sup> Additionally, the court stated that the "quality of judicial decisionmaking suffers" when a judge delegates writing to a party because the writing process results in "stronger, sounder judicial rulings."<sup>82</sup> It is clear that ghostwriting destroys the impartiality sacred to a judicial opinion.

Moving north, the Third Circuit, in *Bright v. Westmoreland*, distinguished *Anderson* as applying solely to findings of facts and conclusions of law, not to entire opinions.<sup>83</sup> *Bright* involved an estate dispute.<sup>84</sup> The court explained that, unlike findings of facts and conclusions of law, opinions "constitute the logical and analytical explanations of why a judge arrived at a specific decision."<sup>85</sup> The Third Circuit reversed the district court after it adopted the appellee's proposed opinion with only minor changes.<sup>86</sup> The court described opinions as the "core work-product of judges" and the proof that a "judge actively wrestled with [the litigant's] claims . . . and made a scholarly decision based on his or her own reason and logic."<sup>87</sup> An adopted opinion from a party, the court wrote, "vitiates the vital purposes served by judicial opinions."<sup>88</sup>

Out west, in *Morrison v. Char*, the Ninth Circuit has interpreted *Anderson* as inapplicable to a case where the adopted findings of fact were pulled from arguments in a brief, rather than a proposed opinion.<sup>89</sup> Therefore, the court subjected the district court's findings of

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79. *Id.* at 274–76.

80. *Id.*

81. *Id.* at 275.

82. *Id.*

83. *Bright v. Westmoreland Cty.*, 380 F.3d 729, 731–32 (3d Cir. 2004).

84. *Id.* at 733.

85. *Id.* at 732.

86. *Id.* at 731–32.

87. *Id.* at 732.

88. *Id.*

89. *Morrison v. Char*, 797 F.2d 752, 755 n.3 (9th Cir. 1986) (distinguishing a brief to support a motion for summary judgment and proposed findings of fact).

fact in a legal malpractice suit to de novo review.<sup>90</sup> The court then reversed the district court's grant of summary judgment.<sup>91</sup>

The Federal Circuit, in reviewing a patent case, *Pentec, Inc. v. Graphic Controls Corp.*, stated that the clear-error standard applies to ghostwritten findings of fact, citing *Anderson*, but that there may be "wariness on review."<sup>92</sup> It is unclear how an appellate court could even apply such contrary standards.

After *Anderson*, circuit courts began to circumscribe ghostwriting, designating acceptable and unacceptable practices. This shows not only that *Anderson* failed to fully answer the numerous questions posed by ghostwriting, but also that there is nearly universal distaste for the practice in appellate courts. Circuit courts have all preached caution about ghostwritten opinions, and for good reason. Ghostwritten opinions fundamentally undermine the impartial judicial process.

## II. PROBLEMS FOR JUSTICE

Adopting verbatim an opinion written by a party gives rise to a host of problems. First, parties to the case are deprived of an impartial opinion. Second, if the case is appealed, the ghostwritten opinion can unfairly affect appellate review. Most importantly, ghostwritten opinions undercut the legitimacy of the judiciary by creating the appearance of bias.

### A. *Depriving Parties of an Impartial Opinion*

An attorney's role is to advocate for her client.<sup>93</sup> When the same advocate is asked to write an impartial opinion, it may be difficult, if not impossible, to shed her role as advocate.<sup>94</sup> Some attorneys may take advantage of the opportunity and write proposed opinions that are significantly biased toward their clients. In an extreme example, in *Jefferson v. Sellers*, the proposed opinion, which was adopted in full,

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90. *Id.* at 755.

91. *Id.* at 757.

92. *Pentec, Inc. v. Graphic Controls Corp.*, 776 F.2d 309, 313 (Fed. Cir. 1985).

93. See Kristin Fieldstad, *Just the Facts, Ma'am - A Review of the Verbatim Adoption of Findings of Fact and Conclusions of Law*, 44 ST. LOUIS U. L.J. 197, 218-19 (2000) (discussing conflict between attorneys' duty to assist courts and their duty to be advocates for clients).

94. *In re Colony Square Co.*, 819 F.2d 272, 275 (11th Cir. 1987) ("When an interested party is permitted to draft a judicial order without response by or notice to the opposing side, the temptation to overreach and exaggerate is overwhelming.").

referred to an affidavit of a person who, as the reviewing court detailed, was “never contacted in connection with [the] case, and no such affidavit was submitted as evidence.”<sup>95</sup> In Hamm’s case, the prosecution wrote, “contrary to Hamm’s assertion, there was no evidence before the jury that Hamm was not the triggerman.”<sup>96</sup> This, of course, was not the defense’s position, and it was likely a hyperbolic description, inconsistent with judicial impartiality.

Indeed, it is arguably an attorney’s duty to write the most favorable opinion for her client while still fulfilling her duty as an officer of the court. This creates the potential for actual bias in an opinion. The attorney remains an advocate first and an opinion writer second: she cannot don the mantle of neutrality after weeks, months, and sometimes even years of arguing for one side. Indeed, she *should not* be neutral because her job is to be a zealous *advocate*.

On the other hand, a judge should not have a stake in the case beyond coming to the right legal conclusion.<sup>97</sup> A written opinion by a judge assures parties—especially the losing party—that their issues have been thoroughly and respectfully addressed.<sup>98</sup> The explanation in an opinion legitimizes the decision. Even if the losing party disagrees, it is given justification for the result. Removing this backstop robs a losing party of closure.<sup>99</sup> An opinion adopted verbatim from the winning party still leaves doubt as to the judge’s reasoning. Parties go to court ready to accept a judge’s decision; that acceptance becomes more difficult when the explanation is written not by the judge, but by the opposing litigant. Parties in court deserve an unbiased explanation from the court, not the other side.

### B. *Threatening Justice in Future Cases*

The purpose of the written judicial opinion is not to notify parties of who wins and who loses. That could easily be accomplished from the bench. Instead, a written opinion explains the judge’s reasoning to the

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95. *Jefferson v. Sellers*, 250 F. Supp. 3d 1340, 1348 (N.D. Ga. 2017).

96. *Hamm v. Alabama*, No. CC 87-121.60 (Ala. Cir. Ct. Dec. 3, 1999).

97. See MODEL CODE OF JUDICIAL CONDUCT R. 2.2 (AM. BAR ASS’N 2011) (“A judge shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially.”).

98. Not all opinions are published, but when an explanation of a decision is required, the parties are read the explanation in open court or are given the written opinion, even if it is not published.

99. See Panoff, *supra* note 2, at 326 (“It is the means by which a judge communicates with litigants.”).

parties, to students of the law, to future parties, and to other courts. The development of the law relies on these opinions.<sup>100</sup>

When a judge adopts a party's opinion verbatim, uncertainty about the judge's thought process remains. An opinion tells the public: "This is the right way to think and talk about this case, and others like it."<sup>101</sup> Although the judge may agree with the proposed opinion's major points, it is impossible that a party would be able to perfectly articulate a judge's rationale on the first try.<sup>102</sup> No two individuals think identically. This is especially so in this context, where the parties and the judge are tasked to think in fundamentally different ways. When a judge uncritically adopts a proposed opinion verbatim, the opportunity to understand the judge's own reasoning and resolution is lost. Or worse, to the extent a party can perfectly capture a judge's thinking, that itself implies a closeness between judge and advocate that undermines notions of impartiality in the judicial process.

A judge's first-hand explanation is especially important in the appellate process, which is meant to correct errors. Judicial opinions trace a case's development. Every appellate court that reviews a case looks to the opinion before it, deferring to it in varying degrees.<sup>103</sup> All standards of deference assume that the judge in the lower court has impartially and thoroughly addressed the various issues herself.<sup>104</sup> But those assumptions are misplaced as to ghostwritten opinions. Take, for example, the recent case of *Michigan v. Borthwell*.<sup>105</sup> There, an opinion

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100. See *Kimble v. Marvel Entm't, LLC*, 135 S. Ct. 2401, 2409 (2015) ("Stare decisis—in English, the idea that today's Court should stand by yesterday's decisions—is a 'foundation stone of the rule of law.'" (quoting *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2036 (2014))).

101. James Boyd White, *Judicial Opinion Writing—What's an Opinion For?*, 62 U. CHI. L. REV. 1363, 1366 (1995).

102. See, e.g., Mahoney, *supra* note 30, at 333 (1988) ("In most cases, I make substantial revisions to a [law clerk's] draft opinion to ensure that the final opinion reflects precisely my views and analysis of the case.").

103. Compare *Mercantile Mut. Ins. Co. of N.Y. v. Folsom*, 85 U.S. 237, 252 (1874) (explaining that findings of fact by the trial court cannot be reviewed by the Supreme Court), with *Ornelas v. United States*, 517 U.S. 690, 691 (1996) (holding that determinations of probable cause in a warrantless search should be reviewed de novo); see also Reif, *supra* note 22.

104. See, e.g., *Sprint/United Mgmt. Co. v. Mendelsohn*, 552 U.S. 379, 384 (2008) (giving broad deference to a district court on evidentiary rulings because of "a district court's familiarity with the details of the case and its greater experience in evidentiary matters"); see also Reif, *supra* note 22, at 36 (explaining that deference "reflects an accommodation of the respective institutional advantages of trial and appellate courts").

105. *People v. Borthwell*, No. 02-000276-01 (Mich. Cir. Ct. June 11, 2018).

was pulled directly from a prosecutor's brief.<sup>106</sup> Of course, the language read more like an argument than an impartial judicial opinion. For example, the brief-opinion read: "Defendant asks this Court to grant a new trial on the basis of unreliable, biased and openly perjured testimony."<sup>107</sup> An appellate court must defer to a lower court's language, biased or not, threatening an impartial appellate review.<sup>108</sup>

Lower courts communicate with appellate courts by explaining their reasoning in opinions. This communication is essential. The parties can communicate with the appellate court through briefs or oral arguments, but the lower court opinion is the only way an appellate court understands the previous judge's unique perspective. Ghostwriting can deprive the appellate court of the lower court's perspective and, for the parties appealing, an opportunity for unbiased review.

### C. *Undermining Confidence in the Judiciary*

The judicial process depends on legitimacy. The appearance of bias that ghostwritten opinions create threatens this legitimacy.<sup>109</sup> This practice is not always exposed when it occurs.<sup>110</sup> But, when the public becomes aware of it, as it did with Doyle Hamm,<sup>111</sup> the secrecy escalates the appearance of bias. Even if an attorney who represents a party in the case manages to write impartially in the judge's place, the appearance of bias still exists when a judge abdicates the role that the public expects her to fulfill.

The public understands that an attorney is an advocate. An attorney fights for the interests of her client, while a judge impartially decides a case. But when a party writes the opinion, those roles become

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106. A comparison of the court's opinion, *id.*, and the prosecution's brief, People's Response to Defendant's Supplemental Brief on His Motion for Relief from Judgment, Borthwell, No. 02-000276-01, shows that most of the substantive analysis of the opinion was pulled from the prosecution's brief.

107. *Id.* at 3.

108. The language of an opinion is so important that two words can make all the difference. For example, Justice Scalia's use of the phrase "homosexual agenda" in the *Lawrence v. Texas*, 539 U.S. 558 (2003), dissent alienated readers and overshadowed any legal argument. See Ian Samuel, *The Counter-Clerks of Justice Scalia*, 10 N.Y.U. J.L. & LIBERTY 1, 10-12 (2016).

109. For examples of criticisms of the practice, see *supra* notes 3, 93.

110. Requests for proposed opinions sometimes occur *ex parte*, and then the final opinion never references that it was adopted from a proposed opinion.

111. See text accompanying *supra* note 3.

“blurred,” and the public can become confused.<sup>112</sup> Who is the judge? Why, then, is the attorney writing the opinion? The public respects opinions because impartial judges wrote them. The legitimacy of the judicial process lies in the judge being a neutral decision-maker. That legitimacy dissipates when the advocate assumes the role of judge.<sup>113</sup> As the Third Circuit has explained, judges provide “neutral fora,” thus any “impropriety, or even the appearance thereof, undermines [the court’s] legitimacy and effectiveness.”<sup>114</sup> Eventually, with enough opinions written by advocates, confidence in the courts will suffer.

### III. SOLUTIONS

The obvious, and most effective, solution to the problem of ghostwritten opinions is to prohibit them entirely. This would require increased resources for the courts and either a legislative or judicial overturning of *Anderson*. But because the Supreme Court has declined to adopt this solution, this Note proposes incremental steps. First, ghostwritten opinions should be eradicated from criminal cases. Second, judicial ethics rules should be changed to create clear standards regarding adopting proposed opinions. Ideally, opinions would never be authored by a party. These solutions would not eliminate ghostwriting completely, but they represent a step in the right direction.

#### A. *The Criminal Context*

1. *Ghostwritten opinions are particularly dangerous in criminal cases.* A defendant’s freedom, or even her life, may be on the line in a criminal case. For that reason, criminal cases are fundamentally different than civil cases. Our system already recognizes this difference in myriad ways. For instance, the Constitution guarantees certain protections in the criminal context that are absent in the civil context.<sup>115</sup>

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112. See Panoff, *supra* note 2, at 331.

113. A judge “shall avoid impropriety and the appearance of impropriety.” MODEL CODE OF JUDICIAL CONDUCT Canon 1 (AM. BAR ASS’N 2011).

114. Bright v. Westmoreland Cty., 380 F.3d 729, 731–32 (3d Cir. 2004).

115. Several constitutional provisions provide protections to criminal defendants that are not necessarily guaranteed in civil cases. See U.S. CONST. amend. IV (requiring probable cause for a warrant); *id.* amend. V (requiring a grand jury indictment for certain crimes, due process of law in a criminal case, and the ability to confront witnesses); *id.* amend. VI (requiring, in criminal

Because of their increased stakes, criminal cases magnify the issues that ghostwriting presents.<sup>116</sup>

It is particularly important that the use of ghostwritten opinions in the criminal context be constrained. Ghostwriting is used widely in criminal cases. The Equal Justice Initiative reported in 2003 that “the trial judge adopted verbatim an order denying or dismissing the Rule 32 petition which was written by the State in seventeen of the 20 most recent capital cases.”<sup>117</sup> In *Disciplinary Counsel v. Stuard*,<sup>118</sup> Judge Stuard, a trial-court judge in Ohio, was publicly reprimanded for communicating with a prosecutor ex parte while writing a capital sentencing opinion.<sup>119</sup> Judge Stuard met with the prosecutor four times between the penalty phase and the sentencing phase of the trial to discuss and work on the sentencing opinion.<sup>120</sup> The defense only learned about the ex parte contact when it noticed the prosecutor silently reading along with Judge Stuard as he announced the opinion from the bench.<sup>121</sup> Similarly, in *Fields v. Commonwealth of Kentucky*,<sup>122</sup> the judge adopted a prosecutor’s proposed findings of fact and conclusions of law verbatim for a post-conviction motion.<sup>123</sup> The Kentucky Supreme Court affirmed, explaining that neither the findings nor the conclusions were clearly erroneous.<sup>124</sup> Likewise, in *Jefferson v. Zant*,<sup>125</sup> the prosecution ghostwrote a 45-page habeas decision in Butts

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cases, a speedy trial, with an impartial jury, in the jurisdiction of the crime, with the assistance of counsel); *id.* amend. VIII (prohibiting cruel and unusual punishment).

116. See Fieldstad, *supra* note 93, at 210 (explaining the difference between civil cases and criminal cases by referencing the dissenter in *State v. Kenley*, Judge Stith). In *Kenley*, the Missouri Supreme Court held that the lower court does not err by adopting a proposed opinion as long as the court considered the proposal carefully. *Id.* Judge Stith dissented, arguing that death is different and that upper courts have a duty to “determine whether the judge below . . . exercised his or her independent judgment in adopting the . . . findings.” *Id.* (quoting *State v. Kenley*, 952 S.W.2d 250, 283 (Mo. 1997) (Stith, J. dissenting)).

117. Brief of *Amici Curiae* Alabama Appellate Court Justices and Bar Presidents in Support of the Petition for Certiorari at 15 n.15, *Hamm v. Dunn*, 138 S. Ct. 828 (No. 15-8753) (quoting Decl. of Aaryn M. Urell ¶ 4, *Barbour v. Campbell*, No. 01-S-1530-N (M.D. Ala. Aug. 28, 2003)).

118. *Disciplinary Counsel v. Stuard*, 901 N.E.2d 788 (Ohio 2009).

119. *Id.* at 790.

120. *Id.* at 790–91.

121. *Id.* at 791.

122. *Fields v. Commonwealth*, No. 2013-SC-000231-TG, 2014 LEXIS 118 (Ky. Dec. 18, 2014).

123. *Id.* at \*12–14.

124. *Id.*

125. *Jefferson v. Zant*, 431 S.E.2d 110 (Ga. 1993).

Superior Court in Georgia.<sup>126</sup> The Georgia Supreme Court gave deference to this opinion and affirmed, rejecting Jefferson's argument that the case should be reviewed under a lower standard than clear error.<sup>127</sup> These are just a few examples of prosecutors writing judicial opinions.<sup>128</sup> And although the full extent of this practice is difficult to discover—the judge's name is the only one to appear on the opinion—it is safe to assume that the practice extends beyond these few reported cases.

Allowing prosecutors, instead of a judge, to write an opinion is especially detrimental in the criminal justice system, where a person's freedom is on the line.<sup>129</sup> This bias follows the case on appeal, continuing to influence the pursuit of justice.<sup>130</sup>

2. *Criminal cases are beyond the scope of Anderson.* *Anderson* is a limited opinion.<sup>131</sup> Although it addresses ghostwriting, it only scratches the practice's surface. Most importantly, *Anderson* was a civil case.<sup>132</sup> The Supreme Court has not addressed ghostwriting in a criminal case. Given the need for increased protections in criminal cases, *Anderson* should not apply.

Even if *Anderson* does apply, it should be interpreted narrowly. Specifically, appellate courts should only give ghostwritten opinions the customary deference when the trial court judge only sought proposed findings from the prosecutor (as opposed to the whole opinion), allowed the defense to respond to the proposed findings, and adopted the findings after revision.<sup>133</sup>

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126. *Id.* at 111.

127. *Id.* at 114.

128. See Brief of *Amici Curiae*, *supra* note 117, at 15–16; Bryan A. Stevenson, *Confronting Mass Imprisonment and Restoring Fairness to Collateral Review of Criminal Cases*, 41 HARV. C.R.—C.L. L. REV. 340, 355–56 (2006).

129. Although the same concerns apply to a defense attorney writing an opinion, I have not been able to find a single case where a defense attorney has ghostwritten an opinion. In a federal nonjury trial, the court must state its findings in writing if a party requests it. For this reason, prosecutors are perhaps less likely to request written findings when they lose, as that would potentially lead to a defense attorney writing a proposed opinion. See FED. R. CRIM. P. 23(c).

130. In 2010, there were an estimated 69,348 criminal appeals in state courts. NICOLE L. WATERS, ANNE GALLEGOS, JAMES GREEN & MARTHA ROZSI, DOJ, CRIMINAL APPEALS IN STATE COURTS 1 (2015) <https://www.bjs.gov/content/pub/pdf/casc.pdf> [<https://perma.cc/S7J3-XA2Q>].

131. *Anderson v. City of Bessemer City*, 470 U.S. 564, 564–56 (1985).

132. *Id.*

133. *Id.*

These limitations correspond to the limitations in *Anderson*. As a reminder, in *Anderson*, the plaintiff won in a Title VII discrimination suit and the trial court adopted the plaintiff's proposed opinion. Several factors limited the Supreme Court's holding. First, only findings were adopted, not legal reasoning.<sup>134</sup> Second, the losing party was given an opportunity to reply to the proposed findings before they were adopted by the judge.<sup>135</sup> Finally, the opinion was not adopted verbatim, which the Supreme Court emphasized as an indication that the judge had made his own independent judgment.<sup>136</sup> This is noteworthy because although the Court affirmed its precedent that a verbatim-adopted opinion is ultimately the court's,<sup>137</sup> it still focused on the district court's revisions of the proposed findings as evidence of independent judgment.<sup>138</sup>

*a. Anderson should not apply to criminal cases.* *Anderson* and other cases addressing ghostwriting each ask whether the judge has independently reviewed the case.<sup>139</sup> There are additional, cumulative concerns discussed above: the loss of the judge's reasoning, actual or apparent bias, and the loss of legitimacy. Taking all these concerns into consideration, judges in criminal cases should be required to write the entire opinion without reliance on prosecutors as ghostwriters in order to receive deference in appellate courts. This is not inconsistent with *Anderson*, which was a civil, not a criminal, case.

If a defendant provides evidence that the judge adopted a prosecutor's proposed opinion verbatim, the state should have to respond with evidence that the lower court wrote its own opinion entirely before an appellate court grants the opinion the typical deference. The type of evidence required from the defendant would likely include the state's proposed opinion, in order to compare it to the actual opinion. This would be difficult, but not impossible, to discover—after all, defense attorneys have discovered such opinions

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134. *Id.* at 571.

135. *Id.* at 568.

136. *Id.* at 571–72.

137. *See* *United States v. El Paso Nat. Gas Co.*, 376 U.S. 651, 656 (1964).

138. *Anderson*, 470 U.S. at 572–73.

139. *See id.* at 571–73; *Bright v. Westmoreland Cty.*, 380 F.3d 729, 732 (3d Cir. 2004) (explaining that the “central issue is whether the district court had made an independent judgment” (quoting *Odeco, Inc. v. Avondale Shipyards, Inc.*, 663 F.2d 650, 652–53 (5th Cir. 1981))).

before.<sup>140</sup> The state's response should include evidence that it did not write the proposed opinion or that the actual opinion was not derived from the proposed opinion. This would be a determination of fact; the appellate court would determine if the defense or the state presents more reliable evidence of what occurred in the lower court. Even better, trial courts should be required to keep copies of proposed opinions on file. This transparency would make ghostwriting easier to discover.

*b. If Anderson applies to criminal cases, then it should be limited.* If *Anderson* does apply to criminal cases, then ghostwritten opinions should receive no deference except under the precise circumstances present in *Anderson*. For a ghostwritten opinion to receive appellate deference, a judge should only adopt findings, not legal reasoning; should allow the defendant to respond to those findings; and should critically review the proposed findings.

Appellate courts should enforce *Anderson* to ensure that ghostwritten opinions receive no deference without evidence of independent judicial review by the lower court. If a defendant provides evidence that findings were adopted verbatim from a prosecutor, that the defense was not given an opportunity to respond, or that the court adopted proposed legal reasoning, then the state should have to produce evidence of independent judicial review to rebut the implication that the lower court did not properly review the case. *Anderson*, read fully in conjunction with its facts, supports these limitations.<sup>141</sup> At bottom, the appellate court should be given assurance before affording deference that the lower court did not “uncritically accept” a prosecutor's proposed opinion. If the appellate court is not assured, then it should review the case de novo.

As more instances of ghostwriting come to light, the case for reconsidering *Anderson* in its entirety strengthens. However, it is critical that, in the meantime, change at least occurs for criminal cases. Both possible solutions—putting criminal cases outside the scope of *Anderson* entirely or limiting deference in certain instances—address the problems with ghostwritten opinions: We do not lose the judge's reasoning; because only factual findings can be adopted verbatim,

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140. Forbidding entirely the practice of ex parte proposed opinions would help ensure that all parties have access to any proposed opinion in the case.

141. *Anderson*, 470 U.S. 564 at 572–73 (noting that the district court provided a framework for the proposed findings, the opposing party was given a chance to respond to the proposed findings, and the court revised the findings).

judges must produce their own legal analysis. Meanwhile, bias in the opinion is prevented by allowing the defense to respond to proposed findings and by giving defendants an opportunity to challenge the impartiality of these opinions in the appellate process. Legitimacy is consequently preserved.

3. *Habeas corpus petitions require safeguards against ghostwritten opinions.* The writ of habeas corpus is the final safeguard against abuse in the criminal system. The writ, petitioned for by the defendant, can command someone who has custody of the defendant, typically the warden of a prison, to release the defendant because of a trial defect.<sup>142</sup> A defendant petitions a court for this writ.<sup>143</sup> The writ is available in all federal district courts, the Supreme Court, and some state courts.<sup>144</sup> The writ of habeas corpus is not only the last chance for a defendant to challenge a conviction, but it is also the last chance for the criminal system to fix its errors.<sup>145</sup>

In 1996, Congress passed the Antiterrorism and Effective Death Penalty Act (AEDPA),<sup>146</sup> which requires appellate courts to give more deference to lower courts when reviewing a habeas petition.<sup>147</sup> In 2010, the Supreme Court, applying pre-AEDPA law, analyzed a ghostwritten opinion in the habeas context.<sup>148</sup> The Court allowed the federal district court to determine whether the ghostwritten opinion should be given a presumption of correctness.<sup>149</sup> The federal district court, declining to afford the ghostwritten opinion that presumption, stated that the “judge’s verbatim adoption of [the] proposed order . . . is an affront to the heightened concern with reliability and trustworthiness due a death penalty case and places the validity of the decision in issue.”<sup>150</sup>

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142. *Federal Habeas Corpus*, COLUM. HUM. RTS. L. REV., Fall-Winter, 1977–78, at 103, 103.

143. *Id.*

144. *Id.* This Note focuses on writs to federal courts, because writs to state courts have their own unique procedures.

145. *Harris v. Nelson*, 394 U.S. 286, 290–91 (1969) (“The writ of habeas corpus is the fundamental instrument for safeguarding individual freedom against arbitrary and lawless state action.”).

146. Antiterrorism and Effective Death Penalty Act of 1996, Pub. Law No. 104-132, 110 Stat. 1214 (codified at 28 U.S.C. § 2254(d) (2018)).

147. *See Harrington v. Richter*, 562 U.S. 86, 98 (2011).

148. *See Jefferson v. Upton*, 560 U.S. 284, 287 (2010).

149. *Id.* at 294.

150. *Jefferson v. Sellers*, 250 F. Supp. 3d 1340, 1354 (N.D. Ga. 2017).

a. *Ghostwritten opinions have not always received deference in habeas law.* In *Jefferson v. Upton*,<sup>151</sup> the Supreme Court considered, but failed to thoroughly address, the issue of ghostwritten opinions in the habeas context. After a habeas hearing on alleged ineffective assistance of counsel in state court, the judge contacted the state ex parte and asked the state's attorney to prepare an opinion.<sup>152</sup> The court adopted the opinion verbatim despite errors and the inclusion of statements of a witness who did not testify in the proceedings.<sup>153</sup> Jefferson's case made it to the Supreme Court,<sup>154</sup> and was subjected to a pre-AEDPA standard,<sup>155</sup> assessing whether Jefferson received a "full and fair evidentiary hearing."<sup>156</sup>

The Court characterized Jefferson's complaint regarding the ghostwriting as an argument that the process was deficient.<sup>157</sup> The Court went on to distinguish the case from *Anderson* because it had not considered the application of the pre-AEDPA habeas statute to "findings . . . drafted exclusively by the attorneys for the State pursuant to an ex parte request from the state-court judge, who made no such request of [the defendant]," nor to instances in which it appears the judge may have not read the opinion.<sup>158</sup> Because the Court felt the record of the state-court proceedings was underdeveloped, it remanded the case to the Eleventh Circuit, which in turn remanded to the district court, to determine whether the State's findings should be given a presumption of correctness.<sup>159</sup>

The district court determined that no presumption of correctness should apply under habeas principles because Jefferson was not provided with a full and fair fact-finding process and therefore, was deprived of due process.<sup>160</sup> The court noted that verbatim adoptions in capital cases are "especially troublesome" and expressed "substantial

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151. *Jefferson v. Upton*, 560 U.S. at 287.

152. *Id.*

153. *Id.* at 288.

154. After the state habeas hearing, Jefferson took his case to the district court, which reversed, finding ineffective assistance of counsel even after accepting all of the findings as true. *Id.* at 289. A divided court of appeals reversed the district court. *Id.*

155. Jefferson filed his habeas application before the passage of AEDPA in 1996. *Id.* at 292.

156. *Id.* (quoting *Townsend v. Sain*, 372 U.S. 293, 312 (1963)).

157. *Id.*

158. *Id.* at 292.

159. *Id.*; *Jefferson v. Warden, Ga. Diagnostic & Classification Prison*, No. 07-12502, 2010 WL 3431652 (11th Cir. July 21, 2010).

160. *Jefferson v. Sellers*, 250 F. Supp. 3d 1340, 1350–51 (N.D. Ga. 2017).

doubt” that the opinion represented the court’s own “analysis and considered conclusions.”<sup>161</sup>

The court distinguished Jefferson’s case from *Anderson* because the judge did not announce a decision from the bench, issue a preliminary memorandum, provide opposing counsel with an opportunity to respond, or revise the proposed opinion before adoption.<sup>162</sup> The district court searched for and found no “indicia of the judge’s independent analysis and review . . . .”<sup>163</sup> Therefore, the district court conducted a de novo review of Jefferson’s claim.<sup>164</sup> The court granted Jefferson’s petition for writ of habeas corpus, vacating his death sentence.<sup>165</sup>

Under pre-AEDPA habeas principles, ghostwritten opinions were not automatically given deference. The troubling nature of ghostwritten opinions gave courts pause, forcing them to consider the implications of such opinions on due process. Although the case law predates AEDPA, the dangers posed by, and the need for protection from, ghostwritten opinions in habeas cases are still present post-AEDPA.

*b. Certain ghostwritten opinions should not be given deference.* It is not clear how AEDPA affects the weighing of ghostwritten opinions in habeas petitions. Under § 2254(d), AEDPA forbids federal courts from issuing a writ of habeas corpus for a state-court proceeding that was adjudicated on the merits unless the decision was “contrary to” or involved an “unreasonable application” of federal law, or the result was based on an “unreasonable determination of the facts.”<sup>166</sup> The Supreme Court has not explained the implications of this new standard on ghostwritten opinions.<sup>167</sup>

The Court has, however, addressed how the new standard interacts with summary dispositions, which declare the state court’s

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161. *Id.* at 1351–52.

162. *Id.* at 1352.

163. *Id.*

164. *Id.* at 1387.

165. *Id.*

166. 28 U.S.C. § 2254(d) (2018).

167. See John H. Blume, *AEDPA: The “Hype” and the “Bite,”* 91 CORNELL L. REV. 259, 296 (2006) (“The final issue worth mentioning is whether § 2254(d) applies in cases where the state district attorney or the state attorney general drafts the order denying collateral relief. . . . Eventually these and other AEDPA issues . . . will find their way to the Supreme Court.”).

decision but do not provide any reasoning. In *Harrington v. Richter*, the Court held that AEDPA deference applies to summary dispositions because the text of AEDPA does not require a written opinion.<sup>168</sup> This decision muddles AEDPA's application to summary dispositions and exceptions to § 2254(d). For an exception to apply under § 2254(d), the decision must be unreasonable.<sup>169</sup> Without an explanation of the court's reasoning, as in the case of summary dispositions, it is difficult, if not impossible, to determine whether the decision was reasonable.<sup>170</sup> Commentators have argued that there is a problem applying these dispositions to the text of the AEDPA exceptions.<sup>171</sup>

Unlike summary dispositions, ghostwritten opinions may provide some explanation of a judge's purported reasoning. However, that explanation may be that of a prosecutor, not the court. Without the assurance that the court critically reviewed the proposed opinion and agreed with its reasoning, a ghostwritten opinion becomes just as opaque as, or even more so than, a summary disposition. In fact, a ghostwritten opinion may be even more opaque. A summary disposition written by a judge at least implies that the judge independently reviewed the case. But with a ghostwritten opinion, we know only that the prosecutor reviewed the issues. In *Doyle Hamm's* case, where the judge adopted every word of the state's proposed opinion and even failed to remove "Proposed" from the title, there is very little assurance that the opinion represents how the judge analyzed Hamm's case. Without an explanation from the court itself, it is difficult to determine if the decision was unreasonable under § 2254(d). Requiring the petitioner to prove that there was no reasonable basis for a decision, especially without the court's own explanation of

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168. See *Harrington v. Richter*, 562 U.S. 86, 98 (2011) ("There is no text in [§ 2254(d)] requiring a statement of reasons. . . . Where a state court's decision is unaccompanied by an explanation, the habeas petitioner's burden still must be met by showing there was no reasonable basis for the state court to deny relief.").

169. § 2254(d). The Court put the burden on the habeas petitioner to show there was no reasonable basis for the decision. *Harrington*, 562 U.S. at 98.

170. See Matthew Seligman, Note, *Harrington's Wake: Unanswered Questions on AEDPA's Application to Summary Dispositions*, 64 STAN. L. REV. 469, 473-74 (2012) ("[A] written opinion may provide the best, and perhaps only, ground for determining the reasonableness of the decision that it accompanies.").

171. See, e.g., *id.* at 474-75 (discussing two incorrect proposed approaches to AEDPA's applicability to summary dispositions and proposing a new approach).

that decision, is beyond the text of § 2254(d) and is not supported by the legislative history.

The legislative history shows that Congress did not view § 2254(d) as a drastic measure that would eliminate federal habeas review. Rather, § 2254(d) was the result of multiple compromises; it requires federal courts to consider state-court determinations but preserves federal courts' authority to review these determinations for reasonableness.<sup>172</sup> During the debates surrounding § 2254(d), Senator Joe Biden expressed concerns that the statute would foreclose federal courts from reviewing state courts.<sup>173</sup> Senator Orrin Hatch disputed this claim, arguing that § 2254(d) would require a speedier federal review of state decisions but that it would not foreclose federal review.<sup>174</sup> President Clinton's signing statement on AEDPA expressed confidence that "[f]ederal courts will interpret these provisions to preserve independent review of Federal legal claims and the bedrock constitutional principle of an independent judiciary."<sup>175</sup>

In sum, it is clear that § 2254(d) was not meant to rubber stamp state decisions. But, when federal courts are expected to defer to verbatim adopted opinions, they are doing precisely that.

Although AEDPA limited federal habeas review, the federal backstop still exists. Both the exceptions under § 2254(d) and the legislative history acknowledge the need for federal review of state decisions. When an opinion is adopted verbatim without critical review by the court, there is no way for a federal habeas court to determine if the decision was reasonable. Ghostwritten opinions deprive the federal courts of any meaningful opportunity for review. This an unacceptable outcome. Federal habeas courts should not defer to ghostwritten opinions. Instead, federal courts should require state courts to provide

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172. See Larry W. Yackle, *A Primer on the New Habeas Corpus Statute*, 44 *BUFF. L. REV.* 381, 422–23 (1996) (explaining that AEDPA was the result of compromises and was not meant to deprive federal courts of the ability to review habeas petitions).

173. "[T]he Republican provision to reform habeas corpus procedures would require Federal courts to defer to State court decisions even when the State court has made an incorrect decision on habeas corpus." 141 *CONG. REC.* S7486 (daily ed. May 25, 1995) (statement of Sen. Biden).

174. "[I]t requires the Federal courts, once a petition is filed, to complete the judicial action within the specified time period. . . . This bill requires deference to court action unless there is some very good reason not to defer. . . ." 142 *CONG. REC.* S3362 (daily ed. Apr. 16, 1996) (statement of Sen. Hatch).

175. Presidential Statement on Signing the Antiterrorism and Effective Death Penalty Act of 1996, 1 *PUB. PAPERS* 630 (Apr. 25, 1996), <https://www.gpo.gov/fdsys/pkg/PPP-1996-book1/pdf/PPP-1996-book1.pdf> [<https://perma.cc/XDU9-N4LY>].

an explanation from the judge before determining if a § 2254(d) exception applies.

*B. Changes to Ethics Rules*

Rather than relying on appellate courts, the ills of ghostwritten opinions can be mitigated ex ante through judicial ethics rules. Most states have adopted some form of the Model Code of Judicial Conduct, promulgated by the American Bar Association.<sup>176</sup> At the federal level, judges are governed by the Code of Conduct for U.S. Judges,<sup>177</sup> which is an adaptation of the Model Code.<sup>178</sup> Federal judges also have the Federal Benchbook, a nonbinding guide created by experienced district court judges.<sup>179</sup> None of these codes explicitly prohibit judges from adopting proposed opinions verbatim in criminal cases. They should. At minimum, these codes should require a judge to critically review proposed opinions and allow the opposing side to respond.

The 1990 edition of the Model Code included a comment stating: “A judge may request a party to submit proposed findings of fact and conclusions of law, so long as the other parties are apprised of the request and are given an opportunity to respond to the proposed findings and conclusions.”<sup>180</sup> This comment was to rule 3(B)(7), which addressed ex parte communications and the parties’ right to be heard by the judge.<sup>181</sup> The comment was removed in the 2007 version of the Model Code because the Commission believed “the permissibility of

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176. MODEL CODE OF JUDICIAL CONDUCT (AM. BAR ASS’N 2011); C.T. Harhut, *Ex Parte Communication Initiated by a Presiding Judge*, 68 TEMP. L. REV. 673, 674–75 (1995) (noting that “[m]ost states and the federal courts have adopted some version” of the ABA model rules for judicial conduct).

177. U.S. COURTS, CODE OF CONDUCT FOR UNITED STATES JUDGES, <http://www.uscourts.gov/judges-judgeships/code-conduct-united-states-judges> [https://perma.cc/XN9C-XVPF].

178. On the American Bar Association’s website, “Federal Implementation of the Model Code of Judicial Conduct” links to the Code of Conduct for United States Judges. *Text of Model Code of Judicial Conduct*, AM. BAR. ASS’N, [https://www.americanbar.org/groups/professional\\_responsibility/resources/judicial\\_ethics\\_regulation/mcjc.html](https://www.americanbar.org/groups/professional_responsibility/resources/judicial_ethics_regulation/mcjc.html) [https://perma.cc/95UR-DAHU].

179. FED. JUDICIAL CTR., BENCHBOOK FOR U.S. DISTRICT COURT JUDGES ii (6th ed. Mar. 2013) (“This *Benchbook* is not a statement of official Federal Judicial Center policy. Rather, it was prepared by, and it represents the considered views of . . . a group of experienced district judges . . .”).

180. MODEL CODE OF JUDICIAL CONDUCT Canon 3(B)(7) cmt. (AM. BAR ASS’N 1990) (amended 2011).

181. Canon 3(B)(7) of the 1990 Model Code correlates to 2.6 and 2.9 of the 2011 version.

the practice was so free from doubt as to render the Comment unnecessary.”<sup>182</sup> The Commission’s view, therefore, is that judges can adopt proposed findings and conclusions of law, but only with the response of the opposing party. Failure to provide opposing counsel an opportunity to respond is thus arguably an ethics violation. Importantly, the Commission has not addressed the verbatim adoption of proposed full opinions that include the legal analysis. Both the removal of the comment to 3(B)(7) and the lack of guidance regarding whole opinions create uncertainty within the Model Code about the ethics of adopting proposed opinions.

The Federal Benchbook also creates uncertainty. In the civil motions section, it explains that adopting or denying parties’ proposed findings and conclusions is not necessary and that “[s]ome courts of appeals look with a jaundiced eye on district court findings or conclusions that follow counsel’s requests verbatim.”<sup>183</sup> Notably, it does not address adopting a whole opinion and it does not address ghostwriting in any form in the criminal context.<sup>184</sup>

This uncertainty should be eliminated in ethics codes and guidelines. When judges know what is expected of them, they can adjust their conduct accordingly. And those that fail to adhere can be fairly disciplined. Acknowledging that time may not permit all judges to write their own opinions from scratch, ethics codes and guides should require a minimum level of review to ensure ethics values are met. Canon 2 of the Model Code requires judges to perform their duties impartially.<sup>185</sup> More specifically, Rule 2.6 of the Model Code ensures the right to be heard,<sup>186</sup> and Rule 2.9 forbids *ex parte* communications, subject to some exceptions.<sup>187</sup> Explicitly requiring judges to critically review proposed opinions and to allow the opposing party to respond fulfills the ethics standards of Canon 2 and its accompanying rules.

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182. MODEL CODE OF JUDICIAL CONDUCT 102 (AM. BAR ASS’N 2007) (amended 2011).

183. FED. JUDICIAL CTR., BENCHBOOK FOR U.S. DISTRICT COURT JUDGES 208 (6th ed. Mar. 2013).

184. *See generally id.* (failing to address proposed opinions in the criminal context).

185. MODEL CODE OF JUDICIAL CONDUCT Canon 2 (AM. BAR ASS’N 2011).

186. *Id.* Rule 2.6.

187. *Id.* Rule 2.9 (prohibiting *ex parte* communications generally before enumerating exceptions).

Ohio has already confronted the ethics implications of ghostwritten opinions.<sup>188</sup> In 2006, in *State v. Roberts*,<sup>189</sup> the Ohio Supreme Court vacated a capital sentence because the judge worked with the prosecutor ex parte to draft the sentencing opinion.<sup>190</sup> Following this decision, prosecutors in Ohio informed judges that they could no longer draft “entries” for the court.<sup>191</sup> A Trumbull County prosecutor informed judges that *State v. Roberts* called the “legality and ethics” of drafting entries for the court into question.<sup>192</sup> The prosecutor suggested that the judges do what other courts have done and hire secretaries and lawyers to draft the entries.<sup>193</sup> However, if the court still wanted prosecutors to draft entries, the prosecutor requested that this be put on the record and the defense be given an opportunity to submit an entry or object.<sup>194</sup>

Ohio’s judicial conduct organization has also addressed ghostwritten opinions.<sup>195</sup> In 2009, with *Disciplinary Counsel v. Stuard*, the court publicly reprimanded a judge who communicated with a prosecutor ex parte to write the judicial opinion.<sup>196</sup> The court found that the judge had violated Canon 2, which requires the judge to respect the law and act in a way that “promotes public confidence in

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188. Iowa has also addressed ghostwriting by requiring notification to opposing parties. See Debra Cassens Weiss, *Retired Judge Wrongly Used Ghostwritten Rulings Without Notifying Opposing Parties, Report Says*, ABA J. (June 5, 2018, 7:05 AM), [http://www.abajournal.com/news/article/retired\\_judge\\_wrongly\\_used\\_ghostwritten\\_rulings\\_without\\_notifying\\_opposing/?utm\\_source=maestro&utm\\_medium=email&utm\\_campaign=weekly\\_email](http://www.abajournal.com/news/article/retired_judge_wrongly_used_ghostwritten_rulings_without_notifying_opposing/?utm_source=maestro&utm_medium=email&utm_campaign=weekly_email) [<https://perma.cc/4RBD-N9EQ>] (describing one Iowa judge’s use of proposed rulings written by attorneys in potentially hundreds of civil cases, contrary to the requirements of a 1984 Iowa Supreme Court decision).

189. *State v. Roberts*, 850 N.E.2d 1168 (Ohio 2006).

190. *Id.* at 1172.

191. Letter from David M. Toepter, Trumbull County Prosecuting Attorney, to Judges Peter J. Kontos, Andrew D. Logan, W. Wyatt McKay and John M. Stuard (Dec. 5, 2006), <https://www.themarshallproject.org/documents/2891965-2006-12-5-Letter-to-Trumbull-County-Judges> [<https://perma.cc/9UKK-PFX2>].

192. *Id.*

193. *Id.*

194. *Id.*

195. Steven Lubet, *Judicial Discipline and Judicial Independence*, 61 LAW & CONTEMP. PROBS. 59, 60 (1998) (“By 1981, all fifty states and the District of Columbia had created judicial conduct organizations empowered to investigate, prosecute, and adjudicate allegations of judicial misbehavior.” (citation omitted)).

196. *Disciplinary Counsel v. Stuard*, 901 N.E.2d 788, 790 (Ohio 2009).

the integrity of the judiciary,” and Canon 3(B)(7), which prohibits ex parte communications.<sup>197</sup>

Although current ethics codes could tackle the problem of ghostwritten opinions through an interpretation of Canon 2 of the Model Code, explicit language is better suited to eliminate a practice that has, unfortunately, become normalized. If ethics rules expressly forbid certain types of ghostwriting, then courts will know exactly what is expected and can conform to the new guidelines. New standards should require that judges independently review proposed opinions, refrain from adopting proposed opinions verbatim, and allow the opposing side to reply. These standards all derive from the Supreme Court’s guidance in *Anderson*.

States could also pass legislation requiring the same standards discussed above. There is some debate about state legislatures’ roles in prescribing court rules.<sup>198</sup> However, where the legislature does have the authority to pass a law prohibiting ghostwritten opinions, states should consider ensuring the discussed standards with the force of law.

#### CONCLUSION

Ghostwritten opinions are rotting the criminal system, slowly degrading ideals of impartiality. They deprive us of the judge’s analysis and create the appearance of and potential for bias. Consequently, the judicial process loses legitimacy. This leads to severe consequences in the criminal justice system, as people are locked away or their death sentence is justified through an opinion written by the very person charged with prosecuting them. Supreme Court precedent allows appellate courts to dispatch with the ordinary deference afforded trial court opinions when those opinions contain these egregious problems. Appellate deference should be given to a ghostwritten opinion only when the judge critically reviewed the proposed opinion, did not adopt it verbatim, and it was composed after the opposing party had an opportunity to reply. Ideally, states will forbid adopting proposed opinions without these requirements, through ethics rules or statute. We cannot allow our criminal system to be corrupted by the problems of ghostwritten opinions—we should demand impartial adjudication.

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197. *Id.* at 791 (quotation omitted).

198. *Legislative Assaults on State Courts - 2018*, BRENNAN CTR. FOR JUST. (Feb. 6, 2018), <https://www.brennancenter.org/analysis/legislative-assaults-state-courts-2018> [<https://perma.cc/4KC3-F6L8>] (documenting trends with respect to “legislative assaults on the courts,” or bills which would “diminish the role or independence of the judicial branch”).

It is time to attack this practice that has haunted courtrooms for too long.