In the Supreme Court of Ohio

STATE OF OHIO,	:	Case Nos. 2018-0444
	:	
Plaintiff-Appellant,	:	On Appeal from the
	:	Cuyahoga County
v.	:	Court of Appeals,
	:	Eighth Appellate District
RANDY JONES, ET AL.,	:	
	:	Court of Appeals
Defendant-Appellee.	:	Case No. 103290, 103302

MERIT BRIEF OF *AMICUS CURIAE* OHIO ATTORNEY GENERAL DAVE YOST IN SUPPORT OF APPELLANT STATE OF OHIO

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INTRODUCTION

Two subparts of one statute, R.C. 2953.08(G)(2)(a) and (b)—call these subparts the "Appellate Review Provisions"—lay out the power of appellate courts to review felony sentences. Two other statutes, R.C. 2929.11 and 2929.12—call them the "General Sentencing Statutes"—guide trial courts in the imposition of felony sentencing. For example, the General Sentencing Statutes require trial courts, when imposing sentences to consider factors like the "overriding purposes of felony sentencing," R.C. 2929.11(A), whether the offender has shown "genuine remorse," R.C. 2929.12(D)(5), and so on.

This case involves the interaction of the Appellate Review Provisions and the General Sentencing Statutes. Nothing in the Appellate Review Provisions empowers appeals courts to review the record and second-guess the trial court's discretionary determination that the sentence is justified by the considerations laid out in the General Sentencing Statutes. Nevertheless, a plurality of the *en banc* Eighth District held that the power to conduct this record review should be "read … into" the Appellate Review Provisions. *State v. Jones*, 8th Dist. Nos. 103290 & 103302, 2018-Ohio-498 ¶5 (*en banc*) (plurality op.). This case presents the question whether the Eighth District erred by reading into the Appellate Review Provisions an implicit right to appeal a trial court's discretionary application of the General Sentencing Statutes.

It did. The Appellate Review Provisions' plain language bars appellate courts from reviewing a trial court's discretionary determination that the record, considered in

light of the General Sentencing Statutes, supports a particular in-range sentence. In holding otherwise, the Eighth District impermissibly expanded the power of Ohio's appellate courts to vacate criminal sentences. Under the Eighth District's reading, sentencing in common-pleas courts will be little more than a dress rehearsal for appellate sentencing. After all, every sentence must apply the General Sentencing Statutes. So any time a defendant believes a sentence too harsh, or any time the State believes a sentence too lenient, an appeals court will be asked to set it aside. On the Eighth District's view, appeals courts will be able to increase, decrease, modify, or vacate a sentence simply because the trial court imposed a sentence different than the one the appeals court thinks right. The General Assembly has not authorized appeals courts to change sentences so freely.

This conclusion follows from text, context, and history. The relevant phrase in the Appellate Review Provisions is "contrary to law." R.C. 2953.08(G)(2)(b). The plain meaning of "contrary to law," in dictionaries and case law, means contrary to statute, not contrary to an appellate panel's view of the record. Statutory context shows the same thing. In one part of the Appellate Review Provisions, the General Assembly directed appeals courts to review five specific statutory findings for consistency with the record. But it provided no authority to do the same with respect to findings made under the General Sentencing Statutes—the statutes the Eighth District says should be "read in." By expressly permitting record review in connection with some specific statutes, the General Assembly implicitly prohibited such review in connection with any other statutes,

including the General Sentencing Statutes. History puts the nail in the coffin. In 1999, the Assembly removed a provision that authorized appeals courts to review all felony sentences for support in the record generally. The Eighth District's opinion effectively negates this amendment, giving appellate courts back the power the General Assembly decided they ought not have.

The Eighth District aggrandized appeals-court power at the expense of the legislative design. This Court should reverse.

STATEMENT OF AMICUS INTEREST

The Attorney General has a duty to defend Ohio laws and an interest in ensuring that those laws are correctly interpreted and enforced. The Attorney General also has an interest in ensuring that the legislative framework for the scope of appellate review in criminal cases is not abandoned. The Eighth District's decision below ignored the plain language of the Appellate Review Provisions in R.C. 2953.08(G)(2) and expanded the scope of appellate sentencing review. The Attorney General has a strong interest in ensuring that this error is corrected.

STATEMENT OF THE CASE AND FACTS

1. A Cuyahoga County Grand Jury indicted Randy and Carissa Jones for involuntary manslaughter and other crimes. The indictment alleged that the Joneses killed their daughter, T.J., through a combination of action and inaction. The facts giving rise to this case began when paramedics responded to a 911 call from the Jones's residence. S*ee State*

v. Jones, 8th Dist. Nos. 103290 & 103302, 2016-Ohio-5923 ¶9 (*Jones I*). When T.J. arrived at the hospital, she smelled like "necrotic" and decaying flesh, was wrapped in dirty bandages, , and was visibly malnourished. *Id.* ¶¶10–11. . And it turned out T.J.'s injuries were even worse than that. Doctors found an infected abscess around her left leg and foot, which, because it went untreated, allowed the staph infection in her leg to migrate into her bloodstream. *Id.* ¶¶15–19. That triggered pneumonia and eventually killed T.J. *Id.* All the while, the Jones's never sought medical care for T.J.—the record showed that T.J. never saw any doctors after 2009 *Id.* ¶41.

After the Joneses pleaded not guilty and proceeded to trial, the jury convicted them of involuntary manslaughter and several allied offenses. At the sentencing hearing, the judge expressed disbelief when Randy Jones insisted that T.J.'s injuries were not sufficiently severe to warrant immediate medical attention. Tr. 1947–57. The judge said that the photographs of T.J's injuries were amongst the five worst photographs of injuries to children she had seen in nearly seventeen years on the bench. Tr. 1947. After hearing the evidence at trial and listening to Randy Jones's statements at the sentencing hearing, the trial judge concluded that the Joneses deliberately avoided seeking medical treatment for T.J. to avoid a possible investigation, which would have been inconvenient for their "perfect" lives. Tr. 1960, 1968. (Carissa Jones said very little: apart from referring to her sentencing memorandum and saying that she agreed with some of Randy's statements,

Carissa simply asked for leniency. Tr. 1975, 1981. She never attempted to accept responsibility for her acts. She never showed remorse.)

The trial judge sentenced the Joneses to non-maximum sentences of ten years' imprisonment. In explaining that sentence, the trial judge explicitly stated that she considered the General Sentencing Statutes (again, R.C. 2929.11 and R.C. 2929.12). Tr. 1987–88. (The sentencing entry also reflected the trial judge's consideration of these statutes, and in particular a determination that the prison term was consistent with the purposes of felony sentencing set forth in R.C. 2929.11.) In further explaining the sentence, the trial judge stressed the more than eighty scars, marks, bruises, cuts, and lacerations on T.J.'s body, and openly expressed "serious doubt" that the injuries were self-inflicted (as the Joneses suggested). Tr. 1983. Finally, the trial judge observed that T.J. died a very painful death and that neither Randy nor Carissa Jones seemed bothered by the fact. Tr. 1987. The trial court contrasted the Jones's callous indifference with the testimony of a seasoned emergency room physician, who was brought to tears while describing the suffering T.J. endured. Tr. 1939–40.

2. The Joneses appealed. Before getting to the substance of their appeals, it is important to provide some background on the law governing sentencing and appeal. The General Sentencing Statutes (R.C. 2929.11 and 2929.12) list certain factors that trial courts must consider when imposing a sentence. As noted, the trial court expressly considered these factors in imposing the ten-year sentence here. And the provisions that expressly

govern sentencing appeals—the Appellate Review Provisions, R.C. 2953.08(G)(2)(a) and (b)—do not permit appellate courts to review the record and decide whether the trial judge's discretionary decision to impose a particular in-range sentence is justified under General Sentencing Statutes in any given case. Instead, as relevant here, they allow appellate courts to review and vacate any sentence that is clearly and convincingly "contrary to law." R.C. 2953.08(G)(2)(b).

Back to the Joneses' case. On appeal, the Eighth District held that the ten-year sentences were excessive. It reasoned that "the record d[id] not support the sentences," and that the sentences therefore had to be vacated *even though* they were "not contrary to law." *Jones I*, 2016-Ohio-5293 ¶¶105–06. On reconsideration, the Eighth District vacated *Jones I* and issued a second opinion. *State v, Jones*, 8th Dist. Nos. 103290 & 103302, 2016-Ohio-7702 (*Jones II*). This time, the Eighth District vacated the ten-year sentences on the ground that those sentences *were* clearly and convincingly "contrary to law." Why? Because the General Sentencing Statutes, viewed in light of the record, did not support the imposition of a ten-year sentence. *Id.* ¶¶114–17. In other words, the court held that any sentences unsupported by the General Sentencing Statutes in light of the record are necessarily "contrary to law," and thus reversible under the Appellate Review Provisions.

After *Jones II*, the Eighth District reviewed the case *en banc*. The *en banc* court produced no majority but three opinions. A plurality concluded that an appellate court may vacate a sentence if it determines that the sentence, when viewed in light of the factors in

the General Sentencing Statutes, is "not supported by the record." *State v. Jones*, 8th Dist. Nos. 103290 & 103302, 2018-Ohio-498 ¶19 (8th Dist.) (en banc) (App. Op.). The plurality said this kind of record review was required by this Court's holding in *State v. Marcum*. *Id.* ¶¶16–17 (citing *State v. Marcum*, 146 Ohio St. 3d 516, 2016-Ohio-1002 ¶23). Then-Judge Stewart concurred in judgment only. She agreed that an appeals court can vacate a sentence "if the record does not support the sentencing court's findings" under the General Sentencing Statutes. *Id*. ¶22 (Stewart, J., concurring in judgment). She then explored a question the *en banc* court "did not ask the parties to brief": whether this kind of record review fit into the "contrary to law" language of the Appellate Review Provisions. *Id*. ¶¶23-34; *see also* R.C. 2953.08(A)(4). Then-Judge Stewart determined that it did, effectively embracing the reasoning of *Jones II*. Five judges dissented. They agreed that appellate courts may vacate sentences that "the record clearly and convincingly does not support," but they did not find that standard to be satisfied here. *Id.* ¶55 (Sean Gallagher, J., dissenting).

3. After the *en banc* ruling, the State asked this Court to review the decision. This Court agreed to answer the following proposition of law:

> Does R.C. 2953.08(G)(2) allow a court of appeals to review the trial court's findings made pursuant to R.C. 2929.11 and R.C. 2929.12?

ARGUMENT

<u>*Amicus Curiae* Ohio Attorney General's Proposition of Law:</u>

> *R.C. 2953.08(G)(2) does not allow a court of appeals to review the trial court's findings under the General Sentencing Statutes, R.C. 2929.11 and R.C. 2929.12, for support in the record.*

This case presents the question whether the Appellate Review Provisions empower appellate courts to vacate felony sentences that they determine are unsupported by the record and the considerations laid out in the General Sentencing Statutes. The answer to that question turns on whether the General Assembly has empowered appellate courts to conduct such review. After all, the Ohio Constitution gives appellate courts "such jurisdiction as may be provided by law to review affirm, modify, or reverse judgments or final orders of the courts of record inferior to the court of appeals within the district." Ohio Const., Article IV, Section 3(B)(2). This Court has long recognized that the "as provided by law" clause empowers the General Assembly to "limit the court of appeals' jurisdiction." *State v. Noling*, 136 Ohio St. 3d 163, 2013-Ohio-1764 ¶20; *see also In re D.H.*, 152 Ohio St. 3d 310, 2018-Ohio-17 ¶5; *Thompson v. Redington*, 92 Ohio St. 101, 104–06, 110 (1915); *cf. State v. Aalim*, 150 Ohio St. 3d 489, 2017-Ohio-2956 ¶2 (same principle for common pleas courts). Acting on that conferred power, the legislature has—in R.C. 2953.08—defined the court of appeals' "subject-matter jurisdiction to hear a defendant's appeal of a felony sentence." *State v. Gwynne*, ___ Ohio St. 3d ___, 2019-Ohio-4761 ¶9 (plurality op.). That statute "specifically and comprehensively defines the parameters

and standards—including the standard of review—for felony-sentencing appeals"; courts need "look no further" to see the limits of felony sentencing review. *State v. Marcum*, 146 Ohio St. 3d 516, 2016-Ohio-1002 ¶21.

So the question boils down to this: Do the Appellate Review Provisions allow an appellate court to review a trial court's discretionary determination that the record and the General Sentencing Statutes justify a particular in-range sentence? No, they do not.

I. The Appellate Review Provisions do not empower courts of appeals to review the record and determine whether a particular sentence is consistent with the General Sentencing Statutes.

The current statute defining appellate jurisdiction to review felony sentences offers only one ground relevant here for a defendant's appeal: defendants may appeal a sentence that is "contrary to law." R.C. 2953.08(A)(4). And appellate courts may vacate a sentence only upon determining that it is contrary to law. This standard of review is set out in R.C. 2953.08(G), which contains the Appellate Review Provisions (R.C. 2953.08(G)(2)(a) and (b)):

> (G)
>
> (1) If the sentencing court was required to make the findings required by division (B) or (D) of section 2929.13 or division (I) of section 2929.20 of the Revised Code, or to state the findings of the trier of fact required by division (B)(2)(e) of section 2929.14 of the Revised Code, relative to the imposition or modification of the sentence, and if the sentencing court failed to state the required findings on the record, the court hearing an appeal under division (A), (B), or (C) of this section shall remand the case to the sentencing court and instruct the sentencing court to state, on the record, the required findings.

> (2) The court hearing an appeal under division (A), (B), or (C) of this section shall review the record, including the findings underlying the sentence or modification given by the sentencing court.
>
> The appellate court may increase, reduce, or otherwise modify a sentence that is appealed under this section or may vacate the sentence and remand the matter to the sentencing court for resentencing. The appellate court's standard for review is not whether the sentencing court abused its discretion. The appellate court may take any action authorized by this division if it clearly and convincingly finds either of the following:
>
> (a) That the record does not support the sentencing court's findings under division (B) or (D) of section 2929.13, division (B)(2)(e) or (C)(4) of section 2929.14, or division (I) of section 2929.20 of the Revised Code, whichever, if any, is relevant;
>
> (b) That the sentence is otherwise contrary to law.

A sentence may be contrary to law in two ways. *First*, a sentence is contrary to law if the "record does not support the sentencing court's findings" made under five specific statutes not at issue in this case: R.C. 2929.13(B); R.C. 2929.13(D); R.C. 2929.14(B)(2)(e); R.C. 2929.14(C)(4); and R.C. 2929.20(I). *Second*, a sentence may be "*otherwise* contrary to law." R.C. 2953.08(G)(2)(b) (emphasis added). The Appellate Review Provisions do not elaborate on what "otherwise contrary to law" means, but text, context, and history all confirm that it means "illegal" or "contrary to a statute." What the phrase does not mean is what the Eighth District said it means: "not supported by the record" under the General Sentencing Statutes. App. Op. ¶19 (plurality op.).

A. The text of the Appellate Review Provisions does not permit an appellate court to determine whether the record supports a trial court's discretionary application of the General Sentencing Statutes.

1. The General Assembly did not define the phrase "contrary to law." When the General Assembly leaves a phrase undefined, courts turn to the "ordinary meaning" of the phrase "at the time of its enactment." *State v. Ramirez*, ___ Ohio St. 3d ___, 2020-Ohio-602 ¶23; *New Prime, Inc. v. Oliveira*, 139 S. Ct. 532, 539 (2019). Ordinary meaning may be found in places such as dictionaries of the time. *See, e.g.*, *Rockies Express, L.L.C. v. McClain*, ___ Ohio St. 3d ___, 2020-Ohio-410 ¶12. Beyond the dictionaries, courts look at whether, at the time the General Assembly used a term, it had "accrued a particular meaning." *Vossman v. Airnet Sys., Inc.*, ___ Ohio St. 3d ___, 2020-Ohio-872 ¶14; *Toledo City Sch. Dist. Bd. of Educ. v. State Bd. of Educ. of Ohio*, 146 Ohio St. 3d 356, 2016-Ohio-2806 ¶19; R.C. 1.42. One source of accrued meaning is how a term is used in "[c]ases from the era" during which the General Assembly added a term to a statute. *Vossman*, 2020-Ohio-872 ¶20. Such cases are relevant because courts assume that "the General Assembly is fully aware of any prior judicial interpretation of an existing statute when enacting an amendment." *Riffle v. Physicians & Surgeons Ambulance Serv., Inc.*, 135 Ohio St. 3d 357, 2013-Ohio-989 ¶19 (internal quotation marks omitted). So, "once words have acquired a settled meaning" through judicial interpretation, "that same meaning will be applied to a subsequent statute on a similar or analogous subject." *Brennaman v. R.M.I. Co.*, 70 Ohio St.3d 460, 464 (1994). These rules point to a consistent meaning for "contrary to law."

Start with the contemporary meaning from dictionaries. As far as sentencing law, the term "contrary to law" entered the Revised Code in 1996. R.C. 2953.08(G)(1) (1996), 146 Ohio Laws, Part IV, 7,136, 7,564–65. In 1996, legal dictionaries defined "contrary to law" as "Illegal; in violation of statute or legal regulations at a given time." Black's Law Dictionary 328 (6th ed. 1990); Ballentine's Law Dictionary (3d ed. 1969) ("Illegal; contrary to any law."); *see also id.* ("Verdict contrary to law": "The verdict of a jury who in arriving at it have failed or neglected to follow the directions of the judge upon matters of law.").

"Contrary to law" also had an acquired meaning in case law by 1996—a meaning that paralleled these dictionary definitions. The term had long been used in the statute for requesting new trials, and then the corresponding Rule of Criminal Procedure. *See* R.C. 2945.79(D); Ohio R. Crim. Pro. 33(A)(4). As used there, the phrase "contrary to law" means contrary to a statute or other controlling law. *See State v. Polk*, Nos. 38833 & 38832, 1979 Ohio App. LEXIS 9620 at *12 (8th Dist. May 17, 1979) (per Krupansky, J.); *State v. Huntley*, 30 Ohio App. 3d 29, 31 (1st Dist. 1986).

Even outside the criminal law, cases use the phrase "contrary to law" to mean contrary to specific legal prohibitions. To take just one example, Ohio employment law recognizes that the employee-employer relationship may end "for any reason which is not contrary to law." *Mers v. Dispatch Printing Co.*, 19 Ohio St. 3d 100, 103 (1985). And those reasons contrary to law are largely "expressed by the legislature in its statutes." *Sutton v. Tomco Machining, Inc.*, 129 Ohio St. 3d 153, 2011-Ohio-2723 ¶8.

All told, something is "contrary to law" when it violates a specific legal prohibition.

2. Now apply these definitions and acquired meaning to the Appellate Review Provisions. Recall that the relevant passage authorizes an appeals court to modify or vacate a sentence if its "otherwise contrary to law." R.C. 2953.08(G)(2)(b). Most obviously, that means contrary to a statute. And there are plenty of sentencing statutes that fit the bill. For example, a sentence might be outside the range of years assigned for a particular felony. R.C. 2929.13. Or it might impermissibly be based on the defendant's race or religion. R.C. 2929.11(C). Such sentences plainly violate specific prohibitions that the General Assembly has put in place to guide felony sentencing. To be sure, R.C. 2929.11(C) is part of the General Sentencing Statutes. Yet appellate courts may review compliance with that subsection: the question whether a trial court violated R.C. 2929.11(C) is an objectively verifiable fact, not a discretionary determination, such as a determination that the defendant showed no genuine remorse. Only the latter type of finding—a discretionary finding—is incapable of being "contrary to law" and thus not reviewable under the Appellate Review Provisions. More on this below.

This statute-driven meaning of contrary to law is exactly how this Court and some commentators have used the term since 1996. For example, in *State v. Kalish*, the lead opinion observed that a sentence is not contrary to law if it is "within the permissible range" and the court considered both the [statutory] purposes and principles of"

sentencing and the statutory sentencing "factors." 120 Ohio St. 3d 23, 2008-Ohio-4912 ¶18. In *State v. Underwood*, Justice O'Donnell, though dissenting from the main holding, offered this uncontroversial take on the phrase: "'contrary to law' … is a description of an act taken by a court that imposes punishment that does not conform with what the legislature has prescribed. … Ignoring an issue or factors which a statute requires a court to consider renders the resulting judgment 'contrary to law.'" 124 Ohio St. 3d 365, 2010-Ohio-1 ¶59 (O'Donnell, J., dissenting) (some internal quotation marks and citations omitted). Finally, a treatise on Ohio sentencing law describes as contrary to law those sentences in "conflict" with sentencing statutes. Griffin & Katz, Ohio Felony Sentencing Law §10:8, 1211 (2008).

Whether gleaned from dictionaries or caselaw, "contrary to law" means contrary to a specific legal prohibition. What "contrary to law" does not mean is appellate second guessing of the trial court's statutorily compliant sentence. If the trial judge selects an in-range sentence that does not run afoul of any legislative prohibitions, it is not "contrary to law." In fact it is *compliant with* and *obedient to* law.

3. Understood in this manner, disagreements about whether a trial court's discretionary determination that a particular sentence is justified by the considerations laid out in the General Sentencing Statutes are not reviewable. They are, in other words, not disagreements about whether the sentence is "contrary to law." Otherwise "contrary to law" would have no limiting effect on appellate review, and appellate review would be

effectively *de novo* review of the trial judge's choice of a particular in-range sentence. Think of it this way. An in-range sentence that used the defendant's religion is contrary to law (specifically, the prohibition in R.C. 2929.11(C)). But an in-range sentence that considered the factors in the General Sentencing Statutes is not—no matter how much an appeals panel thinks that a trial judge picked, for example, the wrong length of prison time. In the latter circumstances, the appeals court is taking issue with the trial court's exercise of discretion, not its compliance with legal requirements. Or think of it this way: appeals courts have "no authority to review" an argument that "the length of [a] sentence resulted from the [trial] court's refusal to give more weight" to any factor in the General Sentencing Statutes. *State v. Akins*, 8th Dist. No. 99478, 2013-Ohio-5023 ¶18 (per Stewart, J.).

B. The context and structure of the Appellate Review Provisions confirm that "contrary to law" points to statutes, not appellate second guessing.

1. The context and structure of the Appellate Review Provisions buttress the plain meaning of "contrary to law." When interpreting a statute, context and structure often inform meaning as much as dictionaries and prior usage. Words must be read **"**in context" and in light of a statute's "structure." *City of Independence v. Office of the Cuyahoga Cnty. Exec.*, 142 Ohio St. 3d 125, 2014-Ohio-4650 ¶24; *Int'l Paper Co. v. Testa*, 150 Ohio St. 3d 348, 2016-Ohio-7454 ¶21. Both a contextual and a structural canon are relevant here. First is the contextual principle that "different language" within a statute "signals" a difference in meaning. *Terraza 8, L.L.C. v. Franklin Cnty. Bd. of Revision*, 150 Ohio St. 3d 527,

2017-Ohio-4415 ¶23. The structural principle is that the meaning of a phrase should be "consistent with the structure of the statute and its other provisions." *Maracich v. Spears*, 570 U.S. 48, 60 (2013); *Culbertson v. Berryhill*, 139 S. Ct. 517, 522 (2019); *Risner v. Ohio Dep't of Nat. Res.*, 144 Ohio St. 3d 278, 2015-Ohio-3731 ¶¶16–19.

2. Both rules show that "contrary to law" means "contrary to a specific prohibition," not "unsupported, in the view of the appeals court, by the record." Recall that an appeals court's sentencing review takes one of two forms, tracking the two parts of the Appellate Review Provisions. Part (a) of that subsection directs appeals courts to vacate a sentence if it finds that the "record" does not "clearly and convincingly" "support" the trial judge's "findings" under five listed statutes. R.C. 2953.08(G)(2), (a). Part (b) of that subsection directs appeals courts to vacate if a sentence is "otherwise contrary to law." R.C. 2953.08(G)(2)(b).

Start with the rule that different language conveys different meaning. That rule is strongest when a legislature "includes particular language in one section of a statute but omits it in another." *Loughrin v. United States*, 573 U.S. 351, 358 (2014) (internal quotation marks omitted); *see also State v. Bryant*, ___ Ohio St. 3d ___, 2020-Ohio-1041 ¶18. So the inquiry in subpart (a) about the "record" supporting trial-court "findings," and the absence of that language in subpart (b) tells us that subpart (b)'s "otherwise contrary to law" phrase cannot direct the appeals court to ask whether the record supports the sentence. In the face of this language, this Court should "presume" that the difference shows that

the General Assembly "intended to impose different legal standards" in these neighboring subparts of the Appellate Review Provisions. *Miracle v. Ohio Dep't of Veterans Servs.*, 157 Ohio St. 3d 413, 2019-Ohio-3308 ¶19; *see also State v. Noling*, 153 Ohio St. 3d 108, 2018-Ohio-795 ¶42. In other words, because subpart (b) does not mention record review like subpart (a), the meaning of "contrary to law" as excluding record review of the trial judge's discretionary decision to select a particular sentence after applying the General Sentencing Statutes is "underscored by what the statute does not say." *Ayers v. City of Cleveland*, ___ Ohio St. 3d ___, 2020-Ohio-1047 ¶21.

Now turn to the rule that meaning should be consistent with structure. The statute's structure in subdivision (G)(2) addresses two kinds of review in two different subparts. Subpart (a) tells the appeals court to review the record to be sure that it supports findings for things like consecutive sentences. For example, subpart (a) directs an appeals court to review a finding that a consecutive sentence is necessary because the offender's "history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by the offender." R.C. 2929.14(C)(4)(c); *see* R.C. 2953.08(G)(2)(a). But no language in the Appellate Review Provisions authorizes an appeals court to conduct the same inquiry into the trial court's findings that a particular sentence is appropriate in light of an offender's "history of criminal convictions." R.C. 2929.12(D)(2). Rather, the trial court's discretion in using criminal history to pick a term of years from the sentencing range is reviewed only to be sure it is not "contrary to

law." R.C. 2953.08(G)(2)(b). Reading "contrary to law" as directing appeals courts to perform a different task than the record review in a different subpart "respects the statutory design." *Maracich*, 570 U.S. at 65. If the General Assembly wanted to authorize appeals courts to conduct the same review of trial judge's in-range sentences as it authorized for consecutive sentences, it "could have" included them in subpart (a). *Bryant*, 2020-Ohio-1041 ¶18. It "chose not to." *Id*.

Here is another strong structural signal. One of the two General Sentencing Statutes explains that the judge who "imposes a sentence under this chapter upon an offender for a felony has discretion to determine the most effective way to comply with the purposes and principles of sentencing set forth in section 2929.11." R.C. 2929.12(A). The Appellate Review Provisions then protect trial-court discretion by specifying that an "appellate court's standard for review is *not* whether the sentencing court abused its discretion." R.C. 2953.08(G)(2) (emphasis added). Thus, reading the Appellate Review Provisions to block the kind of review the Eighth District read in to those provisions "respects the statutory design." *Maracich*, 570 U.S. at 65.

C. The Appellate Review Provisions' evolution eliminates all doubt that "contrary to law" means specific legal prohibitions, not appellate second guessing about applying the General Sentencing Statutes to the record.

1. Finally, the statutory evolution of the Appellate Review Provisions shows that contrary-to-law review does not include appellate review of the question whether the record supports the trial court's discretionary application of (as opposed to its objective-

verifiable factual determinations under) the General Sentencing Statutes. A statute's evolution, as distinct from its legislative history, often bears on meaning. *See, e.g.*, *Miracle*, 157 Ohio St. 3d 413 ¶21; *Riffle*, 135 Ohio St. 3d 357 ¶23. For example, one "well-settled canon of interpretation" is that "an amendment to a statute … will be deemed to have intended some practical change to existing legislation." *Union Trust Co. v. Hawkins*, 121 Ohio St. 159, 180 (1929). "When confronted with amendments to a statute, an interpreting court must presume that the amendments were made to change the effect and operation of the law." *Lynch v. Gallia Cnty. Bd. of Comm'rs*, 79 Ohio St. 3d 251, 254 (1997); *see also Husky Int'l Elecs., Inc. v. Ritz*, 136 S. Ct. 1581, 1586 (2016). And it is hard to show a stronger signal about changing the law than deleting language that would otherwise apply. *See, e.g.*, *State v. Aguirre*, 144 Ohio St. 3d 179, 2014-Ohio-4603 ¶1.

2. The relevant amendment here was a 1999 change that deleted the very language the Eighth District would insert into the Appellate Review Provisions. To see that change, we must first step back to 1996, when the General Assembly overhauled sentencing policy in Ohio. Part of that overhaul authorized an appeals court to vacate a sentence if, among other things, "the record [did] not support the sentence" or the sentence was "otherwise contrary to law." R.C. 2953.08(G)(1), (4) (1997), 146 Ohio Laws, Part IV, 7,136, 7,564–65. In 1999, the General Assembly removed the first kind of review—an appellate courts' authority to vacate any sentence unsupported by the record. R.C. 2953.08(G)(2)(a) (2000), 148 Ohio Laws, Part II, 3,414, 3,419. In other words, because the General Assembly

"removed the [relevant] language," the resulting "different language leads to a different meaning." *United States ex rel. Advocates for Basic Legal Equal., Inc. v. U.S. Bank, N.A.*, 816 F.3d 428, 433 (6th Cir. 2016) (per Sutton, J.). And that different meaning is that appeals courts are no longer authorized to review all felony sentences to determine whether the record supports them. They are instead authorized to conduct that review only for the five statutes specifically listed in R.C. 2953.08(G)(2)(a).

Tracking further back into history only cements the point, because appellate review of sentences before 1996 was almost nonexistent. So, any review now available is a creature of the 1996 reforms and the modifications to those reforms in later amendments. Before 1996, the "general rule" in Ohio was that "an appellate court [would] not review a trial court's exercise of discretion in sentencing when the sentence is authorized by statute and is within the statutory limits." *State v. Hill*, 70 Ohio St. 3d 25, 29 (1994); *City of Toledo v. Reasonover*, 5 Ohio St. 2d 22, syl. ¶1 (1965). Courts could not disturb a sentence unless it fell outside statutory authority. *See Reasonover*, 5 Ohio St. 2d at syl. ¶1; *State v. Burge*, 82 Ohio App. 3d 244, 249–50 (10th Dist. 1992). This deferential review gave trial courts "virtually unlimited discretion" in sentencing felony offenders. *State v. Kuykendall*, 12th Dist. No. CA2004-12-111, 2005-Ohio-6872 ¶13.

The Ohio practice before the 1996 reforms tracked the federal practice before the federal Sentencing Guidelines. "Before the Guidelines system, a federal criminal sentence within statutory limits was, for all practical purposes, not reviewable on appeal."

Koon v. United States, 518 U.S. 81, 96, (1996); *Dorszynski v. United States*, 418 U.S. 424, 431 (1974). In that era, despite changes to English practice giving appellate courts the "power to revise sentences[,]" the Supreme Court had "no such power." *Gore v. United States*, 357 U.S. 386, 393 (1958). That view was also the rule in most States. "The general rule in most jurisdictions is clear: in the absence of a specific statutory grant of power an appellate court will not reduce a sentence which is within the statutory limits merely because it is, in the judgment of that court, excessive." Livingston Hall, *Reduction of Criminal Sentences on Appeal: I*, 37 Colum. L. Rev. 521, 522 (1937).

Against the background, what the U.S. Supreme Court said about federal sentencing reform could equally describe Ohio's reforms: "Although the Act established a limited appellate review of sentencing decisions, it did not alter a court of appeals' traditional deference to a [trial] court's exercise of its sentencing discretion." *Williams v. United States*, 503 U.S. 193, 205 (1992) . And "except to the extent *specifically directed by statute*, 'it is not the role of an appellate court to substitute its judgment for that of the sentencing court as to the appropriateness of a particular sentence.'" *Id.* (citation omitted) (emphasis added).

* * *

At bottom, the General Assembly chose to leave trial judges with responsibility for setting the length of otherwise-legal sentences. Appeals courts may disagree with that choice, but it is a choice for the Assembly, not the courts. Anyway, the Assembly's choice

makes sense. A number of the factors listed in the General Sentencing Statutes are poor subjects for appellate review. How can the cold record capture whether a defendant's remorse was genuine? How can the record reflect the mental injury or psychological suffering of the victim? How does an appellate judge, removed in time and space from the defendant and the victim, substitute for the trial judge's up-close view of the subtle and less tangible factors that guide sentencing? Because appellate courts are not well-suited to these tasks, the General Assembly wisely left these matters to the trial courts.

Because the Eighth District's holding does not respect the General Assembly's design, this Court should reverse.

II. The Eighth District's arguments for reading the Appellate Review Provisions to permit review of the General Sentencing Statute's application fail.

So what did the Eighth District have to say to justify its position that appeals courts may vacate sentences that are, in light of the General Sentencing Statutes, "not supported by the record"? App. Op. ¶19 (plurality op.). Only that this Court's *Marcum* holding allowed it to do what it did. *Id*. But *Marcum* cannot support a decision so at odds with the text, context, and history of the Appellate Review Provisions.

It is true that *Marcum* seems to say that appellate courts can opine on whether the record supports a trial court's particular sentence imposed after considering the General Sentencing Statutes. 146 Ohio St. 3d 516 ¶23. But *Marcum* was "focused on" a different question: Can appeals courts review *any* sentence for abuse of discretion? *See State v. Gwynne*, ___ Ohio St. 3d ___, 2019-Ohio-4761 ¶39 (Kennedy, J., concurring in judgment

only). That different focus led two Justices to say later that the passage from *Marcum* that the Eighth District uses to justify its holding is simply "errant" "dictum." *Id*. ¶¶36, 38.

Without entering that fray, it is worth noting that *Marcum's* statement about record review under the General Sentencing Statutes consists of one paragraph and says only that such review is "fully consistent" with the kind of review appeals courts are authorized to conduct under the five specific sentencing statutes that require detailed findings. *Marcum*, 146 Ohio St. 3d 516 ¶23. But *Marcum* never explains how that statement aligns with the Appellate Review Provisions' text, context, and history—particularly the history where the General Assembly deleted the exact kind of review *Marcum* seemed to bless. If *Marcum* is precedent for authorizing appeals courts to review whether the record supports a trial court's sentence made only after considering the General Sentencing Statutes, the Court should disavow that holding. It is a "judicial duty to … adhere[] to the original meaning of the text[,] … not [to] invoke *stare decisis* to uphold precedents that are demonstrably erroneous." *Gamble v. United States*, 139 S. Ct. 1960, 1989 (2019) (Thomas, J., concurring). That is doubly so, as here, where any "force" owed to *stare decisis* is "reduced" because the Appellate Review Provisions do not set forth any rule that "serve[s] as a guide to lawful behavior" by citizens. *Knick v. Twp. of Scott*, 139 S. Ct. 2162, 2179 (2019) (internal quotation marks omitted). Instead, it is a regulation concerning judicial authority. If *Marcum* means what the Eighth District thought, it is time to correct that mistake.

What about then-Judge Stewart's concurrence below? Recall that she agreed that appeals courts can review the record and second-guess a trial judge's in-range sentence. That concurrence offered no analysis of that point of agreement with the plurality. *See* App. Op.¶22 (Stewart, J., concurring in judgment). Otherwise, the concurrence rested on the insight that some sentences imposed after considering the General Sentencing Statutes might be "otherwise contrary to law." *Id.* ¶¶23–34. That is true; as noted above, a sentence resting on a demonstrable, objectively verifiable statutory violation (like improper consideration of the defendant's race) would be "contrary to law." But the question here is not whether *any* violations of the General Sentencing Statutes might be contrary to law. Instead, the question is whether appeals courts may review a trial court's *discretionary* determination that, on the record before them, the General Sentencing Statutes permit a particular in-range sentence. And the answer to that question is "no."

CONCLUSION

The Court should reverse the judgment of the Eighth District.

Respectfully submitted,

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