

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,

Appellee,

v.

KEVIN JOHNSON,

Appellant.

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Case No. 2006-2154

On Appeal from the Butler  
County Court of Appeals,  
Twelfth Appellate District

App. Case No. 2005-10-0422

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

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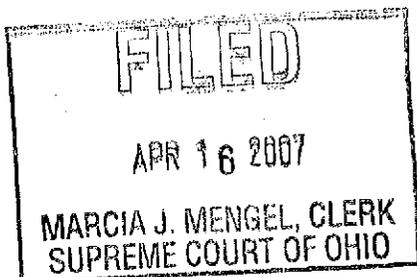
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## STATEMENT OF INTEREST OF AMICUS

The Ohio Association of Criminal Defense Lawyers (OACDL), founded in 1986, is a professional association with more than 500 members in Ohio. OACDL is among the largest professional organizations of criminal practitioners in the state. OACDL advocates for progressive criminal laws and policies that are consistent with constitutional principles, limited government intrusion into the lives of Americans, and a free society.

## STATEMENT OF CASE AND FACTS

Amicus adopts Appellant's statement of case and facts.

## ARGUMENT

Proposition of Law: Trial courts may impose concurrent sentences upon defendants convicted of multiple counts of an offense or offenses listed in R.C. 2929.13(F).

This case will decide whether judges may impose concurrent mandatory sentences when they believe doing so is in the interest of justice and when no statute commands otherwise. If the State's position is adopted, scores of future defendants will see their sentences double, triple, quadruple or worse. Not because judges believe the far greater sentences are warranted. And not because anything in the Ohio Revised Code compels such a result. Instead, all mandatory sentences contained in R.C. 2929.13(F) will be imposed consecutively based upon an errant assumption about an unexpressed legislative intent. Such a holding will further swell Ohio's increasingly overcrowded prisons while simultaneously undermining both judicial discretion and fundamental principles of justice.

This Court need not consider the undesirable public policy ramifications of a ruling for the State, however. Fundamental canons of statutory construction dictate a holding in favor of Appellant Johnson, and in line with the holdings of the Second and Third District Courts of

Appeal. *State v. Franklin* (Dec. 22, 200), Greene App. No. 99-CA-117; *State v. Sharp*, Allen App. No. 01-02-06, 2002-Ohio-2343.

“The Ohio General Assembly provided the rules for determining whether a defendant should serve concurrent or consecutive sentences in R.C. 2929.41.” *State v. Barnhouse*, 102 Ohio St.3d 221, 2004-Ohio-2492, at ¶9. Nothing in R.C. 2929.41 requires the imposition of consecutive sentences for multiple offenses listed in R.C. 2929.13(F). Likewise, R.C. 2929.13(F) does not command the imposition of consecutive sentences. The court below buttresses its contrary interpretation by noting two “instances in which a sentencing court does not have the discretion to impose consecutive or concurrent sentences.” *State v. Johnson*, Butler App. No. CA2005-10-422, 2006-Ohio-5195, at ¶70. It cites R.C. 2929.41(B)’s exception for certain misdemeanors and R.C. 2971.03’s exception for certain violent sex offenses. The court below cites these “instances” as exceptions to R.C. 2929.41’s “general rule.” *Id.* at ¶70, 71. But they are not exceptions to R.C. 2929.41 at all. They are expressly contained in R.C. 2929.41(A) and (B).

Under the doctrine of *expressio unius est exclusio alterius*, “if a statute specifies one exception to a general rule or assumes to specify the effects of a certain provision, other exceptions or effects are excluded.” *Thomas v. Freeman* (1997), 79 Ohio St.3d 221, 224-225, 680 N.E.2d 997. Because R.C. 2929.41 expressly states the very exceptions the court below relies upon, it also excludes the exception that court seeks to invent in this case.

The lower court’s decision also violates the rule of lenity. It is an ancient rule of statutory construction that penal statutes must be strictly construed against the government and in favor of the person facing the penalty. 3 Singer, Sutherland Statutory Construction (6<sup>th</sup> Ed. 2001), 125-126, Section 59:3. In Ohio, this principle is codified in R.C. 2901.04(A):

[S]ections of the Revised Code defining offenses or penalties shall be strictly construed against the state, and liberally construed in favor of the accused.

See also *Washington Court House v. McStowe* (1976), 45 Ohio St.2d 228, 229, 343 N.E.2d 109, 110; *State v. Fanti*, 147 Ohio App.3d 27, 2001-Ohio-7028 at ¶12, 13.

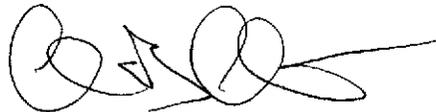
The court below did not apply the rule of lenity. Instead, it construed R.C. 2929.41 and R.C. 2929.13(F)'s silence about consecutive prison terms for Appellant Johnson's convictions liberally in favor of the State. Penal statutes cannot be extended by implication to cases not falling within their terms. *Cleveland v. Jorski* (1944), 142 Ohio St. 529, 53 N.E.2d 513, paragraph one of the syllabus. Due process and the rule of lenity require that R.C. 2929.41 and R.C. 2929.13(F) not be interpreted to say what they do not: that mandatory sentences must be imposed consecutively. See *Dunn v. United States* (1979), 442 U.S. 100, 112, 60 L.Ed.2d 743 (the rule of lenity is rooted in fundamental principles of due process).

Finally, nothing in this Court's decision in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470, mandates the holding sought by the State in this case. *Foster* eliminated certain restrictions on trial courts' ability to impose certain sentences. *Id.* at syllabus. It did not create any new restrictions not previously recognized.

### CONCLUSION

The Ohio Association of Criminal Defense Lawyers urges this Court to reverse the decision of the Twelfth District Court of Appeals.

Respectfully submitted,



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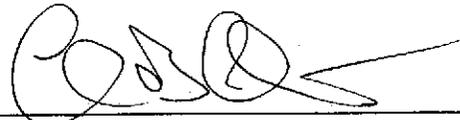
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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing MERIT BRIEF OF AMICUS CURIAE THE OHIO ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF APPELLANT KEVIN JOHNSON was forwarded by regular U.S. Mail to Robin N. Piper, Butler County Prosecutor, Office of the Butler County Prosecutor, Government Services Building, 11<sup>th</sup> Floor, 315 High Street, Hamilton, Ohio 45011 and to Christopher Frederick, Ashtabula 304 North Second Street, Hamilton, Ohio 45011, this 16<sup>th</sup> day of April, 2007.



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