

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, : Case No. 2007-1703
 :
 Plaintiff-Appellee, :
 v. : On Appeal from the
 : Eleventh Appellate District,
 LAURA KALISH, : Lake County, Ohio
 : Case No. 2006-L-093
 Defendant-Appellant. :

**BRIEF OF AMICUS CURIAE
OFFICE OF THE OHIO PUBLIC DEFENDER
IN SUPPORT OF APPELLANT LAURA KALISH**

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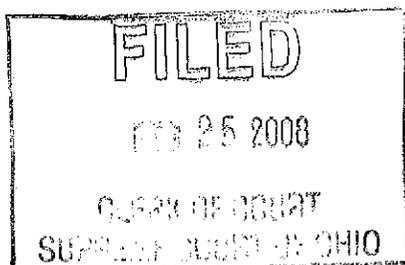


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STATEMENT OF THE CASE AND FACTS

Amicus adopts by reference the statement of the case and facts set forth by Appellant
Laura Kalish.

INTEREST OF AMICUS CURIAE

The Office of the Ohio Public Defender (“OPD”) is a state agency responsible for providing legal representation and other services to indigent criminal defendants convicted in state court. The primary focus of the OPD is on the appellate phase of criminal cases, including direct appeals and collateral attacks on convictions. The primary mission of the OPD is to protect and ensure the individual rights guaranteed by the state and federal constitutions through exemplary legal representation. In addition, the OPD seeks to promote the proper administration of criminal justice by enhancing the quality of criminal defense representation, educating legal practitioners and the public on important defense issues, and supporting study and research in the criminal justice system.

As amicus curiae, the OPD offers the Court the perspective of experienced practitioners who routinely handle significant criminal cases in the Ohio appellate courts. The OPD has an interest in this case insofar as it will determine the standard of review to be applied to felony sentences in light of this Court’s decision in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856. We believe that it is imperative to the protection of our clients’ rights that courts of appeals continue to apply a de novo standard of review, by clear and convincing evidence, when reviewing felony sentences. Application of this heightened standard of review not only effectuates the legislative intent, but ensures that sentencing courts give proper consideration to the general statutory considerations contained in R.C. 2929.11 and 2929.12. Moreover, vigorous appellate review of felony sentences will ensure that the overriding goals of Ohio’s sentencing scheme—to protect the public and punish the offender—are achieved in an efficient and just manner.

FIRST PROPOSITION OF LAW

The decision in *State v. Foster* does not change the standard of review for Ohio felony sentencing appeals. Under R.C. 2953.08(G)(2) the required analysis remains de novo, applying the clear and convincing evidence standard.

In the American legal tradition, judges have generally been given wide discretion in criminal sentencing. See *Apprendi v. New Jersey* (2000), 530 U.S. 466, 482. Historically, “statutes specified the penalties for crimes but nearly always gave the sentencing judge wide discretion to decide whether the offender should be incarcerated and for how long.” *Mistretta v. United States* (1989), 488 U.S. 361, 365. Moreover, the discretion granted to sentencing judges was given “virtually unconditional deference on appeal.” *Id.* at 364. Unfortunately, the unfettered exercise of sentencing discretion, free from meaningful appellate review, led to soaring costs and gross sentencing disparities. See S. Rep. No. 225, 98th Cong., 1st Sess. 41-46 & nn.18-27 (1983); *Developments in the Law—Race and the Criminal Process*, 101 Harv. L. Rev. 1473, 1630-32 (1988). As a result, legislatures across the United States enacted sentencing reform legislation designed to bring a measure of efficiency, uniformity, rationality, and fairness to sentencing. See, generally, Marvin E. Frankel, *Criminal Sentences: Law Without Order* (1972). In large part, sentencing reform legislation focused on proportionality (decreasing the variation among sentences imposed on similarly situated offenders) and certainty (increasing certainty as to the amount of time a particular offender would spend in prison). See Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987.

In accordance with this national trend, the Ohio General Assembly began in the 1990’s to reconsider the efficiency and fairness of indeterminate felony sentencing. After extensive review of Ohio’s sentencing scheme, the General Assembly enacted broad sentencing reforms, which were designed to introduce certainty and proportionality to felony sentencing. See Am.Sub.S.B.

No. 2, 146 Ohio Laws, Part IV, 7136, effective July 1, 1996 (hereinafter "S.B. 2"); see, also, *Foster* 2006-Ohio-856, at ¶34. Notably, since S.B. 2 went into effect, this Court has never questioned that the legislation was a necessary response to the unjustified and shameful consequences of the indeterminate-sentencing system that existed in Ohio prior to its enactment.

The wisdom and propriety of the General Assembly's sentencing reform efforts notwithstanding, the landmark decision of the United States Supreme Court in *Blakely v. Washington* (2004), 542 U.S. 296, compelled this Court to declare that certain portions of S.B. 2 were constitutionally infirm. *Foster*, 2006-Ohio-856. In *Blakely*, the U.S. Supreme Court held that a sentencing scheme which places sentence-elevating fact-finding within the judge's province violates a defendant's right to trial by jury, a right safeguarded by the Sixth and Fourteenth Amendments to the Federal Constitution. *Blakely*, 542 U.S. at 305. In order to bring Ohio's sentencing law into alignment with the U.S. Supreme Court's Sixth Amendment jurisprudence, the *Foster* Court severed those portions of Ohio's sentencing statutes that required judicial fact-finding. *Foster*, 2006-Ohio-856, at syllabus. By its own admission, this Court's decision in *Foster* "severely wounded" Ohio's reformed felony sentencing scheme. *Id.* at ¶84. However, by adopting Appellant's First Proposition of Law, this Court can ensure that *Foster* is not used to deliver the "fatal blow" to sentencing reform in Ohio.

History has shown that unfettered judicial discretion in sentencing, coupled with a lack of meaningful appellate review, leads to a grossly unjust pattern of sentencing that is "terrifying and intolerable for a society that professes devotion to the rule of law." Marvin E. Frankel, *Criminal Sentences: Law Without Order* (1972). In fact, one federal judge described unbridled judicial discretion in indeterminate sentencing systems as "a national scandal." *Shepard v. United States* (6th Cir. 1958), 257 F.2d 293, 294 (commenting on unreviewed discretionary sentencing and

noting that it is "an anomaly that a judicial system which has developed so scrupulous a concern for the protection of a criminal defendant throughout every other stage of the proceedings against him should so neglect this most important dimension of fundamental justice"). In resolving the instant case, and announcing the applicable standard of appellate review for criminal sentences, this Court should not lose sight of the historical consequences emanating from unconditional deference to the judgment of sentencing courts.

Amicus, therefore, urges this Court to adopt Appellant's First Proposition of Law and hold that R.C. 2953.08(G) requires appellate courts to conduct a de novo review of felony sentences, under the clear and convincing evidence standard. In so holding, this Court will resolve the current split among appellate districts by unequivocally announcing that *Foster* did not change the standard of review for Ohio felony sentencing appeals. Continued adherence to the standard of review laid out in R.C. 2953.08(G) is necessary to effectuate the clear legislative intent to subject criminal sentences to a heightened level of review. More importantly, application of this heightened standard of review promotes fundamental principles of fairness and due process, insofar as meaningful appellate review remains the only means to ensure that sentencing determinations are based upon legitimate considerations.

A. This Court should enforce the appellate standard of review enacted by the General Assembly.

That this Court possesses the authority to review, and invalidate, unconstitutional legislation is beyond question. Nonetheless, "[i]t is inherent in our theory of government 'that each of the three grand divisions of the government, must be protected from the encroachments of the others, so far that its integrity and independence may be preserved.'" *State v. Hochhausler* (1996), 76 Ohio St.3d 455, 463 (quoting *South Euclid v. Jemison* (1986), 28 Ohio St.3d 157, 159). As this Court has long recognized, it is not appropriate for the judiciary to substitute its

own opinion for that of the General Assembly in discerning the appropriate means to vindicate important public policy considerations. *State v. Smorgala* (1990), 50 Ohio St.3d 222, 223. This prohibition on judicial legislation rightly acknowledges that the General Assembly is most competent to deal with public policy issues affecting the state and its citizens. *Id.*; *Arbino v. Johnson & Johnson*, 116 Ohio St.3d 468, 2007-Ohio-6948.

Therefore, in accordance with the principle of separation of powers, it is well-settled that “interpretation of the state and federal constitutions is a role exclusive to the judicial branch,” but “the legislative branch is the ultimate arbiter of public policy.” *Beagle v. Walden* (1997), 78 Ohio St.3d 59, 62; *State ex rel. Cincinnati Enquirer v. Dupuis*, 98 Ohio St.3d 126, 2002-Ohio-7041, ¶21. Thus, in the absence of a constitutional concern, the judiciary’s function is to interpret and enforce the law as written by the General Assembly. *Smorgala*, 50 Ohio St.3d at 224. In the context of sentencing law and policy, the General Assembly is in the best position to balance the competing interests at stake and, unless necessary to resolve a constitutional violation, this Court should not disrupt the validly enacted statutory sentencing scheme.

1. The General Assembly intentionally chose to reduce disparity in sentencing by limiting judicial discretion.

Until 1996, when S.B. 2 went into effect, Ohio’s common pleas judges were free to impose any sentence within the range prescribed by the General Assembly. Appellate courts exercised very little supervision over the sentencing process. See *State v. Beasley* (1984), 14 Ohio St.3d 74; *State ex rel. Leis v. Outcalt* (1980), 62 Ohio St.2d 331. Thus, prior to the enactment of statutory reforms, the sentencing discretion of Ohio trial judges was virtually free from substantive control or guidance. See Burt W. Griffin & Lewis R. Katz, *Sentencing Consistency: Basic Principles Instead of Numerical Grids, The Ohio Plan*, 53 Case Wes. Res. L. Rev. 1 (2002).

Predictably, the unlimited discretion afforded judges combined with relatively broad sentencing ranges resulted, over time, in unacceptable disparities and inconsistencies in sentences. Griffin & Katz, 53 Case Wes. L. Rev. 1, at 37-38. Moreover, the indeterminate sentencing era resulted in prison overcrowding and a substantial increase in governmental expenditures to meet the needs of a rapidly expanding prison population. See Interim Report of the Governor's Committee on Prison Crowding (1986); Fritz Rauschenberg, Evaluation of Senate Bill 2 (Staff Report to Ohio Criminal Sentencing Commission) (Sept. 19, 2001). As a result of these very serious flaws in Ohio's criminal justice system, in 1990, the General Assembly embarked on the task of finding fairer, more consistent, and less costly ways of sentencing felony offenders.

As a first step, the General Assembly created the Ohio Criminal Sentencing Commission, which was instructed to "undertake a comprehensive review of Ohio's criminal law and recommend appropriate changes to 'enhance public safety by achieving certainty in sentencing, deterrence, . . . a reasonable use of correctional facilities, programs, and services, and . . . fairness in sentencing.'" Griffin & Katz, Ohio Felony Sentencing Law, 2007 Ed., §1:1 (quoting R.C. 181.24(B)). The Sentencing Commission's enabling legislation required that any proposed sentencing structure provide for "retention of reasonable judicial discretion within established limits." R.C. 181.24(B). Thus, from the beginning of the sentencing reform process, the General Assembly intended to utilize statutory guidelines to cabin judicial discretion in sentencing.

In accordance with its legislative mandate, the Sentencing Commission conducted a comprehensive review of Ohio's sentencing structures and recommended broad based reforms to the General Assembly. Griffin & Katz, Ohio Felony Sentencing Law, §§1:1-1:8. The Sentencing Commission acknowledged the value of judicial discretion in sentencing, but also

observed that unlimited judicial discretion had created sentencing inconsistency statewide. See *A Plan for Felony Sentencing in Ohio: A Formal Report of the Ohio Sentencing Commission* (July 1, 1993). Thus, the Sentencing Commission advised the General Assembly to curb the capricious exercise of judicial discretion by adopting a sentencing statute that "state[s] clear purposes, use[s] sentencing presumptions to guide judges, and monitor[s] sentences through appellate review." *Id.*

The General Assembly adopted nearly all of the Sentencing Commission's recommended reforms. In order to foster greater consistency and predictability in sentencing, while simultaneously controlling costs, the General Assembly enacted a scheme of general legislative guidance coupled with strong appellate review. Griffin & Katz, 53 Case Wes. L. Rev. 1, at 2-28. In practice, the system set out by the General Assembly in S.B. 2 was remarkably successful in resolving many of the problems associated with indeterminate felony sentencing. *Id.*

This Court's decision in *Foster* eliminated much of the statutory guidance that the General Assembly sought to incorporate into Ohio's felony sentencing scheme. However, in announcing its decision, this Court also expressed its intent to salvage the general legislative intent expressed in S.B. 2. *Foster*, 2006-Ohio-856, at ¶86. The history of sentencing reform in Ohio, as detailed above, is instructive of the General Assembly's desire to place reasonable limitations on the exercise of judicial discretion in sentencing. The cornerstone of the General Assembly's plan was the establishment of overriding purposes of punishment and meaningful appellate review to ensure compliance with those purposes.

By affirming the decision of the Eleventh District, this Court will effectively transform Ohio felony sentencing into a purely discretionary system, which is the antithesis of the guided-discretion system recommended by the Ohio Sentencing Commission and adopted by the

General Assembly. Neither the Sixth Amendment nor U.S. Supreme Court sentencing decisions dictates a result that frees trial judges from appellate review of their decisions to ensure compliance with statutory considerations. Therefore, this Court should enforce the law as written by the General Assembly and continue to apply the appellate review statute in R.C. 2953.08(G).

2. ***A key provision of sentencing reform in Ohio was appellate review of sentences and this Court has neither reason nor authority to modify the appellate review statute.***

The starting point for all felony sentencing under S.B. 2 is the accomplishment of the overriding purposes and principles of punishment. Therefore, R.C. 2929.11 requires the sentencing court to consider the overriding purposes of felony sentencing, which are "to protect the public from future crime . . . and to punish the offender." In addition, the sentence imposed must be "reasonably calculated to achieve the two overriding purposes of felony sentencing" and be "commensurate with and not demeaning to the seriousness of the offender's conduct and its impact upon the victim, and consistent with sentences imposed for similar crimes by similar offenders." R.C. 2929.11(B) and (C). Finally, R.C. 2929.12 requires the sentencing court to consider a nonexclusive list of "seriousness" and "recidivism" factors in determining the appropriate sentence. In *Foster*, this Court squarely held that sentencing courts are required to comply with these statutory provisions when exercising their sentencing discretion. *Foster*, 2006-Ohio-856, at ¶36-42.

A criminal defendant has an appeal of right where the sentence is "contrary to law." R.C. 2953(A)(3). Notwithstanding the decision in *Foster*, the purposes and principles in R.C. 2929.11 and 2929.12 remain the law in Ohio and any sentence in conflict with these statutory provisions is contrary to law and subject to appeal under R.C. 2953.08(A)(3). Therefore, a sentence that

does not comport with the principles of reasonableness and proportionality is contrary to law.

Likewise, an inconsistent sentence is contrary to law.

Appellate review of felony sentences is governed by R.C. 2953.08(G)(2). As originally written, this statutory section stated:

The appellate court's standard of 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:

- (a) That the record does not support the sentencing court's findings under divisions (B) or (D) of section 2929.13, division (E)(4) of section 2929.14, or division (H) of section 2929.20, whichever, if any, is relevant;
- (b) That the sentence is otherwise contrary to law.

In *Foster*, this Court invalidated R.C. 2953.08(G)(2)(a) with respect to the record supporting a finding under R.C. 2929.14(E)(4). However, *Foster* did not invalidate remaining portions of R.C. 2953.08(G)(2), which explicitly state that a sentence "contrary to law" will not be reviewed under an abuse of discretion standard.

By enacting R.C. 2953.08(G), the General Assembly sought to secure the goal of consistency in sentencing by abolishing the abuse of discretion standard and giving appellate courts the increased power to modify sentences that violated the basic principles of felony sentencing as set out in R.C. 2929.11 and 2929.12. In fact, the power and importance of appellate review was deliberately enhanced by the General Assembly in S.B. 2 and its successor 2000 H.B. 331 in order to fulfill the legislative mandate that the sentencing statute provide "procedures for assuring that the penalty imposed for a criminal offense upon similar offenders is uniform in all jurisdictions of the state." Griffin & Katz, *Ohio Felony Sentencing Law*, §10:20. For this Court to unilaterally reinstate the abuse of discretion standard would severely undercut the purpose of the General Assembly in conferring upon appellate courts increased power over sentencing judges. Moreover, return to an abuse of discretion standard cannot fairly be said to

advance any interest in preserving Sixth Amendment rights.

3. ***The preservation of meaningful appellate review in felony sentencing is supported by the U.S. Supreme Court's sentencing jurisprudence.***

The U.S. Supreme Court has directly reinforced the importance of a heightened standard of review in felony sentencing. In *United States v. Booker* (2005), 543 U.S. 220, the Supreme Court recognized the importance of establishing a reasonableness standard as opposed to an abuse of discretion standard when it declared the federal sentencing guidelines to be advisory rather than mandatory. *Id.* at 257-66. The *Booker* Court explained that a reasonableness standard of appellate review was necessary to ensure that the guidelines' laudable goal of reducing disparity in sentencing and fostering uniformity was not defeated. The same result obtains in this case, and return to an abuse of discretion standard in under *Foster* would have an equally deleterious effect on the General Assembly's efforts reduce disparity in sentencing.

B. **This Court's decision in *State v. Foster* did not modify the standard of review for felony sentencing appeals.**

Without question, this Court's decision in *Foster* radically altered the sentencing landscape. Nonetheless, in addressing sentencing issues post-*Foster*, it is imperative that lower courts remain focused on the very limited issue before the *Foster* Court. In *Foster*, this Court had but one goal—to bring Ohio sentencing law into conformity with U.S. Supreme Court precedent expressed in the *Apprendi-Blakely-Booker* line of cases. Thus, the singular focus of this Court in *Foster* was to identify those portions of Ohio's sentencing statutes that violated the Sixth Amendment by requiring the judge rather than the jury to make findings of fact necessary for punishment. As further evidence of this Court's desire to limit its holding, the remedy applied in *Foster* was not the wholesale invalidation of Ohio's sentencing statutes. *Id.* at ¶82-83. To the contrary, in *Foster* this Court carefully excised only those portions of the sentencing

statutes that required constitutionally impermissible judicial fact-finding and left vast majority of S.B. 2 intact. Id. at ¶82-102.

Since *Foster* was decided, lower courts have routinely ignored the limited nature of this Court's decision, and, as a result, have significantly expanded *Foster's* reach. The most troubling example of this overreaching relates to the continued vitality of the appellate sentencing statute, R.C. 2953.08(G). In *Foster*, this Court stated that "the appellate statute, R.C. 2953.08(G), insofar as it refers to the severed sections, no longer applies." *Foster*, 2006-Ohio-856, at ¶99. Relying on this sentence from *Foster*, several appellate courts, including the Eleventh District in the case at bar, have declared that R.C. 2953.08(G) is no longer in effect. Moreover, according to these appellate courts, *Foster* requires that courts of appeals apply an abuse of discretion standard in reviewing felony sentences. In truth, nothing in *Foster* dictates that the appellate review statute in R.C. 2953.08(G) is inapplicable to sections of the sentencing statutes that retain their vitality.

1. *After Foster, the appellate review standard in R.C. 2953.08(G) still applies to sentencing appeals based upon violations of R.C. 2929.11 and 2929.12.*

On its own terms, *Foster* did not sever R.C. 2953.08(G), but instead rendered it inapplicable "insofar as it refers to the severed sections." *Foster*, 2006-Ohio-856, at ¶99; see; also, *State v. Mathis*, 109 Ohio St.3d 54, 2006-Ohio-855 (holding that R.C. 2953.08(G) no longer applies to require findings on the appellate record to support consecutive sentences); *State v. Saxon*, 109 Ohio St.3d 176, 2006-Ohio-1245 (holding that "the sentencing review statute, R.C. 2953.08(G), remains effective, although no longer relevant with respect to the statutory sections severed by *Foster*"). Thus, a careful reading of *Foster* and subsequent decisions of this Court compels the conclusion that the heightened appellate standard of review contained in R.C. 2953.08(G) remains in full force and effect as to the unsevered portions of the sentencing statute,

which includes R.C. 2929.11 and 2929.12.

This Court has continually emphasized that the general guidance statutes contained in R.C. 2929.11 and 2929.12 do not violate the Sixth Amendment and are untouched by the decision in *Foster*. *Foster*, 2006-Ohio-856, at ¶36-42; *Mathis*, 2006-Ohio-855. Thus, post-*Foster*, trial courts are still required to consider R.C. 2929.11 and 2929.12 when exercising their discretion in imposing a sentence. *Mathis*, 2006-Ohio-855, at ¶38. Therefore, both *Foster*, and the plain language of R.C. 2953.08(G), establish that appellate courts must conduct a de novo review of challenges based on a sentencing court's failure to consider R.C. 2929.11 and 2929.12. In addition, R.C. 2953.08(G) continues to authorize the appellate court to vacate the sentence if the defendant can show, by clear and convincing evidence, that the sentencing court failed to properly consider the factors enumerated in the general guidance statutes.

2. *By applying an abuse of discretion standard, the Eleventh District violated the plain language of R.C. 2953.09(G).*

In this case, the court of appeals applied an abuse of discretion standard to review Kalish's sentence. *State v. Kalish*, 11th Dist. No. 2006-L-093, 2007-Ohio-3850. According to the Eleventh District, *Foster* changed the standard of review on sentencing appeals to an abuse of discretion standard. *Id.* at ¶14. In reaching this conclusion, the Eleventh District relied on decisions from the Second, Third, Fifth, and Ninth District Courts of Appeals, which had similarly concluded that *Foster* eliminated the appellate review statute and resurrected the abuse of discretion standard with respect to all felony sentencing appeals. *Id.* (citing *State v. Slone*, 2d Dist. Nos. 2005 CA 79 and 2006 CA 75, 2007-Ohio-130, at ¶7; *State v. Schweitzer*, 3d Dist. No. 2-06-25, 2006-Ohio-6087, at ¶19; *State v. Firouzmandi*, 5th Dist. No. 2006-CA-41, 2006-Ohio-5823, at ¶37-40; *State v. Windham*, 9th Dist. No. 05CA0033, 2006-Ohio-1544, at ¶11-12.

The decision of the Eleventh District and similar decisions from other appellate districts

blatantly ignore the plain language of R.C. 2953.08(G), which unequivocally states that “the appellate court’s standard of review *is not whether the sentencing court abused its discretion.*” R.C. 2953.08(G) (emphasis added). The Eleventh District’s application of an abuse of discretion standard also disregards the General Assembly’s intent to ensure proportionality and certainty in sentencing through rigorous appellate review. Finally, the court of appeals’ reliance on *Foster* to eviscerate appellate review is an improper reading of this Court’s precedent and cannot be permitted to stand.

Significantly, numerous courts of appeals have continued, post-*Foster*, to apply the clear and convincing evidence standard under R.C. 2953.08(G). See *State v. Sheppard*, 1st Dist. Nos. C-060042, C-060066, 2007-Ohio-24, at ¶16; *State v. Ramos*, 3d Dist. No. 4-06-24, 2007-Ohio-767, at ¶19-23; *State v. Ramos*, 3d Dist. No. 4-06-24, 2007-Ohio-767, at ¶15-16; *State v. Burton*, 10th Dist. No. 06AP-690, 2007-Ohio-1941, at ¶29. The decisions of these courts rightly acknowledge the limited scope of *Foster’s* holding and follow this Court’s directive that the unsevered portions of S.B. 2 remain in full force and effect.

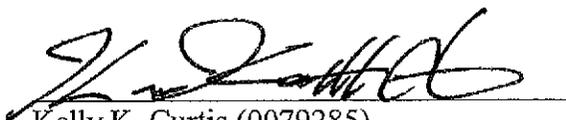
The instant case provides this Court with an opportunity to declare that R.C. 2953.08(G) is not a dead letter. Therefore, the appellate review standard in R.C. 2953.08(G) must be applied to sentencing challenges premised upon unsevered portions of the sentencing statutes, including, but not limited to, R.C. 2929.11 and 2929.12. Indeed, a standard of review that truly mandates appellate review of sentencing determinations is the only way to ensure that trial courts adhere to the goals of proportionality and certainty mandated by the General Assembly.

CONCLUSION

Trial courts exercise awesome responsibility when they sentence a criminal defendant. Fundamental principles of fairness and due process require that they base sentencing decisions on legitimate considerations and strive to impose sentences in a consistent manner. This Court is undoubtedly aware of the intolerable disparities that arise from unlimited judicial discretion in sentencing. Based upon its assessment of the problems inherent in indeterminate sentencing, the General Assembly enacted legislation to improve the quality of sentencing decisions and to ensure that the sentence imposed in each case calls for the minimum amount of custody which is consistent with the protection of the public, gravity of the offense, and the rehabilitative needs of the offender. In its efforts to improve felony sentencing, the General Assembly determined that careful appellate review was an important safeguard to ensure proportionality and fairness in sentencing. This Court should not permit the Eleventh District Court of Appeals to substitute its judgment for that of the General Assembly. Therefore, this Court should reverse the decision of the Eleventh District and adopt Appellant's First Proposition of Law.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing **Brief of Amicus Curiae Office of the Ohio Public Defender in Support of Appellant Laura Kalish** was served by regular U.S. mail, this 25th day of February, 2008, upon the following:

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