

In the
Supreme Court of Ohio

STATE OF OHIO,	:	Case Nos. 2014-1825 and 2014-2122
	:	
Plaintiff-Appellee,	:	On Appeal and Certified
	:	Conflict from the
v.	:	Gallia County
	:	Court of Appeals,
MARY MARCUM,	:	Fourth Appellate District
	:	
Defendant-Appellant.	:	Court of Appeals
	:	Case No. 13CA11

MERIT BRIEF OF APPELLEE STATE OF OHIO

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INTRODUCTION

This appeal asks whether abuse-of-discretion review is available for felony sentencing. A statute gives an easy answer: No. R.C. 2953.08(G)(2) says that “[t]he appellate court’s standard of review is not whether the sentencing court abused its discretion.” The bedrock principle that this Court gives meaning to every word in an act resolves this case. Despite the statute’s plain prohibition on reviewing a felony sentence for an abuse of discretion, Defendant Mary Marcum asks this Court to ignore the statute’s text and permit what the statute forbids. The Fourth District rightly rejected that argument.

A jury convicted Marcum of the illegal manufacture of methamphetamine in the vicinity of a juvenile. Marcum’s two young children were found no more than 20 feet from a highly poisonous and explosive mobile methamphetamine lab. The statutory maximum for her offense was eleven years, and after considering the purposes of sentences and the appropriate sentencing factors, the trial court sentenced Marcum to ten years in prison.

Marcum challenged her sentence in the Fourth District Court of Appeals, arguing that the trial court abused its discretion by imposing the sentence. The Fourth District, though, held that its review was confined to reviewing the sentence to assure that it was not “contrary to law,” R.C. 2953.08(G)(2)(b), and affirmed.

Because other courts of appeals had applied abuse-of-discretion review after this Court’s plurality opinion in *State v. Kalish*, 120 Ohio St. 3d 23, 2008-Ohio-4912, the Fourth District certified a conflict. This Court accepted the conflict and ordered briefing on the following question: “Does the test outline by the court in *State v. Kalish* apply in reviewing felony sentences after the passage of R.C. 2953.08(G)” in 2011?

The only hiccup that makes this appeal more than a one-page discussion of the statutory text is the statute’s history, including the *Kalish* plurality’s interpretation of the statute in 2008.

The part of the history reflected in the *Kalish* plurality opinion was an understandable detour caused by the U.S. Supreme Court's Sixth Amendment cases. Without that detour, all would agree that the statutory ban on abuse-of-discretion review means what it says and prohibits exactly what Marcum seeks. But all that the history adds is this brief diversion. The statute has come full circle through a post-*Kalish* amendment, and is now identical in all ways that matter to the former statute that all agreed left "no doubt" that appeals courts reviewed sentences under the contrary-to-law standard, not the abuse-of-discretion standard. *Kalish*, 2008-Ohio-4912 ¶ 9 (plurality op.). Once again, there is no doubt that appeals courts do not review sentences for abuse of discretion.

The statute's journey starts in 1995, when the legislature enacted provisions requiring judges to make certain findings when imposing felony sentences. The statute also created a limited right to appellate review of felony sentences. In 2000, the legislature amended the appellate review provision to prohibit abuse-of-discretion review. A few years later, and following U.S. Supreme Court decisions barring judicial fact-finding for certain sentencing purposes, this Court severed that portion of R.C. 2953.08(G) that referred to statutory findings for consecutive sentences. *State v. Foster*, 109 Ohio St. 3d 1, 2006-Ohio-856 ¶¶ 97, 99, *abrogated in part by Oregon v. Ice*, 555 U.S. 160 (2009).

Next, a plurality of this Court interpreted *Foster* as changing R.C. 2953.08(G)(2) such that a felony sentence was to be reviewed by asking both whether the sentence was contrary to law *and* whether the trial court abused its discretion by imposing the sentence. *State v. Kalish*, 120 Ohio St. 3d 23, 2008-Ohio-4912 ¶¶ 16, 17. Then, in 2009, the U.S. Supreme Court ruled that States could require judicial fact-finding when imposing consecutive sentences. *Ice*, 555 U.S. at 163-64. Thereafter, the Ohio legislature reenacted the provision severed in *Foster*,

reinserted the provision regarding appellate review of those findings, and retained the prohibition on appellate abuse-of-discretion review. The statute has come full circle. In all relevant ways, the statute today is the same as the statute in 2000.

The question here is whether abuse-of-discretion review is available for felony sentencing. The answer is “no.” *First*, the statute’s text commands this conclusion. Any other answer would ignore the plain language in R.C. 2953.08(G)(2)—“[t]he appellate court’s standard of review is not whether the sentencing court abused its discretion.” *Second*, the history of current R.C. 2953.08(G)(2) and sentencing appeals more broadly confirms that it bars abuse-of-discretion review.

No argument Marcum makes rebuts the plain text. R.C. 2953.08 covers the waterfront for felony sentencing appeals, and unambiguously bars abuse-of-discretion review. Nevertheless, even if this Court answered the certified question “yes,” the Court should still affirm the Fourth District because Marcum’s sentence was neither contrary to law nor an abuse of discretion.

STATEMENT OF FACTS AND PROCEDURE

Marcum’s conviction, and the sentence she challenges, arises from her conviction for manufacturing methamphetamine near her children.

A. Methamphetamine manufacturing creates high risks to those nearby.

Methamphetamine can be manufactured in a number of ways, including what is called the “one-pot” or “shake-and-bake” method. Tr. at 177. In this method, a person first combines lithium metal from an open lithium battery with pseudoephedrine. *Id.* The lithium particles used in this mixture can catch fire. *Id.* at 183, 200. This mixture is then combined with a solvent of Coleman fuel or ammonium nitrate from cold packs. *Id.* Next, lye (sodium hydroxide), which is found in crystal Drano, is added to the mixture. *Id.* These ingredients are combined in a reaction

vessel—a gallon jug, for example. *Id.* at 177, 179. When water is added, the lye and nitrate react to create ammonia gas, which is explosive. *Id.* at 177-78, 183, 200. The ammonia gas then reacts with the lithium, which converts the pseudoephedrine into methamphetamine oil. *Id.*

Next, the manufacturer combines sulfuric acid (liquid drain cleaner) and salt in a different bottle, which creates hydrogen chloride gas. *Id.* at 178. The gas is both poisonous and flammable. *Id.* at 180, 183. When the methamphetamine oil is introduced to the hydrogen chloride gas, it becomes a solid. *Id.* at 178. These one-pot methamphetamine labs are hazardous, and investigating officers try to minimize their contact with such labs. *Id.* at 180, 183.

B. Marcum was charged with and convicted of manufacturing methamphetamine in the vicinity of juveniles.

Acting on a tip about drug activity, two officers arrived at Mary Marcum's house on the night of January 31, 2013. *Id.* at 177, 187, 189, 248. Approaching Marcum's porch, one officer smelled an odor that resembled the smell from the sulfuric-acid and salt mixture. *Id.* at 189-90, 193. The officer investigated the smell and found two trash bags, one of which contained bottles with residue inside. *Id.* at 189-90.

The officers then found Marcum, who gave them permission to search her residence. *Id.* at 195. When the officers searched the two trash bags, they found remnants of a methamphetamine lab in each. *Id.* at 195-96. Specifically, they found a sulfuric-acid and salt mixture, four reaction vessels, a box of ice cream salt, an open lithium battery, a receipt for drain cleaner dated six days earlier, an empty box of pseudoephedrine, and a plastic bag with ammonium nitrate pellets from a cold pack. *Id.* at 195, 205-210. The sulfuric-acid and salt mixture was still releasing hydrogen chloride gas when the officers recovered it. *Id.* at 201-02.

The officers also found a hypodermic needle that could be used to inject methamphetamine. *Id.* at 213.

Marcum told the officers that Bryan White and Ronnie Schaefer were at her house three to four days earlier, and that they must have left the trash bags on her porch. *Id.* at 197. While speaking with Marcum, one officer noticed that she had sores on her body that were common to methamphetamine users. *Id.* at 196. The officers also found two children, ages nine and eleven, in a bedroom only 15 to 20 feet from the methamphetamine labs. *Id.* at 199, 253-54. And they found a roll of trash bags in the house that matched the trash bags on the porch. *Id.* at 214.

Marcum admitted that she purchased the pseudoephedrine, but alleged that she bought it for her mother. *Id.* at 326-27. She further claimed that White and Schaefer came to her house on January 27, 2013, seeking to make methamphetamine there, but that she refused them. *Id.* at 328-30. Marcum further relayed that White asked to use the bathroom where the box of pseudoephedrine was located. *Id.* at 337, 348. White also allegedly asked for a trash bag, and Aaron Fitzpatrick, Marcum's boyfriend, gave White one bag. *Id.* at 332, 354. Marcum denied taking methamphetamine. *Id.* at 338. She stated that she was taking Metadate and Adderall (both stimulants), but had not done any research whether these drugs created false positives. *Id.* at 339.

Following Marcum's arrest, a database search revealed that she had purchased the pseudoephedrine found in the trash bag on January 25, 2013. *Id.* at 221-22. On February 1, 2013, Marcum tested positive for methamphetamine and amphetamines. *Id.* at 278-79. Records also revealed that both White and Schaefer were arrested and incarcerated on January 27, 2013, and were not released until after January 31, 2013. *Id.* at 266-68.

Marcum was indicted for one count of illegal manufacture of methamphetamine in the vicinity of a juvenile in violation of R.C. 2925.04(A), (C)(3)(b), a first-degree felony. *See* Indictment. A jury convicted Marcum of that charge. Trial Tr. at 11, 412-13. At sentencing, the court noted that the offense carried a term of imprisonment not less than four years and not more than eleven years. *Id.* at 421. When given the opportunity to speak, Marcum denied taking part in the offense and stated that she was going to prison “because the other guys didn’t come forward.” *Id.* at 422. Her attorney requested leniency, arguing that Marcum had only two minor prior infractions and that others were involved in the crime. *Id.* at 423.

The court noted the statutory purposes and principles of sentencing and the need for the sentences to be commensurate with the seriousness of the offense. *Id.* at 424-25. It further stated that it had considered these purposes, reviewed the record and evidence, and had weighed the statutory factors. *Id.* at 425. The court observed that Marcum had been convicted of a first-degree felony because the offense was committed within the vicinity of a juvenile. *Id.* The court then sentenced Marcum to a term of ten years. *Id.* at 426.

C. Marcum appealed her sentence, but the Fourth District affirmed.

On appeal, the Fourth District Court of Appeals upheld her conviction and sentence. *State v. Marcum*, 19 N.E.3d 540, 2014-Ohio-4048 ¶ 25 (4th Dist.) (hereafter “App. Op.”). As relevant here, Marcum argued that the trial court abused its discretion by “sentencing her to a near maximum prison term.” *Id.* ¶ 19. The appellate court held that it could not review her sentence for an abuse of discretion, and instead affirmed her sentence using the contrary-to-law standard in R.C. 2953.08(G)(2). *Id.* ¶¶ 20-23. Recognizing the disagreement in the districts, the Fourth District later certified a conflict on the following question: “Does the test outlined by the Court in *State v. Kalish* apply in reviewing felony sentences after the passage of R.C.

2953.08(G)?" *State v. Marcum*, No. 13CA11 (4th Dist. Dec. 5, 2014). Marcum also sought discretionary review. This Court accepted the conflict and discretionary appeal.

ARGUMENT

State's Proposition of Law:

R.C. 2953.08(G)(2), which says that an "appellate court's standard of review is not whether the sentencing court abused its discretion," prohibits abuse-of-discretion review.

The answer to the certified question is no. The test outlined in *State v. Kalish's* plurality opinion no longer applies to felony sentences because R.C. 2953.08(G) specifically prohibits review for abuse of discretion. The historical backdrop, both recent and more distant, confirms this reading. The recent history shows that the legislature in 2011 reinstated the excised provision in R.C. 2953.08(G) that the *Kalish* plurality had cited to inject abuse-of-discretion review into the statute. The more distant backdrop reveals that appellate sentencing review is historically narrow, and that the statute here minimally broadens appellate review. Nothing Marcum argues counters the text or history. But regardless, Marcum's sentence should be affirmed under either the standard compelled by statute or her own suggestion that it be reviewed for abuse of discretion.

A. The plain text of the appellate-review statute compels contrary-to-law review and prohibits abuse-of-discretion review.

A short statutory passage resolves this appeal. "The appellate court's standard of review is not whether the sentencing court abused its discretion." R.C. 2953.08(G)(2). This language has remained in the Revised Code since 2000, including after the General Assembly's 2011 revision following the U.S. Supreme Court's decision in *Oregon v. Ice*, 555 U.S. 160 (2009). Compare R.C. 2953.08(G)(2) (2000) with R.C. 2953.08(G)(2) (2011). Marcum asks this Court to give meaning to the language used in this statute. Br. at 5. The State agrees. This statute

explicitly bars appellate review for an abuse of discretion. Adopting Marcum’s contrary position would drain the quoted language of all meaning.

A cardinal rule of statutory construction tells courts not to ignore words, but instead “give meaning to every word in every act.” *In re Andrew*, 119 Ohio St. 3d 466, 2008-Ohio-4791 ¶ 6 (citation omitted). “[W]hen the General Assembly has plainly and unambiguously conveyed its legislative intent, there is nothing for a court to interpret or construe, and therefore, the court applies the law *as written*.” *In re I.A.*, 140 Ohio St. 3d 203, 2014-Ohio-3155 ¶ 12 (citation omitted) (emphasis added). A court is not “free . . . to disregard or delete portions of the statute through interpretation.” *Hall v. Banc One Mgt. Corp.*, 114 Ohio St. 3d 484, 2007-Ohio-4640 ¶ 24. When a statute’s words have “clear import,” the judicial duty “is to apply the statute rather than interpret it.” *Panther II Transp., Inc. v. Seville Bd. of Income Tax Rev.*, 138 Ohio St. 3d 495, 2014-Ohio-1011 ¶ 16; *see also Lancaster Colony Corp. v. Limbach*, 37 Ohio St. 3d 198, 199 (1988) (if statutory language “reveals that the statute conveys a meaning which is clear, unequivocal and definite, at that point the interpretative effort is at an end, and the statute must be applied accordingly”) (citation omitted).

The statute here is unambiguous: “The appellate court’s standard of review is not whether the sentencing court abused its discretion.” R.C. 2953.08(G)(2). This definite language admits no room for any different interpretation. Appellate courts cannot review felony sentences for an abuse of discretion. Any attempt to construe the statute to permit abuse-of-discretion review ignores the plain text. For this reason alone, this Court should answer the certified question “no” and hold that abuse-of-discretion review is not available for felony sentences.

Indeed, in the five years after the 2000 amendment that added the statutory bar to abuse-of-discretion review, “Ohio’s appellate courts *universally* recognized that they were prohibited

from reviewing a felony sentence for an abuse of discretion, even though some of the felony sentencing statutes . . . refer[red] to a trial court’s ‘discretion’ when sentencing a felony offender.” *State v. Stroud*, 2008-Ohio-3187 ¶ 31 (7th Dist.) (emphasis added) (listing cases from all 12 appellate districts). This unanimous conclusion is still true today—the Revised Code prohibits abuse-of-discretion review of felony sentences.

A birds-eye view of felony sentencing buttresses the plain-text reading of the statute. The sentencing-review statute not only limits the standard of review, it restricts the *jurisdiction* of appellate courts over felony sentences. “The appellate jurisdiction of the courts of appeals is determined by statute. Article IV, Section (B)(2), Ohio Constitution. That jurisdiction with respect to review of criminal sentences is set out in R.C. 2953.08.” *State v. Lofton*, 2004-Ohio-169 ¶ 8 (2d Dist.). Without affirmative statutory authority, appellate courts do not have the power to review felony sentences, let alone the *implied* power to review them by questioning the trial court’s discretion in setting the sentence. Several courts have concluded that the review statute deprives appellate courts of the power to review felony sentences on grounds not stated in that statute. The Second District, for example, has repeatedly noted that the statute does not “permit” appellate review of “an abuse of discretion claim.” *Id.* ¶ 13; *see also State v. Alvarez*, 154 Ohio App. 3d 526, 2003-Ohio-5094 ¶ 14 (2d Dist.) (“Appellate review of sentences imposed for felony convictions is governed by R.C. 2953.08, which is *jurisdictional*.”) (emphasis added); *State v. White*, 2005-Ohio-5906 ¶ 31 (2d Dist.) (“Defendant’s excessive sentence claim is in reality an ‘abuse of discretion’ claim that is not a proper ground for appeal, R.C. 2953.08(A), or a matter for which R.C. 2953.08(G) permits appellate review.”) (collecting cases). The Eighth District has expressed a similar sentiment, noting that appellate courts have “authority” to review whether sentences are “contrary to law,” but “no authority” to consider whether a sentence

within the statutory limits is an “abuse of discretion.” *State v. Akins*, 2013-Ohio-5023 ¶ 15 (8th Dist.); *cf.* Ohio R. Crim P. 32(B)(2) (“After imposing sentence in a serious offense, the court shall advise the defendant of the defendant’s right, *where applicable*, to appeal or to seek leave to appeal the sentence imposed.”) (emphasis added). That is, “apart from any claim that the sentencing judge failed to fulfill a statutorily-mandated obligation before imposing sentence, a sentence falling within the statutory range is *unreviewable*.” *Akins*, 2013-Ohio-5023 ¶ 16 (emphasis added). If courts lack *power* to review abuse-of-discretion claims, they certainly lack authority to *reverse* a sentence on that basis.

B. The law has come full circle to permit the kind of judicial fact-finding required in the 2000 version of the statute, barred in *Foster*, and then reinstated by *Ice* and the amended statute.

Apart from the plain text, the recent history of appellate review for felony sentences further supports the bar on abuse-of-discretion review. This history shows that the legislature provided a limited right to appeal felony sentences only in certain circumstances. There is no *general* right to appeal a sentence freed of the language barring abuse-of-discretion review. That much was apparent in 2000, and, after a detour, it is once again clear. Changes to the legal landscape from the addition of the bar to abuse-of-discretion review in 2000 through the 2011 changes to the same statute, show that the law has come full circle. Whatever defects *Foster* identified in the appellate-review portion of the 2000 statute were cured by a later U.S. Supreme Court decision and an amendment to the statute. More distant history only reinforces the point because appellate review of felony sentences is traditionally narrow. Broad abuse-of-discretion review clashes not only with the statute, but with this tradition.

1. The General Assembly reformed sentencing and barred abuse-of-discretion review on appeal.

In 1995, the General Assembly passed legislation that overhauled felony sentencing. One provision made sentences subject to “a new kind of appellate review.” *State v. Bates*, 118 Ohio St. 3d 174, 2008-Ohio-1983 ¶ 5. The reforms also mandated judicial fact-finding as a prerequisite to certain kinds of sentences including, as relevant here, the imposition of consecutive sentences. *Id.* The new appellate review gave courts the authority to review felony sentences when (1) the record did not support the sentence and (2) the sentence was contrary to law. R.C. 2953.08(G) (1996). In 2000, the legislature amended the statute to specifically bar appellate review of felony sentences for abuse of discretion. R.C. 2953.08(G)(2) (2000). Summarizing this 2000 amendment, the Ohio Legislative Service Commission observed that it authorized appellate intervention “*only* if the sentence is otherwise contrary to law or if, in specified instances, the record does not support the sentencing court’s findings.” Ohio Legislative Serv. Comm’n, H.B. 331, 1999-2000 Regular Session, at 1 (2000) (emphasis added). The amendment and its history disclose a legislative intent for appellate review only of sentences that were contrary to law or that were based on findings not supported by the record.

Following this amendment, the courts uniformly concluded that the statute prohibited abuse-of-discretion review. *See Kalish*, 2008-Ohio-4912 ¶ 16 (the 2000 amendment to R.C. 2953.08 “did not allow appellate courts to use the abuse-of-discretion standard of review”); *see also Alvarez*, 2003-Ohio-5094 ¶ 14; *State v. Freeman*, 155 Ohio App. 3d 492, 2003-Ohio-6730 ¶ 59 (7th Dist.). Instead, appellate review was limited to ensuring that the sentence was not contrary to law or to the record (for certain types of sentences not relevant here). *Stroud*, 2008-Ohio-3187 ¶ 31; *Freeman*, 2003-Ohio-6730 ¶¶ 59-97; *State v. Spradling*, 2005-Ohio-6683 ¶¶ 4-8 (2d Dist.); *State v. Patterson*, 2005-Ohio-2003 ¶¶ 4-12 (8th Dist.).

2. U.S. Supreme Court decisions, and this Court’s *Foster* decision applying them, added uncertainty to the status of some of these reforms.

This uniformity cracked in 2006 after this Court struck some of the sentencing provisions from the Revised Code in light of the constitutional limits on judicial fact-finding announced in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Blakely v. Washington*, 542 U.S. 296 (2004). *See State v. Foster*, 109 Ohio St. 3d 1, 2006-Ohio-856 ¶ 97, *abrogated in part by Ice*, 555 U.S. 160.

As relevant here, *Foster* held unconstitutional the requirement that the trial judge make findings of fact before imposing consecutive sentences. *Id.* ¶¶ 67, 97. The corresponding appellate-review section at the time authorized review of judicial fact-finding, including for consecutive sentences. *See* R.C. 2953.08(G) (2004). This Court struck the appellate review section only “in so far as it refers to the severed section,” i.e., the mandate for fact-finding before imposing consecutive sentences. *Foster*, 2006-Ohio-856 ¶ 99. No other provision referenced in the appellate-review section (R.C. 2953.08(G)) was struck. Even after *Foster*, appellate courts were authorized to review a trial court’s findings regarding community-control sanctions and judicial release. *See* R.C. 2929.13(B) (2004); R.C. 2929.20(H) (2004). And the prohibition on abuse-of-discretion review remained intact. *See Foster*, 2006-Ohio-856 ¶ 99; R.C. 2953.08(G)(2).

Shortly thereafter, this Court confronted the question whether *Foster* had changed the standard of review for sentencing appeals. *Kalish*, 2008-Ohio-4912. A plurality of this Court first noted that Section 2953.08(G)(2) did not allow abuse-of-discretion review. *Id.* ¶ 16. The plurality then observed that “the statute prior to *Foster* was concerned with review of the trial court’s factual findings under the now excised portions of the statute.” *Id.* The plurality then concluded that, because other portions of Title 29 regarding sentencing were not fact-finding

provisions, but afforded trial courts discretion in sentencing, it followed that appellate courts could review for an abuse of discretion. *Id.* at ¶ 17.

3. The U.S. Supreme Court abrogated *Foster*, and the General Assembly restored judicial fact-finding.

After *Foster* and *Kalish*, the U.S. Supreme Court ruled that States may constitutionally “constrain judges’ discretion by requiring them to find certain facts before imposing consecutive, rather than concurrent, sentences.” *Ice*, 555 U.S. at 163-64. Acting on this new guidance, the General Assembly amended its sentencing statutes to again impose such constraints on a trial court’s ability to impose consecutive sentences. *See* 2011 Am. Sub. No. H.B. 86. The amended R.C. 2953.08 retained the prohibition on abuse-of-discretion review. R.C. 2953.08(G)(2).

Throughout this judicial back-and-forth, the General Assembly has consistently instructed appellate courts that their review of felony sentences is *not* for abuse of discretion. That is no less true now than it was before *Foster*. *Foster*’s surgery to R.C. 2953.08(G) was limited to that statute’s reference to findings regarding consecutive sentences. 2006-Ohio-856 ¶ 99. The remaining portions of R.C. 2953.08(G), including review of other findings and the prohibition on abuse-of-discretion review, were not touched. The *Kalish* plurality did not acknowledge that the statute still contained review of trial-court findings, but rather focused on the review of findings that *Foster* excised. 2008-Ohio-4912 ¶ 16; *id.* at ¶ 61 (Lanzinger, J., dissenting) (*Foster* did not change standard of review to abuse of discretion). The *Kalish* plurality thus overlooked two key features of the statute as it stood after *Foster*.

First, R.C. 2953.08(G)(2) still governed review of certain judicial fact-finding because *Foster* did not eliminate all judicial fact-finding. *See, e.g., State v. Saxon*, 109 Ohio St. 3d 176, 2006-Ohio-1245 ¶ 4 n.1 (“the sentencing review statute, R.C. 2953.08(G), *remains effective*, although no longer relevant with respect to the statutory sections severed by *Foster*” (emphasis

added)). Thus, *Kalish* over-described the statute with the statement that “prior to *Foster* [it] was concerned with review of the trial court’s factual findings under the now excised portions of the statute.” 2008-Ohio-4912 ¶ 16; *cf. Foster*, 2006-Ohio-856 ¶ 97 (equally broad in saying that “R.C. 2953.08(G), which refers to review of statutory findings for consecutive sentences in the appellate record, no longer applies”); *Kraly v. Vannewkirk*, 69 Ohio St. 3d 627, 633 (1994) (plurality opinions are “of questionable precedential value”); *State v. Schraishuhn*, 2011-Ohio-3805 ¶ 40 (5th Dist.) (*Kalish* has “limited precedential value”) (collecting cases).

Second, subsection (G)(2)—unscathed by *Foster*—remained in place as a bar to abuse-of-discretion review. Nothing in *Foster*, or the portions of 2953.08(G)(2)(a) regarding review of fact-finding, limited subsection (G)(2), which—since 2000—has barred abuse-of-discretion review in favor of contrary-to-law review for all sentencing appeals, *including those that raise no question about judicial fact-finding*. See R.C. 2953.08(G)(2)(a), (b) (2004). *Kalish* read *Foster* too broadly and the statute too narrowly.

The statute’s bar to abuse-of-discretion review applies to two distinct inquiries, and the second was untouched by *Foster*. An appellate court may modify or vacate a sentence if it concludes *either* that the record does not support the judge’s fact-finding (subpart (G)(2)(a)) or if the sentence is “contrary to law” (subpart (G)(2)(b)). The contrary-to-law holding need not involve a sentence that involved any judicial fact-finding. Marcum’s appeal illustrates this point. No aspect of her sentence triggered either the kinds of judicial fact-finding listed in the 2004 version of R.C. 2953.08(G) reviewed in *Foster* or in today’s version of the statute. The *Kalish* plurality read too much into *Foster*’s cuts to R.C. 2953.08(G)(2). The surgery was minor.

But whatever the merits of the differing positions in the *Kalish* plurality, concurrence, and dissent about what *Foster* did, later legal developments have overtaken that debate. The

only part of the review statute struck in *Foster*—the reference to review of consecutive sentence findings—has been returned to the statute. The General Assembly thus took the Supreme Court’s guidance in *Ice*, restored what had been excised in *Foster*, and erased any doubt that it opposed abuse-of-discretion review for felony sentencing. And the legislature did so with full knowledge that this Court had fractured over whether *Foster* had changed the appellate-review standard. See *Kalish*, 2008-Ohio-4912 ¶ 12 (yes); *id.* ¶¶ 27-28, 42 (Willamowski, J., concurring) (maybe); *id.* ¶ 62 (Lanzinger, J., dissenting) (no; “plurality’s approach rewrites the statute”). When the General Assembly acts, it is presumed to be “fully aware” of this Court’s interpretations of the statute because it usually shows “no hesitation” when it disagrees with court rulings “involving statutory construction.” *Riffle v. Physicians & Surgeons Ambulance Serv., Inc.*, 135 Ohio St. 3d 357, 2013-Ohio-989 ¶ 19 (internal quotation marks omitted). The General Assembly passed the 2011 amendment knowing that a plurality of this Court had interpreted *Foster* as *undoing* its statutory ban on abuse-of-discretion review. Thus, any reason in 2008 for disregarding the prohibition on reviewing for abuse of discretion is gone after the 2011 amendments restored the statute to its pre-*Foster* status as far as section 2953.08(G)(2) is concerned.

The appellate-review statute admits no varying interpretations; appellate courts do not have authority to review a sentence for an abuse of discretion. After 2011, that statute is identical in all relevant ways to its pre-*Foster* scope. At best, *Kalish* represents a brief interregnum between statutory commands that appeals courts in Ohio cannot review sentences for abuse of discretion. The Fourth District should be affirmed.

4. The broader historical background confirms that felony-sentencing appeals do not include abuse-of-discretion review.

The current appellate-review statute represents an evolution in how courts review felony sentences. The search for legislative meaning often benefits from the perspective of what preceded it. *Columbus City School Dist. Bd. of Educ. v. Testa*, 130 Ohio St. 3d 344, 2011-Ohio-5534 ¶ 21 (using “legislative background” to confirm meaning of statute); see *State ex rel. Johnston v. Ohio Bur. of Workers’ Comp.*, 92 Ohio St. 3d 463, 470 (2001) (“historical background against which a statute is enacted” is relevant to meaning); R.C. 1.49(B), (D) (“legislative history” and “common law” background bear on meaning). Current practice is more favorable to those seeking review, but it is far from the open-ended, abuse-of-discretion review that Marcum posits. The 1996, 2000, and 2011 amendments to Ohio’s statute expanded appellate review from exceedingly narrow to not quite as narrow. Against that backdrop, the current bar on abuse-of-discretion review preserves the historic narrowness of appellate sentence review.

Prior to 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 [was] authorized by statute and [was] 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) (“the Court of Appeals cannot hold that a trial court abused its discretion by imposing too severe a sentence . . . where the sentence imposed is within the limits authorized by the applicable ordinance and statutes”). Although the cases used the abuse-of-discretion language, an appellate court 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) (review limited to ensuring that the trial court considered the statutory criteria and did not impose a sentence outside of the statutory limits); *City of*

Miamisburg v. Smith, 5 Ohio App. 3d 109, 110-11 (2d Dist. 1982) (“failure to consider” sentencing factors could be abuse of discretion, but sentence “within the parameters” of the sentencing statute was not an abuse of discretion); *State v. Goodwin*, 9th Dist. No. 3829, 1985 WL 10900, at *2 (Oct. 23, 1985) (“[W]e find that the sentence imposed by the trial court is well within the plain import of the sentencing statute. As such, the sentence generally is not subject to review.”); *State v. Bowling*, 5th Dist. No. 32-CA-76, 1977 WL 200747, at *2 (Dec. 14, 1977) (“appellate review of sentence is not a general accepted principle in our judicial system”). This deferential review gave trial courts “virtually unlimited discretion” in sentencing felony offenders. *State v. Kuykendall*, 2005-Ohio-6872 ¶ 13 (12th Dist.). In light of this history, today’s bar on abuse-of-discretion review continues a long tradition opposed to open-ended second-guessing in the appellate courts. *See Anderson v. Minter*, 32 Ohio St. 2d 207, 211-12 (1972) (examining statute “in the light of its historical background”) (statute enacted against backdrop of “no right of appeal”)

The Ohio practice before the 1996 reforms tracked the federal practice before the 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) (“once it is determined that a sentence is within the limitations set forth in the statute under which it is imposed, appellate review is at an end”); *United States v. Rosenberg*, 195 F.2d 583, 604-05 (2d Cir. 1952) (“If there is one rule in the federal criminal practice which is firmly established, it is that the appellate court has no control over a sentence which is within the limits allowed by a statute.”) (citation omitted) (collecting cases). In that era, despite changes to English practice

giving appellate courts “power to revise sentences[,]” the Supreme Court had “no such power.” *Gore v. United States*, 357 U.S. 386, 393 (1958) (Frankfurter, J.).

Against this backdrop, major sentencing reform came to Ohio in 1996, with the change at the heart of this appeal appearing in a 2000 amendment to that omnibus reform. *See* 148 Ohio Laws (II) 3414, 3418-3420 (2000). That amendment preserved the 1996 law’s explicit mention of appellate review, but modified it to *exclude* appellate review for a trial court’s abuse of discretion. *Id.* What the U.S. Supreme Court said about federal sentencing reform could equally describe the 2000 amendments to Ohio’s sentencing reforms. “Although the Act established a limited appellate review of sentencing decisions, it did not alter a court of appeals’ traditional deference to a district court’s exercise of its sentencing discretion. . . . The [statute] . . . has not changed our view that, 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.’” *Williams v. United States*, 503 U.S. 193, 205 (1992) (citation omitted) (emphasis added). The lesson of history looms large; the ban on abuse-of-discretion review is consistent with a practice of avoiding wide-ranging second-guessing in sentencing appeals.

C. Marcum’s counterarguments do not offer any reason to disregard the statute’s language.

Despite the plain language of the statute and the supporting lessons of history, Marcum resists the conclusion that the statute forecloses her request for open-ended abuse-of-discretion review. She rests this conclusion on a host of statutes *other than* the specific statute that governs felony sentencing review. None of Marcum’s arguments pass muster.

1. Neither the final order statute nor the language of Article IV remove the bar to abuse-of-discretion review in R.C. 2953.08(G)(2).

First, Marcum over-reads the words “[i]n addition to any other right to appeal” in Section 2953.08. Br. at 1. To Marcum, those words suggest that other statutes beyond R.C. 2953.08

confer a right to broad sentencing review, including a right to the very abuse-of-discretion review barred in R.C. 2953.08. Marcum’s argument runs headlong into this Court’s obligation to “give effect to every word and clause in the statute.” *State ex rel. Carna v. Teays Valley Local School Dist. Bd. of Educ.*, 131 Ohio St. 3d 478, 2012-Ohio-1484 ¶ 18. That is perhaps why Marcum offers no authority for this point. And it is why the courts have consistently read the language in the review statute as barring abuse-of-discretion review. *See, e.g., Stroud*, 2008-Ohio-3187 ¶ 31; *Alvarez*, 2003-Ohio-5094 ¶ 16; *Freeman*, 2003-Ohio-6730 ¶ 59. There is simply no reason to read “other right to appeal” as meaning other *sentencing* appeals, when it must mean other rights to appeal *convictions*. *See Ohio Neighborhood Fin., Inc. v. Scott*, 139 Ohio St. 3d 536, 2014-Ohio-2440 ¶ 22 (courts “read and understand statutes according to the natural and most obvious import of the language”) (internal quotation marks omitted). Marcum’s invitation to twist meaning in one phrase to deny meaning in another should fail.

Nor is Marcum right that barring abuse-of-discretion review gives no meaning to the words “[i]n addition to any other right to appeal.” Br. at 5. In addition to appealing a felony sentence under R.C. 2953.08, defendants have a right to appeal their convictions under other provisions. Marcum attempts to give those words more meaning than intended. They do not authorize a wholesale right to appeal, but acknowledge that, in addition to appealing their sentences under R.C. 2953.08, defendants still have the right to appeal their convictions.

Marcum is also mistaken that the language in Article IV of the Constitution supports her view that the appellate-review statute does not limit the scope of sentencing appeals. Br. at 6. Marcum contends that Article IV, Section 3 gives appellate courts broad powers to affirm, modify, or reverse judgment. But Marcum does not quote the key limit on that power: appellate courts have “jurisdiction” to affirm, modify, or reverse “*as may be provided by law.*” Ohio

Const., art. IV, § 3(B)(2) (emphasis added). The Ohio legislature has done exactly what the Constitution envisions by restricting the jurisdiction of appellate courts reviewing sentences to exclude abuse-of-discretion review. Marcum’s contrary reading simply gives no meaning to the language in R.C. 2953.08(G)(2). *See State v. Straley*, 139 Ohio St. 3d 339, 2014-Ohio-2139 ¶ 9 (court has duty “not to delete words used” in a statute) (citation omitted).

Marcum’s pivot to the general appellate-review statute, R.C. 2505.03(A), as authorizing abuse-of-discretion review for sentences confuses generality and specificity. Br. at 6. That section authorizes appellate review of “[e]very final order, judgment, or decree of a court” in a court with “jurisdiction.” R.C. 2505.03(A). The statute’s function is limited to authorizing review in those courts with jurisdiction. *Id.*; *cf. State v. Fisher*, 35 Ohio St. 3d 22, 24 (1988) (there is “no absolute right of appeal in a criminal matter unless specifically granted . . . by statute”) (State’s appeal). And the statute is silent about the *standard* of review, even in courts *with* jurisdiction. A statute silent about the standard of review does not enact one under the table when another statute addresses that very topic. *See, e.g., Roe v. Planned Parenthood Sw. Ohio Region*, 122 Ohio St. 3d 399, 2009-Ohio-2973 ¶ 42 (court “must give effect only to the words used” and not “insert words into a statute” that is “silent”); *State ex rel. Summit Cty. Republican Party Exec. Comm. v. Brunner*, 118 Ohio St. 3d 515, 2008-Ohio-2824 ¶ 30 (O’Donnell, J., concurring) (“where the constitution and statutes are silent,” there is no authority); *cf. Koon v. United States*, 518 U.S. 81, 97 (1996) (the power to engage in “limited appellate review” does not “vest in appellate courts wide-ranging authority over district court sentencing decisions”; appellate review is confined to the scope “specifically directed by statute”) (citations omitted). Marcum’s reliance on the final order statute simply does not add up.

Marcum's view of the final-order statute is further undercut by the rule that the specific governs the general. See *State ex rel. Motor Carrier Serv., Inc. v. Rankin*, 135 Ohio St. 3d 395, 2013-Ohio-1505 ¶ 29 ("specific provisions cannot be overcome" by "more general provisions"). Courts "apply the more specific provision, the one meant to govern the particular situation involved, rather than the more general rule." *Troyer v. Janis*, 132 Ohio St. 3d 229, 2012-Ohio-2406 ¶ 15. Here, the appellate-review statute (R.C. 2953.08(G)) governs felony sentencing appeals, and should apply over the general provisions of the final-order statute (R.C. 2505.03). Accordingly, R.C. 2505.03 provides no support for Marcum's position.

A final point about the final-order statute: consider an analogy to the federal system, where there is no statute setting a standard of review. This void in the federal statute means that the courts *imply* a standard and therefore a "district court's sentence is reviewed for reasonableness under an abuse-of-discretion standard." *Peugh v. United States*, ___ U.S. ___, 133 S. Ct. 2072, 2080 (2013); see *Setser v. United States*, ___ U.S. ___, 132 S. Ct. 1463, 1472 (2012). Still, this *implied* standard of review does not open the door entirely. A federal court of appeals is "unable" to "review a sentencing court's decision not to depart from sentencing guidelines unless the court mistakenly believed that it lacked the authority to do so." *United States v. Louthian*, 756 F.3d 295, 306 (4th Cir. 2014); cf. *United States v. Maxwell*, 778 F.3d 719, 735 (8th Cir. 2015) ("The extent of a downward departure from the advisory Sentencing Guidelines is not reviewable absent an unconstitutional motive.") (citation omitted). Even when a standard of review is *implied*, that court-made standard is not all encompassing. If an implied standard does not lead to Marcum's suggested full-spectrum abuse-of-discretion review, an explicit standard *rejecting* that kind of review must not either.

2. A trial court’s discretion to sentence does not translate to an appellate court’s review for abuse of discretion.

Equally unavailing is Marcum’s argument that the standard of review must be abuse of discretion because the trial court’s sentencing decision is discretionary. Br. at 7. The statute specifically closes this door because it bars abuse-of-discretion review for all felony sentencing appeals. See R.C. 2953.08(G)(2); *Stroud*, 2008-Ohio-3187 ¶ 37 (“the reference to discretion in R.C. 2929.12(A) does not mean that we can ignore R.C. 2953.08(G)(2)’s prohibition of the abuse of discretion standard of review”). Statutes may limit or foreclose appellate review of a lower-court decision. See, e.g., R.C. 2323.52(G) (limits on appeals by vexatious litigators); *Dart Cherokee Basin Operating Co., LLC v. Owens*, ___ U.S. ___, 135 S. Ct. 547, 552 (2014) (remand orders are generally “not reviewable on appeal or otherwise”) (citation omitted); *Powerex Corp. v. Reliant Energy Servs., Inc.*, 551 U.S. 224, 229 (2007) (“The authority of appellate courts to review district-court orders remanding removed cases to state court is substantially limited by statute.”). And statutes may restrict review of discretionary decisions on appeal. Although some discretionary decisions are reviewed for abuse of discretion, statutes may change that review to something else. Consider two examples.

Under Chapter 2506, the common pleas and appellate courts both have roles in reviewing local administrative decisions. But those roles differ. While the common pleas courts have wide power to reverse if the action is, among other things, “unreasonable,” the appellate courts’ review is confined to deciding if that review contained an error “of law.” R.C. 2506.04. As this Court recently reiterated, in these kinds of appeals, the appellate courts “may review the judgments of the common pleas courts *only on questions of law*; they do not have the same power [as common pleas courts] to weigh the evidence.” *Cleveland Clinic Found. v. Cleveland Bd. of Zoning Appeals*, 141 Ohio St. 3d 318, 2014-Ohio-4809 ¶ 25 (emphasis added). The

statute thus restricts courts of appeals to reversing “only when the common pleas court errs in its application or interpretation of the law or its decision is unsupported by a preponderance of the evidence as a matter of law.” *Id.* ¶ 30. That statute, like the sentencing-review statute, sets different standards for common pleas action and later appellate review.

In another example, Chapter 119.12 grants the common pleas courts the power to review decisions of state agencies. Those agencies have wide discretion to set penalties for violating administrative rules and statutes. But that discretion does not translate into wide-ranging abuse-of-discretion review in the courts. Instead, “in an administrative appeal brought pursuant to R.C. 119.12, the common pleas court is *not authorized to modify a penalty* that is supported by both sufficient evidence and the law, even if that penalty seems ‘admittedly harsh.’” *Westlake Civ. Serv. Comm’n v. Pietrick*, ___ Ohio St. 3d ___, 2015-Ohio-961 ¶ 46 (O’Donnell, J., dissenting) (quoting *Henry’s Cafe, Inc. v. Bd. of Liquor Control*, 170 Ohio St. 233, 236 (1959) (emphasis added)); *see also Henry’s Cafe*, 170 Ohio St. at syl. ¶ 3 (on appeal, “the Court of Common Pleas has no authority to modify a penalty that the agency was authorized to and did impose, on the ground that the agency abused its discretion”). Again, the statute sets different standards, one for the entity setting the penalty and one for appellate review of the penalty.

Marcum offers nothing to the contrary. Tellingly, none of the cases she cites on these points involve a statute governing appellate review. *See State v. Kirkland*, 140 Ohio St. 3d 73, 2014-Ohio-1966 ¶ 67 (admission of testimony); *Charvat v. Ryan*, 116 Ohio St. 3d 394, 2007-Ohio-6833 ¶¶ 26-27 (award of attorney fees in a civil matter); *Colvin v. Abbey’s Rest.*, 85 Ohio St. 3d 535, 537-39 (1996) (civil new trial order); *Fabian v. State*, 97 Ohio St. 184 (1918) (limits on cross examination). None of these cases addresses a statute that specifically limits appellate review; none support Marcum’s argument.

Marcum's last gasp at translating trial-level discretion to appellate level-discretion is an incomplete reference to the Sentencing Commission study that preceded the 1995 reforms in Ohio. Br. at 8. Marcum cites the report for the unsurprising proposition that the Commission wanted to "monitor sentences through appellate review." *Id.* (quoting A Plan For Felony Sentencing in Ohio, Ohio Criminal Sentencing Commission at 19 (July 1, 1993)). Marcum's quotation is incomplete. It leaves unanswered the question of *how* appellate monitoring would work. The Commission's answer undercuts Marcum's argument. The Commission envisioned "limited appellate review" for a "few matters . . . appealable of right" that was "narrower" than other States permitting "appeals of the actual sentence imposed." A Plan For Felony Sentencing at 49-50; *cf. State v. Dunwoody*, No. 97CA11, 1998 WL 513606, at *1-2 (4th Dist. Aug. 5, 1998) (legislature addressed the Sentencing Commission's concerns about predictability by defining scope of trial court's sentencing latitude and placing "various controls on judicial discretion through statutory guidelines stating various purposes, principles, presumptions and factors a court must consider in making its sentencing determination"). The Sentencing Commission itself rejected the broad appellate review Marcum seeks from this Court. But even if it had not, the relevant question is what the General Assembly did with that recommendation, not what the Commission recommended. *See State v. Elam*, 68 Ohio St. 3d 585, 587 (1994) (legislative intent is "best glean[ed] from the words the General Assembly used"). The General Assembly's express words reject the any abuse-of-discretion review on appeal.

Marcum cannot avoid R.C. 2953.08(G)(2)'s explicit command that "[t]he appellate court's standard of review is not whether the sentencing court abused its discretion." Adopting an abuse-of-discretion standard would delete this language from the statute. The Court should affirm the Fourth District's judgment and hold that R.C. 2953.08(G)(2) provides the only

standard of review for felony sentencing and that it expressly prohibits review for abuse of discretion.

D. Marcum’s sentence is neither contrary to law nor an abuse of discretion.

The judgment below should be affirmed even if the Court answers the certified question in Marcum’s favor because her sentence is neither contrary to law nor an abuse of discretion. *See, e.g., State v. Schleiger*, 141 Ohio St. 3d 67, 2014-Ohio-3970 ¶¶ 1-2 (answering a certified question contrary to the court of appeals but affirming on other grounds); *cf. Dombroski v. WellPoint, Inc.*, 119 Ohio St. 3d 506, 2008-Ohio-4827 ¶ 30 (answering certified question with middle ground between conflicting district court positions, but reversing judgment even under “expanded” test crafted in this Court). To see why Marcum’s appeal fails under either standard, we consider first the meaning of abuse of discretion and contrary to law in this context and then show why Marcum’s sentence meets either standard.

1. Contrary-to-law review measures compliance with statutes; Marcum’s requested abuse-of-discretion review asks whether a sentence is too harsh or “ridiculous.”

This Court and others have defined the contrary-to-law standard as directed to the sentencing court’s compliance with the specific sentencing statutes. In *Kalish*, the plurality observed that a sentence is not contrary to law if it is “within the [statutory] range” and the “court considered both the [statutory] purpose and principles of sentencing” and the statutory sentencing “factors.” 2008-Ohio-4912 ¶ 18; *see also State v. Underwood*, 124 Ohio St. 3d 365, 2010-Ohio-1 ¶ 59 (O’Donnell, J., dissenting) (“[T]he 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.’”) (some internal quotation marks

omitted); *see also* Griffin & Katz, Ohio Felony Sentencing Law Section 10:8, 1211 (2008) (sentence in “conflict” with sentencing statutes is contrary to law).

Other courts take the same approach. The Second District has said that the phrase “sensibly means a sentencing decision that ignores an issue or factor which a statute requires a court to consider.” *State v. Kennedy*, 2003-Ohio-4844 ¶¶ 10, 12 (2d Dist.) (refusing to review claim that “the [sentencing] court was wrong in the conclusions it reached” because that argument “essentially” raised “an abuse of discretion claim”); *Lofton*, 2004-Ohio-169 ¶ 11 (same); *Akins*, 2013-Ohio-5023 ¶ 14 (“a sentencing court’s failure to perform a mandated action or make required findings would . . . be contrary to law”). That is, because appellate courts “do not review for an abuse of discretion,” any “general argument that the court failed to properly weigh the seriousness and recidivism factors” cannot prevail under the contrary-to-law standard. *See State v. Graham*, 2005-Ohio-2700 ¶ 13 (7th Dist.). Courts therefore reject arguments like Marcum’s that claim a “sentence is excessive” because such claims assert that a “trial court was simply wrong” in selecting an “appropriate sentence.” *State v. White*, 2005-Ohio-5906 ¶ 31 (2d Dist.) (collecting cases). Those arguments have “nothing to do with whether the trial court failed to follow some required procedure to impose the sentence it selected, and thus whether the sentence is contrary to law.” *Id.*

Contrast that with Marcum’s broad definition of abuse of discretion. Her approach includes an appellate court concluding that a sentence is “ridiculous.” Br. at 8. And it empowers appeals courts to vacate sentences that are “unreasonable” even if they fall “within the statutory range.” *Id.* at 8, 12. None of that is consistent with a statute that restricts appellate review to sentences that are “contrary to law.” R.C. 2953.08(G)(2).

To be sure, abuse of discretion is a phrase that wears many hats. *Compare State ex rel. Simpson v. State Teachers Ret. Bd.*, ___ Ohio St. 3d ___, 2015-Ohio-149 ¶¶ 17-19 (abuse of discretion includes “some evidence” and “clear legal right” thresholds) *with State ex rel. Scott v. Franklin Cty. Bd. of Elections*, 139 Ohio St. 3d 171, 2014-Ohio-1685 ¶ 19 (abuse of discretion to “disregard” evidence) *with Sivit v. Village Green of Beachwood, L.P.*, ___ Ohio St. 3d ___, 2015-Ohio-1193 ¶ 9 (abuse of discretion “‘implies that the court’s attitude is unreasonable, arbitrary or unconscionable’”) (citation omitted). And in the sentencing field, the term has a long history of equating abuse *only* with sentences outside the range for the crime. *See, e.g., Hill*, 70 Ohio St. 3d at 29 (no abuse if sentence is “within the statutory limits”); *Reasonover*, 5 Ohio St. 2d at 24 (1965) (same); *cf. Koon*, 518 U.S. at 96, (federal sentence within limits was, “for all practical purposes, not reviewable on appeal”). As the Eighth District recently explained, “in sentencing cases, appellate courts engage in error correction, but only to correct errors of law that affect substantial rights. The decision as how long a sentence should be—assuming it falls within a defined statutory range—is a pure exercise of discretion.” *Akins*, 2013-Ohio-5023 ¶ 16. That is, even if the statute somehow permitted abuse-of-discretion review, that review should police only sentences *outside* the statutory range. Marcum makes no argument that her sentence is outside the relevant range.

2. Marcum’s sentence was neither contrary to law nor an abuse of discretion under any standard.

Marcum concedes that her sentence is not contrary to law. *See* Br. at 12 (urging abuse-of-discretion review despite sentence “within the statutory range”). That leaves Marcum to press an expansive version of abuse-of-discretion review and argue that the trial judge acted unreasonably when settling on a ten-year sentence. Even under that standard, however, Marcum cannot prevail. As the plurality said in *Kalish*, there is no abuse if the sentencing judge gives

“careful and substantial deliberation to the relevant statutory considerations.” 2008-Ohio-4912

¶ 20. That was true here.

The ten-year sentence fell within the four-to-eleven-year range for manufacturing methamphetamine near a juvenile. Tr. at 421, 426. The judge opted for that sentence after considering the purposes and principles of sentencing, factoring in the need for the sentence to be commensurate with the seriousness of the offense, and weighing the statutory sentencing factors. *Id.* at 424-25. Here, three statutory factors show that the sentence was not an abuse of discretion.

First, the record reveals that Marcum’s offense was “more serious than conduct normally constituting the offense.” R.C. 2929.12(B). The statutory element that the methamphetamine is manufactured “in the vicinity of a juvenile” requires an offense committed within 100 feet of a person under the age of eighteen regardless of whether the offender knows the offense is being committed near a juvenile. R.C. 2925.01(BB). But that encompasses a wide range of conduct. The trial testimony established that Marcum left an explosive, poisonous, mobile methamphetamine lab on her front porch knowing that her children were inside. Tr. at 179-80, 182-83, 190, 195-96. By the officer’s estimation, this hazardous material was only 15 to 20 feet away from Marcum’s two children, ages nine and eleven. *Id.* at 199, 253. These circumstances are more serious than *unknowingly* being 100 feet away from a *teenager*, which would still satisfy the elements of the offense. *See* R.C. 2925.01(BB). The children were quite close to the lab. They were young. And Marcum knew she was committing the offense with her children so close. Marcum’s offense was more serious than the typical offense in the scope of the relevant statute.

Other courts have upheld even maximum sentences based, in part, on the severity of an element of the offense. For example, the Seventh District affirmed a maximum sentence for a

defendant convicted of child endangerment. *State v. Burch*, 2013-Ohio-4256 ¶ 37 (7th Dist.). Elements of child endangerment include that the victim was under 18, that the defendant was a parent or custodian of the victim, and that the child suffered serious physical harm. *See* R.C. 2919.22(A), (E)(2)(c). The court of appeals held that the maximum sentence was not an abuse of discretion. As the court explained, “[w]eighing heavily against appellant are *the age of the child, appellant’s position as the victim’s mother, the seriousness of the injury*, the victim’s future suffering both physically and emotionally, the drug involvement and culture, the lack of care at the time, and the perceived lack of real remorse now.” *Burch*, 2013-Ohio-4256 ¶ 32 (emphasis added). The court affirmed, in large part, by citing factors that were elements of the crime. The key was that the offense displayed serious manifestations of those elements.

Second, the court factored in Marcum’s drug abuse and her failure to acknowledge that abuse. Tr. at 196, 278-79. One officer noticed sores on Marcum’s body that were common to methamphetamine users. *Id.* at 196. Marcum tested positive for methamphetamine and amphetamine the day following her arrest. *Id.* at 278-79. Despite this testimony and the testing, Marcum denied illegal drug use and implied that her test was a false positive. *Id.* at 338-39. Marcum’s failure to acknowledge her drug-abuse pattern is a statutory factor weighing in favor of a longer sentence. *See* R.C. 2929.12(D)(4).

Third, Marcum showed no remorse. Even after a jury found her guilty, Marcum denied any involvement in the offense and continued to blame others. Tr. at 422-23. Those same two people were arrested and incarcerated on the day Marcum alleged that they put the methamphetamine lab on her porch. *Id.* at 263-71, 328-32. Lack of remorse is a statutory factor that supports a longer sentence. *See* R.C. 2929.12(D)(5).

Pressing against the weight of this reasoning, Marcum avers that the court could not consider that she committed the offense within the vicinity of a juvenile because that was an element of the offense. She cites *Stroud*, 2008-Ohio-3187, Br. at 10, but it affords her no comfort. *Stroud* reversed—*using the contrary-to-law standard*, *id.* at ¶ 43—because the trial judge used the fact of death as the “only factor” in imposing a maximum sentence even though that fact was “present in every case” of voluntary manslaughter, *id.* at ¶¶ 52, 57. *Stroud* simply bristled at using the *bare fact* that a conviction satisfies an element to impose a maximum sentence; it said nothing about whether more serious *manifestations* of that element could support a long sentence.

All told, the factors in R.C. 2929.12 support the trial court’s decision to impose a ten-year sentence. Nothing in the record shows that Marcum’s sentence was unreasonable, let alone contrary to law.

CONCLUSION

For the foregoing reasons, the Court should answer the certified question no and affirm the Fourth District's judgment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Merit Brief of Appellee State of Ohio was served by regular U.S. mail this 26th day of May, 2015 upon the following:

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