

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, :  
 :  
 : CASE NOS. 2014-1825 AND 2014-2122  
 :  
 PLAINTIFF-APPELLEE, :  
 :  
 : ON DISCRETIONARY APPEAL FROM THE  
 :  
 V. : GALLIA COUNTY COURT OF APPEALS,  
 :  
 : FOURTH APPELLATE DISTRICT,  
 :  
 MARY MARCUM, : CASE No. 13CA11  
 :  
 :  
 :  
 DEFENDANT-APPELLANT. :

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**REPLY BRIEF OF APPELLANT MARY MARCUM**

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## INTRODUCTION

This appeals boils down to one question: Should a court of appeals have to affirm a sentence it knows to be arbitrary, unreasonable and unconscionable? The State says “yes.” This Court should say “no.”

In reaching that decision, this Court should give full effect to three relevant statutes. Sections 2953.02 and 2505.03 of the Revised Code provide a general right to timely appeal all aspects of a final order in a criminal case under the normal standards of review, including abuse-of-discretion for review of discretionary trial court decisions related to sentencing. And R.C. 2953.08 creates an additional way to appeal a sentence which creates a standard of review that applies only to appeals of sentences “under this section.”

Here, one statute authorizes an appeal of a broad array of issues under a deferential standard of review, while another statute authorizes an appeal of only two issues under a less deferential standard. Each statute has full effect without restricting the other.

Ohio Revised Code Section 2953.08 means what it says—it applies to sentences appealed “under this section” and gives a right to appeal “[i]n addition to any other right to appeal[.]” R.C. 2953.08(A),(C)(1),(D)(1),(D)(2),(D)(3),(F),(G)(2).

## ARGUMENT

**I. The General Assembly intended R.C. 2953.08 to supplement, not replace, abuse-of-discretion review of sentences under other statutes.**

**A. Specific statutes control over general statutes only when the statutes are irreconcilably in conflict.**

*The State's analysis skips two steps.*

The State is correct that this case is largely about the interplay of two statutes granting the general right to review final orders, R.C. 2505.03 and R.C. 2953.02, with R.C. 2953.08, a statute that grants specific rights to appeal criminal sentences.<sup>1</sup> State's Brief, 20. But the State skips two steps when it asserts that a specific statute *automatically* controls a general one. Under R.C. 1.51, a specific statute controls a general statute only when 1) the two statutes "conflict," and 2) the statutes are so "irreconcilable" that they cannot be construed "so that effect is given to both." Accordingly, it's "an elementary rule of statutory construction that, *in the absence of language to the contrary*, a specific statute controls over a general provision." (Emphasis added.) *Quality Ready Mix, Inc. v. Mamone*, 35 Ohio St.3d 224, 226-227, 520 N.E.2d 193 (1988). And one example of "language to the contrary" is "[i]n addition to any other right to appeal. . . ." R.C. 2953.08(A).

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<sup>1</sup> The State's brief refers to "other provisions." State's Brief, 19. The only statute that seems to fit that description is R.C. 2953.02.

- B. **R.C. 2953.08 provides less deferential review of two narrow issues; R.C. 2953.02 and 2505.03 provide more deferential review of a broader range of issues.**

*The purpose of R.C. 2953.08(G)(2) is to give less deferential review to sentencing findings made pursuant to that section.*

Ohio Revised Code Section 2953.08 is not in conflict with either R.C. 2505.03 or R.C. 2953.02, and this Court should give effect to all three. Section 2953.08 gives special appellate rights beyond the standard abuse-of-discretion review. Specifically, it empowers appellate courts to independently review the record and reverse if, in the appellate court's judgment, the record "clearly and convincingly" "does not support the sentencing court's" statutory findings or is "contrary to law." R.C. 2953.08(G)(2)(a). The section specifies that when "hearing an appeal under division (A), (B), or (C)" of R.C. 2953.08, the "standard for review is not whether the sentencing court abused its discretion." R.C. 2953.08(G)(2).

The clear-and-convincing standard requires only that, before reversing a sentence, the appellate court have "a firm belief or conviction" that the trial court's findings were incorrect. *Lansdowne v. Beacon Journal Pub. Co.*, 32 Ohio St.3d 176, 180-181, 512 N.E.2d 979 (1987) (describing the clear-and-convincing standard), citing *Cross v. Ledford*, 161 Ohio St. 469, 120 N.E. 2d 118 (1954), paragraph three of the syllabus. The clear-and-convincing standard also permits the appellate court to exercise *its own* judgment ("a firm belief or conviction").

By contrast, abuse of discretion is a deferential review of the reasonableness of the trial court's judgment to determine whether the trial court's decision was "unreasonable, arbitrary, or unconscionable." *State v. Kirkland*, 140 Ohio St.3d 73, 2014-Ohio-1966, 15 N.E.3d 818, ¶ 67, quoting *State v. Brady*, 119 Ohio St.3d 375, 2008-Ohio-4493, 894 N.E.2d 671, ¶ 23. The General Assembly reasonably chose to give more searching review of the findings it required trial courts to consider, but then to leave the abuse-of-discretion standard for the remaining issues.

Accordingly, giving full meaning to R.C. 2505.03 and 2953.02 does not "remove the bar" on abuse-of-discretion review under R.C. 2953.08. State's Brief, 18-19. Applying all three statutes simply confines the R.C. 2953.08 prohibition against abuse-of-discretion review to appeals "under this section."

**C. The General Assembly's repeated use of the phrase "under this section" shows that R.C. 2953.08 is not the sole means of appealing a sentence.**

If the words "[i]n addition to any other right to appeal" at the beginning of R.C. 2953.08 mean only "in addition to the right to appeal *a conviction*," then the words "under this section," which are repeated numerous times in R.C. 2953.08, are mere surplusage—they could be eliminated from most of the statute without changing its meaning. The following portions of R.C. 2953.08 would mean exactly the same with or without the words "under this section":

R.C.2953.08(D)(1) A sentence imposed upon a defendant is not subject to review ~~under this section~~ if the sentence is authorized by law, has been

recommended jointly by the defendant and the prosecution in the case, and is imposed by a sentencing judge.

(2) Except as provided in division (C)(2) of this section, a sentence imposed upon a defendant is not subject to review ~~under this section~~ if the sentence is imposed pursuant to division (B)(2)(b) of section 2929.14 of the Revised Code. Except as otherwise provided in this division, a defendant retains all rights to appeal as provided under this chapter or any other provision of the Revised Code. A defendant has the right to appeal under this chapter or any other provision of the Revised Code the court's application of division (B)(2)(c) of section 2929.14 of the Revised Code.

(3) A sentence imposed for aggravated murder or murder pursuant to sections 2929.02 to 2929.06 of the Revised Code is not subject to review ~~under this section~~.

(E) A defendant, prosecuting attorney, city director of law, village solicitor, or chief municipal legal officer shall file an appeal of a sentence under this section to a court of appeals within the time limits specified in Rule 4(B) of the Rules of Appellate Procedure, provided that if the appeal is pursuant to division (B)(3) of this section, the time limits specified in that rule shall not commence running until the court grants the motion that makes the sentence modification in question. A sentence appeal ~~under this section~~ shall be consolidated with any other appeal in the case. If no other appeal is filed, the court of appeals may review only the portions of the trial record that pertain to sentencing.

\* \* \*

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

(2) The court hearing an appeal ~~under division (A), (B), or (C) of this section~~ shall review the record, including the findings underlying the sentence or modification given by the sentencing court.

The appellate court may increase, reduce, or otherwise modify a sentence that is appealed ~~under this section~~ or may vacate the sentence and remand the matter to the sentencing court for resentencing. The appellate court's standard for review is not whether the sentencing court abused its discretion. The appellate court may take any action authorized by this division if it clearly and convincingly finds either of the following:

(a) That the record does not support the sentencing court's findings under division (B) or (D) of section 2929.13, division (B)(2)(e) or (C)(4) of section 2929.14, or division (I) of section 2929.20 of the Revised Code, whichever, if any, is relevant;

(b) That the sentence is otherwise contrary to law.

When a statute means the same thing with or without certain words, those words are surplusage. *See Black's Law Dictionary* 1672 (10th Ed.2014) ("surplusage" defined as "Redundant words in a statute or legal instrument; language that does not add meaning").

**D. The post-*Kalish* amendments restored the less deferential review of sentencing findings under R.C. 2953.08.**

The State asserts that the General Assembly intended to eliminate abuse-of-discretion review when it amended R.C. 2953.08 after this Court issued *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124. State's Brief, 15. But the State's argument fails because the amendment did not abolish *all* abuse-of-discretion review. The amendment merely restored the less deferential clear-and-convincing review of

sentencing findings abolished in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470. R.C. 2953.08(G)(2).

More importantly, the State's argument depends on its hypothesis that R.C. 2953.08 is the sole means to appeal a criminal sentence. If R.C. 2953.08 is the sole means to appeal a criminal sentence, then this section's ban on abuse-of-discretion review bans all abuse-of-discretion review. But if other sections permit review of criminal sentences, then defendants are permitted to avail themselves of the appropriate standard of review under those sections.

**E. Ms. Marcum's claim is based on the general right to appeal in R.C. 2505.03 and 2953.02, not on the additional appellate rights contained in R.C. 2953.08.**

The State is correct that if this appeal is governed solely by R.C. 2953.08, abuse of discretion cannot be the standard of review. State's Brief, 23. But the State's argument is a logical tautology—no cases support applying the abuse-of-discretion standard under a statute that bans abuse-of-discretion. *Id.* But that's not what Ms. Marcum argues. She argues that she has the right to an abuse-of-discretion review under R.C. 2505.03 and 2953.02, neither of which bars such review.<sup>2</sup>

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<sup>2</sup> In her merit brief, Ms. Marcum cited to *Charvat v. Ryan*, 116 Ohio St.3d 394, 2007-Ohio-6833, 879 N.E.2d 765, for the general assertion that the abuse-of-discretion standard applies to discretionary decisions. Appellant's Brief, 7. The portion of the *Charvat* opinion she cited was this Court's description of an argument of a party, not the holding of this Court. Ms. Marcum cited other authority for the same proposition, so the error does not affect her argument. Counsel for Ms. Marcum apologizes for his mistake.

**II. Ohio appellate courts have always had the authority to review criminal sentences for abuse of discretion when the record supports that claim.**

The State is correct that historical context matters in this case, but the State gets that context wrong. The State truncates a quote from this Court’s decision in *City of Toledo v. Reasonover*, 5 Ohio St. 2d 22, 213 N.E.2d 179, paragraph one of the syllabus (1965), in a way that inverts the relevant meaning of the decision. The State quotes *Reasonover* to hold that “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[.]” State’s Brief, 16. But the State omits the rest of the quoted sentence, and the omitted text explains that an appellate court will not review a sentence for abuse of discretion *when the facts support the sentence*:

The Court of Appeals cannot hold that a trial court abused its discretion by imposing too severe a sentence on a defendant convicted of violating an ordinance, where the sentence imposed is within the limits authorized by the applicable ordinance and statutes *and there is nothing in the record to indicate whether defendant had a past criminal record or what his driving record was or that the trial court in sentencing defendant did not consider any such past records.* (Emphasis added.)

*Id.* And *Reasonover* relied on *Lee v. State*, 32 Ohio St. 113, 115 (1877), which held that “[i]n the absence of a showing to the contrary, we must presume, that there were sufficient reasons addressing themselves to the sound judicial discretion of the court for such action, and that it was deemed to be necessary in furtherance of justice and the due administration of the law.” (Emphasis added.) And *State v. Hill*, 70 Ohio St.3d 25, 29,

635 N.E.2d 1248 (1994), which reaffirmed *Reasonover*, stated only the “general rule” that appellate courts don’t review sentences for abuse of discretion. *Hill* did not overrule the *Reasonover* holding that, by making a “showing to the contrary,” a defendant could prove that the trial court abused its discretion.

### **III. The State’s interpretation makes R.C. 2505.03 superfluous.**

The State argues that R.C. 2505.03’s “function is limited to authorizing review in those courts with jurisdiction.” State’s Brief, 20, citing *State v. Fisher*, 35 Ohio St.3d 22, 517 N.E.2d 911 (1988). But under that theory, R.C. 2505.03 means nothing—a court has jurisdiction when a court has jurisdiction.

*Fisher* also does not support the State’s case because the statute at issue in that case was merely procedural. In *Fisher*, this Court explained that the now-repealed R.C. 2953.05 did not provide a right to appeal because it only imposed deadlines. But neither R.C. 2953.02 nor R.C. 2505.03 imposes a deadline, so *Fisher* did not interpret an analogous statute.

In addition, *Fisher* relied on *State v. Simmons*, 49 Ohio St. 305, 31 N.E. 34 (1892). *Fisher* at 24. And in *Simmons*, this Court held that it was “obvious” that, under former R.S. 7356 (1892), “the defendant in any criminal case may have a review in the court of common pleas, circuit court, or Supreme Court, of a judgment or final order that has been rendered against him.” *Simmons* at 306. The decision is relevant because former R.S. 7356 is analogous to the current R.C. 2953.02. The following table shows the

language from the two statutes, and the only material difference is that the modern statute adds references to death sentences and violations of municipal ordinances:

R.C. 2953.02	R.S. 7356 (1892)
“In . . . any . . . criminal case, . . . the judgment or final order of a court of record inferior to the court of appeals may be reviewed in the court of appeals.” <sup>3</sup>	“[T]he defendant in any criminal case may have a review in the court of common pleas, circuit court, or Supreme Court, of a judgment or final order that has been rendered against him.”

Section 2505.03 does not state merely that courts have jurisdiction when courts have jurisdiction. It provides appellate courts with subject matter jurisdiction in both civil and criminal cases.

**IV. This Court has repeatedly held that R.C. 2505.03 provides jurisdiction for appeals in criminal cases.**

The State does not directly respond to Ms. Marcum’s argument that this Court has repeatedly held that R.C. 2505.03 is the basis for appeals in criminal cases.

Appellant’s Brief, 6-7, citing, *State v. Lester*, 130 Ohio St.3d 303, 2011-Ohio-5204, 958

N.E.2d 142, paragraph one of the syllabus (judgment entries of conviction); *State v.*

*Muncie*, 91 Ohio St.3d 440, 441, 2001-Ohio-93, 746 N.E.2d 1092, paragraph one of the

syllabus (forced medication to restore competency); *State v. Anderson*, 138 Ohio St.3d

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<sup>3</sup> Ms. Marcum has omitted language concerning capital cases and misdemeanors. The unredacted R.C. 2953.02 is as follows: “In a capital case in which a sentence of death is imposed for an offense committed before January 1, 1995, and in any other criminal case, including a conviction for the violation of an ordinance of a municipal corporation, the judgment or final order of a court of record inferior to the court of appeals may be reviewed in the court of appeals.”

264, 2014-Ohio-542, 6 N.E.3d 23, ¶ 43-47 (orders denying motions to dismiss based on double jeopardy); *State v. Threatt*, 108 Ohio St.3d 277, 2006-Ohio-905, 843 N.E.2d 164, ¶ 18 (court costs); and *State v. Chambliss*, 128 Ohio St.3d 507, 2011-Ohio-1785, 947 N.E.2d 651, ¶ 16 (dismissal of counsel).

There is no reason to limit R.C. 2505.03 to appeals of criminal convictions when this Court has applied the statute much more broadly.

**V. The State’s analogy to other statutes does not support its position.**

**A. The vexatious litigator statute expressly limits regular appeals.**

The State cites to the vexatious litigator statute, but that statute expressly sets forth a broad exemption from the general right to file appeals. State’s Brief, 22, citing R.C. 2923.52(E)(2). Under that section, a person determined to be a vexatious litigator “who seeks to institute or continue *any legal proceedings in a court of appeals . . . shall file an application for leave to proceed in the court of appeals in which the legal proceedings would be instituted or are pending.*” (Emphasis added.) R.C. 2923.52(F)(2). The statute expressly states that it is placing a condition on the normal right to file “any legal proceedings in a court of appeals[.]” By contrast, no language in R.C. 2953.08 purports to preempt any other statute.

**B. In zoning appeals, appellate courts retain jurisdiction to review for abuse of discretion.**

The State’s reliance on *Cleveland Clinic Found. v. Cleveland Bd. of Zoning Appeals*, 141 Ohio St.3d 318, 2014-Ohio-4809, 23 N.E.3d 1161, ¶ 25, only strengthens Ms.

Marcum's argument. State's Brief, 22-23. In *Cleveland Clinic*, this Court held that an appellate court's jurisdiction is limited to questions of law in zoning appeals, but should still reverse a trial court's decision that "is not supported by a preponderance of reliable, probative and substantial evidence." (Emphasis deleted.) *Id.* at ¶ 24, quoting *Kisil v. Sandusky*, 12 Ohio St.3d 30, 34, 465 N.E.2d 848 (1984). In addition, in *Kisil*, this Court specified that in zoning appeals, "[w]ithin the ambit of 'questions of law' for appellate court review *would be abuse of discretion by the common pleas court.*" (Emphasis added.) *Kisil* at 34, fn.4.

**VI. The sentence imposed on Ms. Marcum was an abuse of discretion.**

The State argues that "the court factored in Marcum's drug abuse and her failure to acknowledge that abuse." State's Brief, 29. The trial court was silent as to its reasons for choosing which prison term to impose, and did not find that Ms. Marcum ever used methamphetamine. T.p. 424-27. Further, the State's argument is supported by nothing more than the lay opinion of the arresting officer and the unscientific drug screen performed by a juvenile court employee shortly after Mr. Marcum's arrest. *Id.* at 196, 274-5, 279, 288-91.

Further, in her merit brief, Ms. Marcum conceded that she did not show remorse at sentencing for a very good reason—she maintains her innocence, which, in postconviction, she has supported with the sworn affidavit of one of the people who committed this offense. At the sentencing hearing, Ms. Marcum's attorney explained

that she was taking the blame for the crimes of others, one of whom was outside the courtroom at the time. T.p. 423. Counsel did not call the person as a witness because it was “too late.” *Id.* But that person’s sworn statement is now part of the record before this Court. In an affidavit submitted with Ms. Marcum’s postconviction petition, Aaron Fitzpatrick explained that he, along with Bryan White and Ronnie Schaefer, made methamphetamine and left the remnants of their shake-and-bake lab in the trash bag on Ms. Marcum’s porch. Affidavit to Petition to Vacate or Set Aside Conviction (May 16, 2014), T.d. 45. The three did not tell Ms. Marcum of their illegal activity. *Id.*

Accordingly, Ms. Marcum had an appropriate reason to maintain her innocence—she didn’t commit this crime, and one of the people who did commit the crime confessed in a sworn affidavit.

### CONCLUSION

For both the certified conflict and the discretionary appeal, this Court should reverse the decision of the court of appeals and remand this case for resentencing. In the alternative, this Court should remand this case to the court of appeals to perform an abuse of discretion analysis.

Respectfully submitted,

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### **Certificate of Service**

I hereby certify that a true copy of the foregoing was sent via electronic mail to Ohio Solicitor General Eric Murphy, eric.murphy@ohioattorneygeneral.gov, and to Deputy Solicitor Michael J. Hendershot, Michael.Hendershot@ohioattorneygeneral.gov, on this 12th day of June, 2015.

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