

IN THE SUPREME COURT OF OHIO

ORIGINAL

STATE OF OHIO, : **Case No. 2012-0819**  
 :  
 Appellant, : On Appeal from the  
 : Franklin County Court  
 vs. : of Appeals, Tenth  
 : Appellate District  
 :  
 MARLON G. PARIAG, : Court of Appeals  
 : Case No. 11AP-569  
 :  
 Appellee. :

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**MERIT BRIEF OF APPELLANT, STATE OF OHIO**

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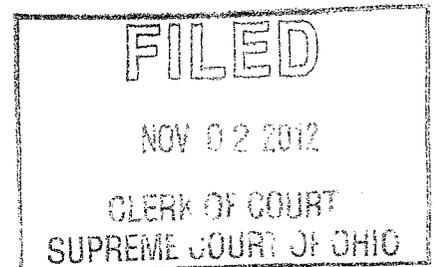


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## STATEMENT OF FACTS AND OF THE CASE

On December 31, 2010, Appellee, Marlon Pariag, was stopped for driving under suspension by Officer Andrew D. Jones of the Ohio State Highway Patrol. As a result of the stop, Appellee was issued citations for driving under suspension, a first degree misdemeanor in case 2011TRD100861 and possession of drug paraphernalia, a fourth degree misdemeanor, and possession of drugs of abuse, a minor misdemeanor in case number 2011CRB239. The criminal and traffic offenses were assigned separate case numbers as required by Sup.R. 37(A)(4)(c) and Sup.R. 43(B)(2), even though they stemmed from the same act. The case was resolved with a plea bargain on February 25, 2011; Appellee pleaded guilty to the driving under suspension offense in violation of RC 4510.11(A), in exchange for which the State dismissed the drug paraphernalia and drug possession offenses.

On March 11, 2011 Appellee applied for the sealing of his record pertaining to the dismissal of the drug paraphernalia and drug possession violations. The State filed an objection to the application on May 9, 2011 and the trial court granted Appellee's request for the sealing of his record on June 3, 2011. On appeal, in a divided decision, the Tenth District Court of Appeals held that Revised Code 2953.61 only pertains to the time when an application for sealing of record may be filed, rather than an overall eligibility to have matters sealed. *Pariag* at ¶21. Further, the lower court distinguished the instant case from contrary holdings in other districts based on the fact that the dismissed charge and conviction in the case sub judice were filed under separate case numbers. *Id.* at ¶14.

This timely appeal follows the appellate court's affirmation of the trial court's judgment, recorded in *In re Application of Pariag*: 10<sup>th</sup> Dist. No. 11AP-569, 2012-Ohio-1376.

### ARGUMENT

In the instant case, the Tenth District Court of Appeals determined that despite the clear language of Revised Code 2953.61, an individual applying to seal the records of a dismissed criminal charge that is the result of or in connection to a conviction that is statutorily ineligible for sealing is not precluded from having the records of the dismissal sealed if the charges are filed under separate case numbers. *In re Application of Pariag*, 10<sup>th</sup> Dist. No. 11AP-569, 2012-Ohio-1376, ¶21. The lower court held that in instances where a dismissed charge is the result of or in connection with the same act as a conviction and is filed under a separate case number, RC 2953.61 simply prescribes the timing of an application to seal the record of dismissal, it does not act as a bar. *Id.* at ¶14, ¶21. As a result, the lower court's decision requires that any public office or agency possessing records related to the dismissed criminal charge *partially* seal their records, records that include everything from arrest reports to written statements to transcripts to journal entries; a task that this Court found to be a near impossibility and impractical reality in its decision in *State v. Futrall*, 123 Ohio St.3d 498, 2009-Ohio-5654. Agencies that fail to properly seal their records and prevent disclosure of sealed material pursuant to RC 2953.321, RC 2953.35, RC 2953.54, and RC 2953.59 are subject to potential criminal penalties, and as such, the implications of this decision are far reaching.

The State submits that when an applicant is not eligible for the sealing of the record of a conviction resulting from or in connection with the same act that forms the

basis of the dismissal he seeks to have sealed, RC 2953.61 specifically prohibits the court from granting the requested sealing of record. The lower court held differently in the instant case for the following reasons: 1) RC 2953.61 only acts as a bar to the sealing of a record in instances where multiple charges with different dispositions are filed under a single case number or indictment and 2) RC 2953.61 simply prescribes the timing of an application to seal records, not whether an offender is eligible to have a record sealed.

The lower court erred on both counts and its decision should be reversed.

**Proposition of Law I:**

**A trial court is precluded as a matter of law from sealing the record of a dismissed charge, pursuant to Revised Code 2953.61, if the dismissed charge arises from or is in connection with a conviction which is statutorily exempt from sealing, regardless of whether dismissed charge and conviction are filed under separate case numbers.**

Expungement of a criminal record is an “act of grace created by the State.” *State v Hamilton* (1996), 75 Ohio St. 3d 636, 639. Because records sealing is a matter of privilege, not of right, the requirements of the sealing must be strictly followed and can be granted only when all statutory requirements for eligibility are met. *State v. Jithoo*, Tenth Dist. No. 05AP-436, 2006-Ohio-4978 at ¶6. Revised Code 2953.32 et seq. sets out the limits of the trial court’s jurisdiction to grant a request for an expungement. *Id.* at ¶7. If an applicant is not eligible for records sealing pursuant to RC 2953.32 et seq., the trial court lacks jurisdiction to grant the requested relief. *Futrall* at ¶6 (Whether a conviction is exempt from being sealed involves a question of law subject to de novo review.)

Revised Code 2953.52 outlines the trial court’s jurisdiction to seal records after a finding of not guilty, dismissal of proceedings or no bill. As pertains to the sealing of a record of dismissal, the statute provides:

(A)(1) Any person, who is found not guilty of an offense by jury or a court or who is the defendant named in a dismissed complaint, indictment, or information, may apply to the court for an order to seal his official records in the case. **Except as provided in section 2953.61 of the Revised Code**, the application may be filed at any time after the finding of not guilty or the dismissal of the complaint, indictment, or information is entered upon the minutes of the court or the journal, whichever entry occurs first.

RC 2953.52(A)(1) (emphasis added). Where multiple charges are involved in a records sealing request, RC 2953.61 determines when an application may be filed. It provides:

When a person is charged with two or more offenses as a result of or in connection with the same act and at least one of the charges has a final disposition that is different than the final disposition of the other charges, **the person may not apply to the court for the sealing of his record in any of the cases until such time as he would be able to apply to the court and have all of the records in all of the cases pertaining to those charges sealed** pursuant to divisions (A)(1) and (2) of section 2953.32 and divisions (A)(1) and (2) of section 2953.52 of the Revised Code.

R.C. §2953.61 (emphasis added).

In the case at hand, Appellee was initially charged with Driving Under Suspension (M1), Possession of Drug Paraphernalia (M4), and Possession of Drugs of Abuse (MM) out of the same incident. Appellee was subsequently convicted of Driving Under Suspension pursuant to RC 4510.11(A) and the possession of drug paraphernalia and possession of drugs of abuse offenses were dismissed. Pursuant to RC 2953.61, Appellant's ability to apply for sealing of the possession of drug paraphernalia and drugs of abuse offenses in this case is limited by the court's jurisdictional authority to seal the related driving under suspension conviction.

Revised Code 2953.36 establishes the parameters for the court's exercise of records sealing jurisdiction. It states that the preceding sections 2953.31 to 2953.35 (defining who is eligible for records sealing, at what time they are eligible and the criteria

for granting said sealing) do not apply to “convictions under ... Chapter 4510... of the Revised Code, or a conviction for a violation of a municipal ordinance that is substantially similar to any section contained in [the] chapter.” Accordingly, Appellee is not eligible for the sealing of his driving under suspension conviction, which arises under Chapter 4510, at any time. Because Appellee’s driving under suspension conviction is not eligible for sealing, RC 2953.61 specifically prohibits the sealing of his related criminal dismissals.

Numerous Ohio Courts of Appeal have held that pursuant to RC 2953.61, multiple offenses arising from the same set of facts cannot be sealed unless all of the offenses are eligible for sealing. *State v. Minkner* (March 21, 1997), Second Dist. No. 95-CA-124, 1997 Ohio App. LEXIS 1084; *State v. Selesky*, Eleventh Dist. No. 2008-P-0029, 2009-Ohio-1145; *State ex rel. Lewis v. Lawrence County*, 95 Ohio App.3d 565, 642 N.E.2d 1166; *State v. Spohr*, First District No. C-110314, 2012-Ohio-556. In *Minkner*, the appellant pleaded guilty to one count of unlawful restraint amended from a kidnapping charge after being acquitted of a rape charge stemming from the same set of facts. *Id.* at \*2. Appellant appealed to the Second District Court of Appeals after the trial court denied his application to seal the record of his rape acquittal. On appeal, the Second District held that the appellant’s request to seal his rape acquittal was expressly prohibited under RC 2953.61 and RC 2953.32. *Id.* at \*3. Because the appellant’s rape and unlawful restraint offenses arose from the same set of facts, the appellant was not eligible to have his rape acquittal sealed until he was eligible to have his unlawful restraint conviction sealed. *Id.* \*3. The appellant’s unlawful restraint conviction would never be eligible for sealing because the appellant had a prior conviction for rape in 1978

and thus was not a first offender as defined by RC 2953.32. *Id.* at \*4. Accordingly, the rape acquittal would never be eligible for sealing pursuant to RC 2953.61. *Id.* \*3-\*4.

The Fourth District, in *State ex rel. Lewis v. Lawrence County*, held that when multiple charges arise out of the same set of facts and events, none of the charges are eligible for sealing unless all of the charges qualify for sealing and thus, because the Appellant's conviction for rape was ineligible for sealing, the four dismissed criminal counts filed in the same indictment were also ineligible. *Id.* at \*568.

In *State v. Selesky*, the appellee was charged with one count of hit skip and one count of failure to control stemming from the same set of facts; the hit skip was dismissed and the appellee was convicted of the failure to control. *Id.* at ¶19. The Eleventh District Court of Appeals reversed the trial court's decision to grant the appellee's application to seal the record of his hit skip dismissal, holding that the appellant's hit skip dismissal did not qualify for sealing pursuant to RC 2953.61 because the companion charge of failure to control, of which he was convicted, was not eligible for sealing by operation of RC 2953.36 which exempted traffic code convictions from Ohio's expungement scheme. *Id.* at ¶22.

In *State v. Spohr*, the First District flatly rejected the Appellee's argument that he was entitled to have his domestic violence acquittal sealed, despite the fact that he was convicted of a disorderly conduct offense out of the same act, which was in turn ineligible for sealing because Appellee was not a first offender. *Spohr* at ¶10. The court held that the plain language of RC 2953.61 prohibited Appellee from having his acquittal sealed when it was in connection with a conviction that was otherwise prohibited from sealing under RC 2953.32(A).

As in *Minkner, Lewis, Selesky* and *Spohr*, Appellee in the instant case does not qualify to have the records of his drug possession and drug paraphernalia charges sealed pursuant to RC 2953.61 because the charges arose out of the same set of facts as his conviction for violating RC 4510.11(A), driving under suspension, which is specifically prohibited from being sealed as a matter of law pursuant to RC 2953.36(B). Because Appellee's driving under suspension conviction is never eligible to be sealed, his related offenses of drug possession are also never eligible to be sealed.

To distinguish the instant case from those decided by the appellate courts in *Minkner, Selesky, Lewis* and *Spohr*, as well as this Court's decision in *Futrall*, the lower court focused on the fact that the dismissed charges and conviction in the case sub judice were filed under two separate case numbers, rather than one case number. *Pariag* at ¶14. This is a distinction without a difference. Clearly absent from the language in RC 2953.61 is any requirement that the "two or more offenses as a result of or in connection with the same act" be filed under a single case number or single indictment. To the contrary, as noted by the dissent in the instant case, "the plain language of RC 2953.61 expressly prohibits the sealing of records in 'any of the *cases* [plural]' until such time as he would be able to seal the records in "all of the *cases* [plural]." Revised Code 2953.61 therefore looks beyond the administratively assigned case number and instead focuses on whether the charges result from, or are connected with, the same act and receive different dispositions." *Pariag*, dissent at ¶24.

In addressing the potential difficulty of partially sealing records, the lower court concluded that because the instant matter involves two separate case numbers with "two separate files, each with separate reports, index references, half sheets and records", the

“official records associated with the conviction can be sealed without disturbing the official records of the dismissals” and thus “the practical difficulties forming the bases for the analyses in *Futrell* are notably absent from the instant matter”. *Pariag* at ¶14. This conclusion is erroneous. An order to seal a person’s records pursuant RC 2953.32 et seq. is not limited to the trial court or clerk’s office’s official records, but rather, applies to “all records that are possessed by any public office or agency that relate to a criminal case”, including “all records and investigative reports possessed by law enforcement” and “all records of all testimony and evidence presented in all proceedings in the case.” RC 2953.51(D).

As recognized by the dissent in the instant case, “where a conviction and a dismissal are connected with the same act and share many of the same investigative reports and arrest records, it may be impossible to seal ‘all official records’ in only one of the cases.” *Pariag*, dissent at ¶30. Thus, the practical difficulties of partial sealing so readily dismissed by the lower court as inapplicable in the instant case are very much a concern and, as noted by this Court in a similar context, “how this task would be accomplished and who would have the authority to attempt it are questions that underscore the impractical reality of an attempt to seal certain convictions in one case while revealing others.” *Futrell* at ¶20.

Additionally, the lower court’s single minded focus on the fact that the dismissed traffic charge and criminal conviction were filed under separate case numbers completely ignores the fact that the Ohio Rules of Superintendence require that criminal offenses and traffic offenses be assigned separate case numbers, even if arising from the same act or transaction. See Sup.R. 37(A)(4)(c). Though court systems throughout the state are

required by the Rules of Superintendence to file traffic and criminal charges under separate case numbers, law enforcement and other public agencies operate under no similar requirement. Thus, despite the fact that the arrest reports, transcripts, written statements and other law enforcement records underlying both the dismissed charge and the conviction necessarily include information about both charges, the lower court's holding requires all public agencies in possession of the records of the dismissed charge to partially seal them; a near impossible feat, as recognized by this court in *Futrall*. The language of RC 2953.61 is not limited to offenses filed under a single case number or indictment. To the contrary, the statutory language clearly contemplates the possibility of multiple offenses arising out of multiple cases and prohibits a court from ordering the *partial* sealing of records of offenses that are the result of or in connection to the same act but have different dispositions.

**Proposition of Law II:**

**Revised Code 2953.61 prohibits records from being partially sealed and is not simply a prescription for the timing of applications to seal records.**

The lower court's holding that RC 2953.61 pertains only to the timing of an application to seal records and does not prohibit the partial sealing of records is also error and in contradiction to this Court's reasoning in *Futrall*. *Pariag* at ¶21. In *Futrall*, this Court was presented with the question of whether a trial court is precluded from sealing an applicant's convictions that are eligible to be sealed by statute when one of the convictions is exempt by statute from being sealed. In making its determination that a conviction that is exempt by statute from being sealed also precludes the sealing of convictions that are otherwise eligible, this Court specifically looked to RC 2953.61 for guidance.

Though RC 2953.61 was not directly applicable because the charges sought to be sealed in *Futrall* did not have different dispositions, this Court determined that RC 2953.61, along with RC 2953.31 (definition of first offender and effect of two or more convictions connected with the same act) and RC 2953.32 (processes and duties imposed for sealing records), demonstrated that the General Assembly, in enacting these provisions, “appears to have recognized the inherent difficulty of sealing only some convictions in one case” and illustrate the General Assembly’s intent to authorize the sealing of cases, not the sealing of individual convictions within cases.” This Court’s analysis in *Futrall* clearly contemplates that RC 2953.61 serves to bar applicants from seeking to partially seal their records and is not simply a prescription regarding the timing of applications to seal records. Thus, the lower court’s holding that RC 2953.61 “was fashioned to prevent multiple applications when the timing associated with the underlying offenses differed....and is intended to promote judicial economy and efficiency, rather than acting as a complete bar to having matters expunged or sealed” is erroneous and in contradiction to this Court’s reasoning in *Futrall*. *Pariag* at ¶21.

Other Courts of Appeal have consistently held that RC 2953.61 acts as a bar to requests to partially seal an applicant’s records. As discussed previously, the Second, Fourth and Eleventh Districts have all held that dismissed charges that arise from or are in connection with convictions cannot be sealed unless the convictions also qualify for sealing. *Minkner*, supra; *Selesky*, supra *Lewis*, supra. Most recently, as noted by the dissent in the instant case, the First District Court of Appeals in *State v. Spohr*, 1<sup>st</sup> Dist. No. C-110314, 2012-Ohio-556, “reaffirmed that RC 2953.61 is plain and unambiguous

and expressly rejected the argument that a distinction exists between eligibility and timing.” *Pariag* dissent at ¶27; *Spoehr* at ¶11.

The plain, unambiguous language of RC 2953.61 provides that records sealing relief is not available to applicants who seek to seal records of dismissed charges that are the result of or in connection to convictions that are ineligible for sealing, regardless of whether the dismissed charges and convictions were assigned separate case numbers. The plain language of the statute requires that an individual who seeks to seal a record of dismissal that arises from or is connected to a record of conviction must wait to apply for sealing until he or she is “able to apply to the court *and have all of the records in all of the cases pertaining to those charges sealed.*” Accordingly, because the applicant in the instant case is never going to be able to apply and have his driving under suspension traffic conviction sealed, RC 2953.61 does not allow the trial court to seal the records of the applicant’s related criminal dismissals. To this end, the lower court erred when it held otherwise.

### CONCLUSION

For the foregoing reasons, this Honorable Court should find that the Tenth District Court of Appeals erred when it held that RC 2953.61 is not applicable to offenses filed under separate case numbers and further, simply prescribes the timing of an application to seal a record rather than serve as a bar to records sealing. When an applicant is not eligible for the sealing of the record of a conviction resulting from or in connection with the same act that forms the basis of the record of a dismissal sought for records sealing, RC 2953.61 specifically prohibits the court from granting the requested sealing of record. To find to the contrary requires that any public office or agency

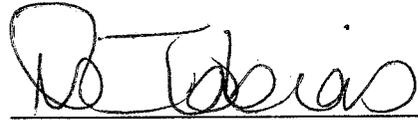
possessing records related to the dismissed criminal charge *partially* seal their records, records that include everything from arrest reports to written statements to transcripts to journal entries; a task that this Court has found to be a near impossibility and impractical reality. Thus, this Court should reverse the judgment of the Tenth District Court of Appeals.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

This is to certify that a true copy of the foregoing Brief of Appellant was mailed by regular U.S. Mail to Marlon G. Pariag, Defendant-Appellee Pro-Se, 7682 Eagle Trace Drive, Westerville, Ohio 43082 this 2<sup>nd</sup> day of November, 2012.

A handwritten signature in black ink, appearing to read "Melanie R. Tobias". The signature is written in a cursive style with a large initial "M" and "T".

Melanie R. Tobias (0070499)  
Director – Appellate Unit

APPENDIX

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charges were filed in case No. 2011 CRB 239. Appellee pleaded guilty to the traffic charge in 2011 TRD 100861, and, in exchange, the drug charges in 2011 CRB 239 were dismissed.

{¶ 3} In March 2010, appellee filed an application requesting the records of the dismissed drug charges be sealed under R.C. 2953.52. The State objected and argued that R.C. 2953.61 prohibited the records from being sealed because the dismissed drug charges were connected to appellee's driving under suspension conviction, which could never be sealed.

{¶ 4} The trial court disagreed with the State's interpretation and granted appellee's application. Specifically, it concluded that the conviction in the traffic case did not preclude an expungement of the dismissed criminal case. In support, the trial court cited a case decided by this court, *In re Hankins*, 10th Dist. No. 99AP-797, 2000 WL 633591, 2000 Ohio App.LEXIS 2072 (May 18, 2000). The State now appeals and advances the following assignment of error:

THE TRIAL COURT LACKED JURISDICTION TO  
EXPUNGE APPELLEE'S RECORD AND, THUS, ERRED AS  
A MATTER OF LAW WHEN IT ORDERED APPELLEE'S  
RECORDS SEALED.

{¶ 5} In its sole assignment of error, the State challenges the decision granting appellee's application to seal the official records in dismissed case No. 2011 CRB 239.

{¶ 6} Generally, a trial court's decision to grant or deny a request to seal records is subject to an abuse of discretion standard of review. *State v. Hillman*, 10th Dist. No. 09AP-478, 2010-Ohio-256, ¶ 11, citing *State v. Futrall*, 123 Ohio St.3d 498, 2009-Ohio-5590, ¶ 6-7. However, when the decision is based upon an erroneous interpretation or application of the law, the matter is reviewed de novo. *Id.*

{¶ 7} In its assignment of error, the State contends that appellee's dismissed drug charges were connected to his driving under suspension conviction, which could never be sealed. It therefore argues that R.C. 2953.61 prohibits the records from ever being sealed. In support, the State cites *State v Minkner*, 2d Dist. No. 95-CA-124 (Mar. 21, 1997); *State v Capone*, 2d Dist. No. 20134, 2004-Ohio-4679; *State v Selesky*, 11th Dist. No. 2008-P-0029, 2009-Ohio-1145; *State ex rel. Lewis v Lawrence Cty.*, 95 Ohio App.3d 565 (4th Dist.1993); and *Futrall*. The State's reliance on each of these cases, however, is misplaced

because each is inapposite herein. To reveal the sophistical nature of the State's arguments, we will address each case to obviate the sophistication.

{¶ 8} Initially, we turn to *Minkner*. In that matter, the defendant was indicted for rape and kidnapping based upon conduct in 1994. A jury convicted him on the kidnapping charge and acquitted him on the rape charge. On appeal, the kidnapping conviction was reversed. The defendant then entered a guilty plea to a reduced charge. He then applied to have the record sealed with respect to the rape charge. The trial court denied the application, and the defendant appealed. Upon appeal, the Second Appellate District noted that the defendant had been convicted of rape in 1978. As a result, he was not a "first offender" and was therefore ineligible to have his rape acquittal expunged and its records sealed.

{¶ 9} As *Minkner* relates herein, it is clear that appellee had no prior conviction barring him from being considered a "first offender" under R.C. 2953.32. *Minkner* is clearly distinguishable from the instant matter.

{¶ 10} Next, we turn to *Capone*. In that matter, a December 16, 2002 indictment charged the defendant with eight counts of unlawful sexual conduct with a minor and two counts of corrupting a juvenile with drugs. Then, on March 10, 2003, the defendant was charged with two additional counts of selling intoxicating liquor to an underage person, an unclassified misdemeanor. All of the counts were filed under the same case number. The defendant entered guilty pleas to the unclassified misdemeanors, and the State entered a nolle prosequi as to the remaining counts. The defendant applied to have the nollied charges expunged and the records sealed. The trial court denied his application. On appeal, the court reasoned: "Because the indictment and the bill of information fall under the same case number, stemming from the same set of facts and events, the nolle of the charges under the indictment alone did not dismiss the case." *Id.* at ¶ 8. "[B]ecause Capone's case was not dismissed, his records could not be expunged." *Id.*

{¶ 11} In *Selesky*, the defendant was charged with failure to stop after an accident and failure to control. He entered a no contest plea with respect to the failure to control charge, and the trial court found him guilty of that offense. The court then dismissed the failure to stop charge. The defendant filed an application to seal the records of the dismissed charge. The trial court granted the application and sealed the records. Upon

appeal, the Eleventh Appellate District held that the defendant's application was subject to R.C. 2953.61 because it regarded a case with multiple charges. Further, because one of the charges in the case was ineligible for expungement, so too was the other charge in the case.

{¶ 12} We next turn to *Lewis*, which presented a mandamus action filed by a defendant who sought to have records sealed. In *Lewis*, the defendant was charged with five counts in the same indictment. He was found guilty of one of the counts, while the others counts were either nollied or dismissed. The defendant sought to seal the records of the four counts for which he was not convicted. The trial court denied his request. Upon appeal, the Fourth Appellate District analyzed R.C. 2953.61 and held:

[A]lthough several counts in the indictment against appellant were either dismissed or *nolle prosequi*, neither a complaint nor an indictment was dismissed against appellant. In other words, the statute requires that an indictment against the appellant be dismissed, not merely a count in an indictment.

*Id.* at 568.

{¶ 13} Finally, in *Futrall*, the Ohio Supreme Court was asked to determine: "whether an applicant with multiple convictions *in one case* may seal the portion of his or her criminal record that is eligible pursuant to R.C. 2953.32 when one of the convictions is statutorily exempt from being sealed." (Emphasis added.) *Id.* at ¶ 15. The court emphasized the practical difficulties associated with separating and sealing records for multiple convictions under the same case. Indeed, it noted: "parsing out those convictions that can be sealed from those that cannot—would be impossible: a trial court is unable to order *all* index references to the case deleted while at the same time ordering that index references to one conviction in that case be maintained because the case cannot be lawfully sealed." (Emphasis sic.) *Id.* at ¶ 19. According to the court, R.C. 2953.61 was inapplicable to the circumstances presented therein but was "instructive on the issue of how sealing of multicount convictions should be handled." *Id.* at ¶ 17. Ultimately, the Supreme Court held:

When an applicant with multiple convictions *under one case number* moves to seal his or her criminal record in that case pursuant to R.C. 2953.32 and one of those convictions is

exempt from sealing pursuant to R.C. 2953.36, the trial court may not seal the remaining convictions.

(Emphasis added.) *Id.* at syllabus.

{¶ 14} As is clear, *Capone*, *Selesky*, *Lewis*, and *Futrall* are all distinguishable from the instant matter. Indeed, those matters all presented circumstances where a defendant's application sought to expunge and seal counts of a single case. In other words, separate portions of a single case were sought to be sealed. Conversely, in the instant matter, we have two separate cases with two separate files, each with separate reports, index references, half sheets, and records. Thus, the official records associated with case No. 2011 CRB 239 can be sealed without disturbing the official records of case No. 2011 TRD 100861. The practical difficulties forming the bases for the analyses in *Capone*, *Selesky*, *Lewis*, and *Futrall*, are notably absent from the instant matter. Therefore, the holdings of those cases are inapplicable herein.

{¶ 15} Moreover, our court has previously decided a case strikingly similar to the instant matter. *See Hankins*, 10th Dist. No. 99AP-797. In *Hankins*, the defendant was charged with speeding and with possession of an open container of beer in a public place. He entered a guilty plea with respect to the speeding charge and the open container charge was dismissed. He filed an application to seal the records pertaining to the open container charge. When the trial court denied his application, he appealed. On appeal, the State argued that the defendant's speeding conviction was not an expungeable offense and, consequently, the open container charge should similarly be excluded from being expunged under R.C. 2953.61. More specifically, the State argued that R.C. 2953.61 should apply "because appellant's speeding and open container charges occurred in connection with *the same act*, which was appellant's driving a motor vehicle while speeding and possessing an open container." (Emphasis added.) *Id.*, 10th Dist. No. 99AP-797, 2000 WL 633591, at \*1, 2000 Ohio App.LEXIS 2072, at \*3. We disagreed after interpreting the legislative intent of the expungement statutes.

{¶ 16} In the instant matter, the relevant statutes are R.C. 2953.52(A)(1) and 2953.61. According to R.C. 2953.52(A)(1):

Any person, who is found not guilty of an offense by a jury or a court or who is the defendant named in a dismissed complaint, indictment, or information, may apply to the court

for an order to seal his official records in the case. Except as provided in section 2953.61 of the Revised Code, the application may be filed at any time after the finding of not guilty or the dismissal of the complaint, indictment, or information is entered upon the minutes of the court or the journal, whichever entry occurs first.

Under R.C. 2953.61:

When a person is charged with two or more offenses *as a result of or in connection with the same act* and at least one of the charges has a final disposition that is different than the final disposition of the other charges, the person may not apply to the court for the sealing of his record in any of the cases until such time as he would be able to apply to the court and have all of the records in all of the cases pertaining to those charges sealed pursuant to divisions (A)(1) and (2) of section 2953.32 and divisions (A)(1) and (2) of section 2953.52 of the Revised Code.

(Emphasis added.)

{¶ 17} When construing a statute, a court's objective is to determine and give effect to the legislative intent. *State ex rel. Solomon v. Police & Firemen's Disability & Pension Fund Bd. of Trustees*, 72 Ohio St.3d 62, 65 (1995), citing *State v. S.R.*, 63 Ohio St.3d 590, 594-95 (1992). In determining legislative intent, a court must first consider the words used in a statute. *State v. Maxwell*, 95 Ohio St.3d 254, 256 (2002), citing *Provident Bank v. Wood*, 36 Ohio St.2d 101, 105 (1973). Clear and unambiguous statutes must be applied as written and must not be subject to further statutory construction. *State v. Wemer*, 112 Ohio App.3d 100, 103 (4th Dist.1996), citing *State ex rel. Herman v. Klopffleisch*, 72 Ohio St.3d 581, 584 (1995). However, further construction is required when a statute is unclear and ambiguous. *State v. Chappell*, 127 Ohio St.3d 376, 2010-Ohio-5991, ¶ 16, citing *Bailey v. Republic Engineered Steels, Inc.*, 91 Ohio St.3d 38, 40 (2001).

{¶ 18} We believe the language of R.C. 2953.61 is unclear with respect to the phrase, "as a result of or in connection with the same act." Indeed, the phrase can be interpreted in different ways. That is, by its context and syntax, "the same act" can refer to instances where the same conduct of the defendant amounts to two or more offenses. *See, e.g.*, R.C. 2941.25(A). Conversely, however, it might also refer to instances where different conduct amounts to two or more dissimilar offenses. *See, e.g.*, R.C. 2941.25(B).

Moreover, the statute is unclear about how remote the purported connection between the charges and this "same act" may potentially be. According to the dissent's interpretation, however, the mere filing of charges has astounding implications. Because the statute is unclear in these regards, further construction is necessary. *Deaconess Hosp. v. Ohio Dept. of Job & Family Servs.*, 10th Dist. No. 11AP-259, 2012-Ohio-95, ¶ 11.

{¶ 19} "[T]he same act" in *Hankins* was said to have been "driving a motor vehicle while speeding and possessing an open container." *Hankins*, 10th Dist. No. 99AP-797, 2000 WL 633591, at \*1, 2000 Ohio App.LEXIS 2072, at \*3. In the instant matter, it can only be said that "the same act" was appellee's driving a motor vehicle while having a suspended license and possessing drugs and possessing drug paraphernalia.

{¶ 20} Courts must construe statutes to avoid unreasonable or absurd results. *State ex rel. Striker v. Cline*, 130 Ohio St.3d 214, 2011-Ohio-5350, ¶ 25, citing *Volbers-Klarich v. Middletown Mgt., Inc.*, 125 Ohio St.3d 494, 2010-Ohio-2057, ¶ 26. Furthermore, co-existing statutes relating to the same general subject matter must be read in pari materia. *State v. Cook*, 128 Ohio St.3d 120, 2010-Ohio-6305, ¶ 45, quoting *United Tel. Co. of Ohio v. Limbach*, 71 Ohio St.3d 369, 372 (1994), quoting *Johnson's Mkts., Inc. v. New Carlisle Dept. of Health*, 58 Ohio St.3d 28, 35 (1991). When possible, courts must harmonize such statutes and construe them in a manner to give proper force and effect to each. *Id.*; see also *State ex rel. Dublin Securities, Inc. v. Ohio Div. of Securities*, 68 Ohio St.3d 426, 430 (1994), citing *State v. Chippendale*, 52 Ohio St.3d 118 (1990); see also R.C. 1.51.

{¶ 21} As is relevant herein, R.C. 2953.36 defines non-expungeable offenses. Had the legislature intended for a non-expungeable offense to act as a complete bar to an otherwise expungeable offense, it could have so stated in R.C. 2953.36. Furthermore, as the dissent correctly notes, R.C. 2953.52(A)(1) expressly prohibits the filing of an application to seal records until the mandatory waiting period in R.C. 2953.61 has been satisfied. In harmonizing R.C. 2953.52(A)(1), 2953.61, and 2953.36, we believe R.C. 2953.61 pertains to the time when an application may be filed, rather than the overall eligibility to have matters expunged or sealed. We believe R.C. 2953.61 was fashioned to prevent multiple applications when the timing associated with underlying offenses differed. In this regard, the statute was intended to promote judicial economy and

efficiency, rather than acting as a complete bar to having matters expunged or sealed. Our holding follows *Hankins*, which noted: "R.C. 2953.61 was introduced in pertinent part to 'require a longer waiting period before sealing the records[.]' " (Emphasis added.) *Id.*, 10th Dist. No. 99AP-797, 2000 WL 633591, at \*2, 2000 Ohio App.LEXIS 2072, at \*5-6. Unlike the dissent, we refuse to interpret the statutes in a way that extends this waiting period on forever.

{¶ 22} As a result, we reject the State's contention that the trial court lacked jurisdiction to grant the expungement and seal appellee's records related to the drug charges in case No. 2011 CRB 239. We therefore affirm the judgment of the Franklin County Municipal Court.

*Judgment affirmed.*

BROWN, P.J., concurs.  
SADLER, J., dissents.

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SADLER, J., dissenting.

{¶ 23} The majority holds that an individual convicted of a non-sealable offense can immediately apply to seal the records of any dismissed offenses charged in connection with the same act. I respectfully dissent because I believe that R.C. 2953.52(A) and 2953.61 unambiguously prohibit the filing of such applications.

{¶ 24} Because "expungement is a privilege and not a right," *State v. Futrall*, 123 Ohio St.3d 498, 2009-Ohio-5590, an individual cannot apply to seal the records of a dismissed complaint without satisfying the eligibility requirements contained in R.C. 2953.52(A) and, as pertinent here, R.C. 2953.61. Generally, R.C. 2953.52(A)(1) allows an individual to apply to seal the records of a dismissed complaint "at any time" after dismissal; however, the statute expressly states that this timeframe is subject to the mandatory waiting period in R.C. 2953.61. *See* R.C. 2953.52(A)(1) ("*Except as provided in section 2953.61 of the Revised Code, the application may be filed at any time after the \* \* \* dismissal of the complaint.*"). (Emphasis added.)

{¶ 25} R.C. 2953.61 governs situations where an individual was charged with multiple offenses resulting in different dispositions. In its entirety, R.C. 2953.61 provides:

When a person is charged with two or more offenses as a result of or in connection with the same act and at least one of

the charges has a final disposition that is different than the final disposition of the other charges, *the person may not apply to the court for the sealing of his record in any of the cases until such time as he would be able to apply to the court and have all of the records in all of the cases pertaining to those charges sealed* pursuant to divisions (A)(1) and (2) of section 2953.32 and divisions (A)(1) and (2) of section 2953.52 of the Revised Code.

(Emphasis added.)

{¶ 26} In my view, R.C. 2953.61 unambiguously applies here. Appellee filed an application to seal the records of his dismissed drug charges in case No. 2011 CRB 239 when those charges were connected to the same act as his conviction for driving under suspension in case No. 2011 TRD 100861. Because the charges resulted in different dispositions—two in dismissal and one in conviction—R.C. 2953.61 prohibited appellee from sealing the records of his dismissed drug charges until he could become eligible to seal the records "in all of the cases," including his conviction for driving under suspension. Under R.C. 2953.36(B), however, a driving-under-suspension conviction cannot be sealed. Therefore, because appellee could not seal the records of his conviction, he was ineligible to seal the records of his dismissed drug charges under R.C. 2953.52(A) and 2953.61.

{¶ 27} However, the majority holds that R.C. 2953.61 merely governs the time for applying to seal records, not an individual's eligibility to seal records. I see no difference. An individual is *necessarily ineligible* to seal the records of a dismissal in one case "until such time as he would be able to apply" to seal all of the records in all of the cases. The words "until such time" and "would" are indefinite and indicate that the statute does not entitle every individual to the privilege of sealing records. The First District has recently reaffirmed that R.C. 2953.61 is "plain and unambiguous" in this regard and has expressly rejected the argument that a distinction exists between eligibility and timing. *State v. Spohr*, 1st Dist. No. C-110314, 2012-Ohio-556, ¶ 11, 14.

{¶ 28} The First District's holding is consistent with the cases relied on by appellant; however, the majority finds those cases to be distinguishable because they involve charges filed under a single case number. (Majority Opinion at ¶ 14.) This is a correct factual distinction, but it does not lead to the conclusion that R.C. 2953.61 is

inapplicable whenever charges are filed under *multiple* case numbers. In fact, the plain language of R.C. 2953.61 expressly prohibits the sealing of records in "any of the cases [plural]" until such time as he would be able to seal the records in "all of the cases [plural]." R.C. 2953.61 therefore looks beyond the administratively assigned case number and instead focuses on whether the charges result from, or are connected with, the same act and receive different dispositions.

{¶ 29} The only portion of R.C. 2953.61 found to be ambiguous by the majority is the provision requiring the offenses to be charged "as a result of or in connection with the same act." However, the "same act" requirement was not at issue here—in fact, none of the language in R.C. 2953.61 was claimed to be ambiguous—and I believe it has nothing to do with whether R.C. 2953.61 imposes an eligibility requirement. Neither the trial court nor the parties disputed whether the offenses were charged as a "result of or in connection with the same act" just as they did not dispute whether the offenses resulted in differing "final disposition[s]." Nevertheless, even if the "same act" requirement was at issue and could be considered ambiguous,<sup>1</sup> it is unnecessary to resort to other forms of interpretation when applying the remaining portions of the statute.

{¶ 30} While I believe it is unnecessary to look to legislative intent, I also disagree with the majority's characterization of that intent. The purpose of R.C. 2953.61 was best explained by the Supreme Court of Ohio in *Futrall*. Although the court found the statute to be inapplicable in *Futrall*'s case (because the statute governs charges receiving different dispositions whereas each of *Futrall*'s charges received a conviction), the court nevertheless recognized that the statute illustrated the "inherent difficulty" of partially sealing records. *Id.* at ¶ 20. This is especially true here. When a court grants an application to seal records under R.C. 2953.52, it must seal "all records that are possessed by any public office or agency that relate to a criminal case," including "all records and investigative reports" possessed by law enforcement and "all records of all testimony and

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<sup>1</sup> I would note that the language in R.C. 2953.61 is virtually identical to the language contained in the statute governing when an individual qualifies as a "first offender." See R.C. 2953.31(A) ("When two or more convictions *result from or are connected with the same act* or result from offenses committed at the same time, they shall be counted as one conviction."). (Emphasis added.) Courts have applied the plain language of R.C. 2953.31(A) without resorting to other forms of statutory interpretation. See, e.g., *State v. Saltzer*, 20 Ohio App.3d 277 (8th Dist.1985); *State v. Grossman*, 10th Dist. No. 10AP-1156, 2011-Ohio-6818, ¶ 16-20 (collecting cases).

evidence presented in all proceedings in the case." R.C. 2953.51(D). Thus, where a conviction and a dismissal are connected with the same act and share many of the same investigative reports and arrest records, it may be impossible to seal "all official records" in only one of the cases. As noted in a similar context, "How this task would be accomplished and who would have the authority to attempt it are questions that underscore the impractical reality of an attempt to seal certain convictions in one case while revealing others." *Id.* at ¶ 20.

{¶ 31} The real issue here is not whether the statute is ambiguous with respect to the phrase "the same act," or whether R.C. 2953.61 applies to charges filed under separate case numbers, but whether we should follow *In re Hankins*, 10th Dist. No. 99AP-797 (May 18, 2000). In *Hankins*, a divided panel of this court found that R.C. 2953.61 allowed the sealing of a dismissed open-container charge even though the charge was connected to the same traffic stop as a non-sealable speeding conviction. I find *Hankins* to be materially distinguishable from the present case. Unlike the offense of speeding, which the *Hankins* panel considered "relatively minor" and exempt from R.C. 2953.61, this case involves a conviction for driving under suspension—a *first-degree* misdemeanor violation of R.C. 4510.11(A). Such a violation requires a previous license suspension and is subject to heightened penalties, including criminal forfeiture of the offender's vehicle and a potential 180-day jail term. See R.C. 4510.11(D)(1), (D)(2)(c); R.C. 2929.24(A)(1). Therefore, I find no basis to apply *Hankins* to these facts.

{¶ 32} While some may find the application of R.C. 2953.52(A) and 2953.61 severe in cases where a traffic conviction prohibits an individual from applying to seal the records of a dismissal, I believe the plain language of those statutes and their evident legislative purpose expressly require such a result. Based on the above, I believe appellee was ineligible under R.C. 2953.52(A) and 2953.61 to seal the records of his dismissal and would reverse the trial court's decision to grant his application. Because the majority does not, I respectfully dissent.

---



NOTICE OF APPEAL FROM A COURT OF APPEALS

STATE OF OHIO, : Case No. 12-0819  
Appellant, :  
-v- : On Appeal from the Franklin  
County Court of Appeals,  
Tenth Appellate District  
MARLON G PARIAG, :  
Appellee. : Court of Appeals  
Case No. 11 AP-569

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NOTICE OF APPEAL OF APPELLANT

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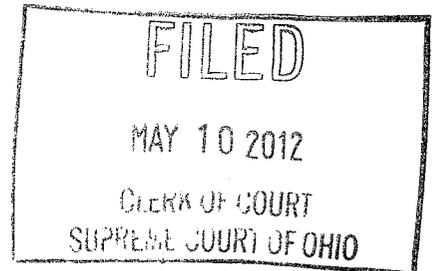
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**Notice of Appeal of Appellant**

Appellant State of Ohio hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Franklin County Court of Appeals, Tenth Appellate District, entered in Court of Appeals case No. 11 AP-569 on March 29, 2012.

This case raises a substantial constitutional question and is one of public or great general interest.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

This is to certify that a copy of the foregoing Notice of Appeal was sent via the regular U.S. Postal Service to Marlon G. Pariag, Pro-Se Defendant, 7682 Eagle Trace Drive, Westerville, Ohio 43082, this 10th day of May, 2012.

A handwritten signature in black ink, appearing to read "Melanie R. Tobias", written over a horizontal line.

Melanie R. Tobias (0070499)  
Director – Appellate Unit

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, : Case No. 12-0819  
Appellant, : On Appeal from the  
vs. : Franklin County Court  
MARLON G. PARIAG, : of Appeals, Tenth  
Appellee. : Appellate District  
Court of Appeals  
Case No. 11 AP-569

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APPELLANT'S MEMORANDUM  
IN SUPPORT OF JURISDICTION

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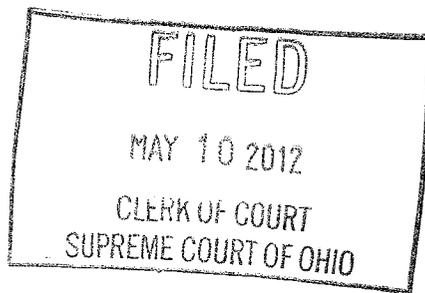


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## EXPLANATION OF WHY THIS COURT SHOULD ACCEPT JURISDICTION

This case presents for review a significant matter of first impression. In the instant case, the Tenth District Court of Appeals determined that despite the clear language of Revised Code 2953.61, an individual applying to seal the records of a dismissed criminal charge that arises from or is in connection to a conviction that is statutorily ineligible for sealing is not precluded from having the records of the dismissal sealed if the charges are filed under separate case numbers. *In re Application of Pariag*, 10<sup>th</sup> Dist. No. 11AP-569, 2012-Ohio-1376, ¶21. As a result, the lower court's decision requires that any public office or agency possessing records related to the dismissed criminal charge *partially* seal their records, records that include everything from arrest reports to written statements to transcripts to journal entries; a task that this Court found to be a near impossibility and impractical reality in its decision in *State v. Futrall*, 123 Ohio St.3d 498, 2009-Ohio-5654. Agencies that fail to properly seal their records and prevent disclosure of sealed material pursuant to RC 2953.321, RC 2953.35, RC 2953.54, and RC 2953.59 are subject to potential criminal penalties, and as such, the implications of this decision are far reaching and this issue is of great importance.

Expungement of a criminal record is an "act of grace created by the State." *State v. Hamilton* (1996), 75 Ohio St. 3d 636, 639. Because expungement is a matter of privilege, not of right, the requirements of the expungement must be strictly followed and expungement can be granted only when all statutory requirements for eligibility are met. *State v. Jithoo*, Tenth Dist. No. 05AP-436, 2006-Ohio-4978 at ¶6. If an applicant is not eligible for records sealing pursuant to RC 2953.32 et seq., the trial court lacks jurisdiction to grant the requested relief. *Futrall* at ¶6; *State v. Simon* (2000), 87 Ohio St.3d 531, 721 N.E.2d 1041. Thus, when a court's judgment is based on an erroneous interpretation of the law, de novo review is appropriate. *Futrall* at ¶6

In the case sub judice, the trial court erred when it failed to follow the plain language of RC 2953.61, which provides that “when a person is charged with two or more offenses as a result of or in connection with same act and at least one of the charges has a final disposition that is different than the final disposition of the other charges, the person may not apply to the court for the sealing of his record in any of the cases until such time as he would be able to apply to the court and have all of the records in all of the cases pertaining to those charges sealed \*\*\*.” The lower court held that RC 2953.61 pertains only to the timing of an application to seal records and does not prohibit the partial sealing of records. *Pariag* at ¶21.

Of further importance to the lower court’s decision was the fact that the charges in the instant case were assigned two separate case numbers, rather than one single case number. *Id.* at ¶14. The Ohio Rules of Superintendence, though, require that criminal offenses and traffic offenses be assigned separate case numbers, even if arising from the same act or transaction. The lower court failed to acknowledge this requirement. See Sup.R. 37(A)(4)(c). Thus, despite the fact that the arrest reports, transcripts, written statements and other law enforcement records underlying both the dismissed charge and the conviction necessarily include information about both charges, the lower court’s holding requires all public agencies in possession of the records of the dismissed charge to partially seal them; a near impossible feat, as recognized by this court in *Futrell*. The plain language of RC 2953.61 contemplates this potential difficulty by specifically prohibiting the sealing of records of offenses with different dispositions arising out of or in connection with the same act unless *all of the records in all the cases* are eligible for sealing.

## STATEMENT OF FACTS AND OF THE CASE

On December 31, 2010, Appellee, Marlon Pariag, was stopped for driving under suspension by Officer Andrew D. Jones of the Ohio State Highway Patrol. As a result of the stop, Appellee was issued citations for driving under suspension, a first degree misdemeanor in case 2011TRD100861 and possession of drug paraphernalia, a fourth degree misdemeanor, and possession of drugs of abuse, a minor misdemeanor in case number 2011CRB239. The criminal and traffic offenses were assigned separate case numbers as required by Sup.R. 37(A)(4)(c) and Sup.R. 43(B)(2), even though they stemmed from the same act. The case was resolved with a plea bargain on February 25, 2011; Appellee pleaded guilty to the driving under suspension offense in violation of RC 4510.11(A), in exchange for which the State dismissed the drug paraphernalia and drug possession offenses.

On March 11, 2011 Appellee applied for the sealing of his record pertaining to the dismissal of the drug paraphernalia and drug possession violations. The State filed an objection to the application on May 9, 2011 and the trial court granted Appellee's request for the sealing of his record on June 3, 2011. On appeal, in a divided decision, the Tenth District Court of Appeals held that Revised Code 2953.61 only pertains to the time when an application for sealing of record may be filed, rather than an overall eligibility to have matters sealed. *Pariag* at ¶21. Further, the lower court distinguished the instant case from contrary holdings in other districts based on the fact that the dismissed charge and conviction in the case sub judice were filed under separate case numbers. *Id.* at ¶14.

This timely appeal follows the appellate court's affirmation of the trial court's judgment, recorded in *In re Application of Pariag*: 10<sup>th</sup> Dist. No. 11AP-569, 2012-Ohio-1376 (opinion and judgment entry attached).

## ARGUMENT

First Proposition of Law: A trial court is precluded as a matter of law from sealing the record of a dismissed charge, pursuant to Revised Code 2953.61, if the dismissed charge arises from or is in connection with a conviction which is statutorily exempt from sealing, regardless of whether dismissed charge and conviction are filed under separate case numbers.

Revised Code 2953.52 outlines the trial court's jurisdiction to seal records after a finding of not guilty, dismissal of proceedings or no bill. As pertains to the sealing of a dismissal, the statute provides:

(A)(1) Any person, who is found not guilty of an offense by jury or a court or who is the defendant named in a dismissed complaint, indictment, or information, may apply to the court for an order to seal his official records in the case. Except as provided in section 2953.61 of the Revised Code, the application may be filed at any time after the finding of not guilty or the dismissal of the complaint, indictment, or information is entered upon the minutes of the court or the journal, whichever entry occurs first. RC 2953.52(A)(1) (emphasis added).

Where multiple charges are involved in an application to seal, RC 2953.61 determines when an application may be filed. It provides:

When a person is charged with two or more offenses as a result of or in connection with the same act and at least one of the charges has a final disposition that is different than the final disposition of the other charges, **the person may not apply to the court for the sealing of his record in any of the cases until such time as he would be able to apply to the court and have all of the records in all of the cases pertaining to those charges sealed pursuant to divisions (A)(1) and (2) of section 2953.32 and divisions (A)(1) and (2) of section 2953.52 of the Revised Code.** R.C. §2953.61 (emphasis added).

In the instant case, Appellee was initially charged with Driving Under Suspension (M1), Possession of Drug Paraphernalia (M4), and Possession of Drugs of Abuse (MM) out of the same traffic stop. As is required by Sup.R. 37 (A)(4)(c) and Sup.R. 43 (B)(2), the criminal and traffic offenses were assigned separate case numbers. Appellee was subsequently convicted of Driving Under Suspension pursuant to RC 4510.11(A) and the possession of drug paraphernalia and possession of drugs of abuse offenses were dismissed. Pursuant to RC 2953.61, Appellee's ability to apply for sealing of the possession of drug paraphernalia and drugs of abuse offenses is limited by the court's jurisdictional authority to seal the related driving under suspension conviction.

Revised Code 2953.36 establishes the parameters for the court's exercise of expungement jurisdiction. It states that the preceding sections 2953.31 to 2953.35 (defining who is eligible for records sealing, at what time they are eligible and the criteria for granting said sealing) do not apply to "convictions under ... Chapter 4510... of the Revised Code, or a conviction for a violation of a municipal ordinance that is substantially similar to any section contained in [the] chapter[]." As such, Appellee was not eligible for sealing of his driving under suspension conviction under Chapter 4510 at any time.

Relying on a previous decision from the Tenth District Court of Appeals, *In re Hankins*, 10<sup>th</sup> Dist. No. 99AP-797, the trial court granted the sealing of the applicant's drug abuse and possession of drug paraphernalia dismissals, despite the language of RC 2953.61. In affirming the trial court's judgment, the lower court held that Revised Code 2953.61 only applies to charges filed under a single case number and further, only prescribes the waiting period required to apply for sealing of a record rather than limit the eligibility requirements for sealing of a

record involving multiple charges as result of or in connection with the same act with different dispositions. *Pariag* at ¶21.

Several Ohio Courts of Appeal have held that pursuant to RC 2953.61, multiple offenses arising from the same set of facts cannot be sealed unless all of the offenses are eligible for sealing. *State v. Minkner* (March 21, 1997), Second Dist. No. 95-CA-124, 1997 Ohio App. LEXIS 1084; *State v. Capone*, Second Dis. No. 20134, 2004-Ohio-4679; *State v. Selesky*, Eleventh Dist. No. 2008-P-0029, 2009-Ohio-1145; *State ex rel Lewis v Lawrence County* (1994), 95 Ohio App. 3d 565. In *Minkner*, the appellant pleaded guilty to one count of unlawful restraint amended from a kidnapping charge after being acquitted of a rape charge stemming from the same set of facts. *Id.* at \*2. On appeal, the Second District held that the appellant's request to seal his rape acquittal was expressly prohibited under RC 2953.61 and RC 2953.32. *Id.* at \*3. Because the appellant's rape and unlawful restraint offenses arose from the same set of facts, the appellant was not eligible to have his rape acquittal sealed until he was eligible to have his unlawful restraint conviction sealed. *Id.* \*3. The appellant's unlawful restraint conviction would never be eligible for sealing because the appellant had a prior conviction for rape in 1978 and thus was not a first offender as defined by RC 2953.32. *Id.* at \*4. Accordingly, the rape acquittal would never be eligible for sealing pursuant to RC 2953.61. *Id.* \*3-\*4.

In *State v. Selesky*, the appellee was charged with one count of hit skip and one count of failure to control stemming from the same traffic stop; the hit skip was dismissed and the appellee was convicted of the failure to control. *Id.* at ¶19. The Eleventh District Court of Appeals reversed the trial court's decision to grant the appellee's application to seal the record of his hit skip dismissal, holding that the appellant's hit skip dismissal did not qualify for sealing pursuant to RC 2953.61 because the companion charge of failure to control, of which he was

convicted, was not eligible for sealing by operation of RC 2953.36 which exempted traffic code convictions from Ohio's expungement scheme. *Id.* at ¶22.

As in *Minkner* and *Selesky*, Appellee in the instant case does not qualify to have the records of his drug possession and drug paraphernalia dismissals sealed pursuant to RC 2953.61 because the charges arose out of the same set of facts as his conviction for violating RC 4510.11(A), driving under suspension, which is specifically prohibited from being sealed as a matter of law pursuant to RC 2953.36(B).

To distinguish the instant case from those decided by the appellate courts in *Minkner*, *Selesky* and *Lewis*, as well as this Court's decision in *Futrall*, the lower court focused on the fact that the dismissed charges and conviction in the case sub judice were filed under two separate case numbers, rather than one case number. *Id.* at ¶14. This is a distinction without a difference. As noted by the dissent in the instant case, "the plain language of RC 2953.61 expressly prohibits the sealing of records in 'any of the *cases* [plural]' until such time as he would be able to seal the records in "all of the *cases* [plural]." Revised Code 2953.61 therefore looks beyond the administratively assigned case number and instead focuses on whether the charges result from, or are connected with, the same act and receive different dispositions." *Pariag*, dissent at ¶24.

Moreover, the lower court's conclusion that because the instant matter involves two separate case numbers with "two separate files, each with separate reports, index references, half sheets and records" means that the "official records associated with the conviction can be sealed without disturbing the official records of the dismissals" and thus "the practical difficulties forming the bases for the analyses in *Futrall* are notably absent from the instant matter" is clearly erroneous. An order to seal a person's records pursuant RC 2953.32 et seq. is not limited to the trial court's official records, but rather, applies to "all records that are possessed by any public

office or agency that relate to a criminal case”, including “all records and investigative reports possessed by law enforcement” and “all records of all testimony and evidence presented in all proceedings in the case.” RC 2953.51(D).

As recognized by the dissent in the instant case, “where a conviction and a dismissal are connected with the same act and share many of the same investigative reports and arrest records, it may be impossible to seal ‘all official records’ in only one of the cases.” *Pariag*, dissent at ¶30. Thus, the practical difficulties of partial sealing so readily dismissed by the lower court as inapplicable in the instant case are very much a concern and, as noted by this Court in a similar context, “how this task would be accomplished and who would have the authority to attempt it are questions that underscore the impractical reality of an attempt to seal certain convictions in one case while revealing others.” *Futrall* at ¶20.

Second Proposition of Law: Revised Code 2953.61 prohibits records from being partially sealed and is not simply a prescription for the timing of applications to seal records.

The lower court’s holding that RC 2953.61 pertains only to the timing of an application to seal records and does not prohibit the partial sealing of records is also error and in contradiction to this Court’s reasoning in *Futrall*. *Pariag* at ¶21. In *Futrall*, this Court was presented with the question of whether a trial court is precluded from sealing an applicant’s convictions that are eligible to be sealed by statute when one of the convictions is exempt by statute from being sealed. In making its determination that a conviction that is exempt by statute from being sealed also precludes the sealing of convictions that are otherwise eligible, this Court looked specifically to RC 2953.61 for guidance.

Though not directly applicable because the charges sought to be sealed in *Futrall* did not have different dispositions, this Court determined that RC 2953.61, along with RC 2953.31 (definition of first offender and effect of two or more convictions connected with the same act) and RC 2953.32 (processes and duties imposed for sealing records), demonstrate that the General Assembly, in enacting these provisions, “appears to have recognized the inherent difficulty of sealing only some convictions in one case” and illustrate the General Assembly’s intent to authorize the sealing of cases, not the sealing of individual convictions within cases.” This Court’s analysis clearly contemplates that RC 2953.61 serves to bar applicants from seeking to partially seal their records and is not simply a prescription regarding the timing of applications to seal records. Thus, the lower court’s holding that RC 2953.61 “was fashioned to prevent multiple applications when the timing associated with the underlying offenses differed....and is intended to promote judicial economy and efficiency, rather than acting as a complete bar to having matters expunged or sealed” is erroneous and in contradiction to this Court’s reasoning in *Futrall*. *Pariag* at ¶21.

Other Courts of Appeal have consistently held that RC 2953.61 acts as a bar to requests to partially seal an applicant’s records. As discussed previously, the Second, Fourth and Eleventh Districts have all held that dismissed charges that arise from or are in connection with convictions cannot be sealed unless the convictions also qualify for sealing. *State v. Minkner* (March 21, 1997), Second Dist. No. 95-CA-124, 1997 Ohio App. LEXIS 1084; *State v. Selesky*, Eleventh Dist. No. 2008-P-0029, 2009-Ohio-1145; *State ex rel Lewis v Lawrence County* (1994), 95 Ohio App. 3d 565. Additionally, as noted by the dissent in the instant case, the First District Court of Appeals, in *State v. Spohr*, 1<sup>st</sup> Dist. No. C-110314, 2012-Ohio-556, has also recently

“reaffirmed that RC 2953.61 is plain and unambiguous and has expressly rejected the argument that a distinction exists between eligibility and timing.” *Pariag* dissent at ¶27.

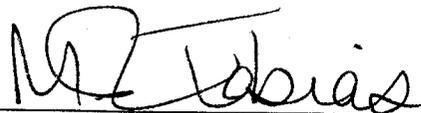
The plain, unambiguous language of RC 2953.61 provides that records sealing relief is not available to applicants who seek to seal records of dismissed charges that arise from or are in connection with convictions that are ineligible for sealing, regardless of whether the dismissed charges and convictions were assigned separate case numbers. To this end, the lower court erred when it held otherwise.

Respectfully submitted,

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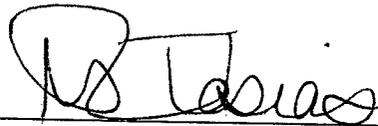


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**CERTIFICATE OF SERVICE**

This is to certify that a true copy of the foregoing Notice of Appeal and Memorandum in Support of Jurisdiction was mailed by regular U.S. Mail to Marlon G. Pariag, Appellee Pro-Se, 7682 Eagle Trace Drive, Westerville, Ohio 43082, this 10th day of May, 2012.

A handwritten signature in black ink, appearing to read "Melanie R. Tobias", written over a horizontal line.

Melanie R. Tobias (0070499)  
Director – Appellate Unit