

ORIGINAL

IN THE SUPREME COURT OF OHIO

State of Ohio,

Appellant

vs.

Marlon G. Pariag,

Appellee

Case No. 2012-0819

On Appeal from
the Franklin County Court of Appeals,
Tenth Appellate District

Court of Appeals case no. 11AP-569

Marlon Pariag's Motion for Reconsideration

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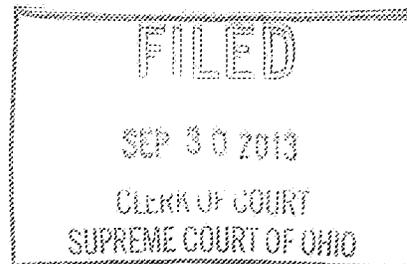
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I. Question presented by this motion

"The paramount importance of vigorous representation follows from the nature of our adversarial system of justice. This system is premised on the well-tested principle that truth—as well as fairness—is best discovered by powerful statements on both sides of the question." *Penon v. Ohio*, 488 U.S. 75, 84, 109 S. Ct. 346, 102 L. Ed. 2d 300 (1988). Here, an out-of-state, unrepresented defendant who misunderstood the nature of the appeal process did not submit briefs or present oral argument before the court of appeals or this Court. None of the significant statewide organizations with expertise in criminal-record-sealing law voiced their perspective on the issue presented in this case. This Court's September 19th opinion in this case made a major expansion to an exception to the criminal-record-sealing law, without the benefit of fully adversarial briefing and oral argument. Vigorous advocacy on Mr. Pariag's behalf would have highlighted the absurd results of the rule announced in this case—results that neither the appellant nor the majorities or dissents in the court of appeals and this Court appear to have been aware of. Vigorous advocacy would also have demonstrated how baseless was the State's key argument for this Court to accept jurisdiction in the first place. Should this Court, therefore, reconsider its recent decision in this case?

II. An absurd result from the wrong case

A. Absurd result: same charge would be sealable as a conviction but not sealable as a dismissal

This Court's recent decision in this case held:

A trial court is precluded, pursuant to R.C. 2953.61, from sealing the record of a dismissed charge if the dismissed charge arises "as the result of or in connection with the same act" that supports a conviction when the records of the conviction are not sealable under R.C. 2953.36, regardless of whether the charges are filed under separate case numbers.

State v. Pariag, __Ohio St.3d__, 2013-Ohio-4010, syllabus. This means that Mr. Pariag's *dismissed* drug charges will not be sealed, should the trial court find on remand that they are "as a result of or in connection with the same act" as his non-sealable traffic conviction. Neither the State nor any court that reviewed this case has recognized that if Mr. Pariag had been *convicted* of the drug charges, there would be no question that the trial court could have sealed them. This absurd result can be avoided by reconsidering this Court's recent decision and instead affirming the Tenth District's decision below.

There are two conditions required for R.C. 2953.61 to apply in a given case. The State's argument and this Court's opinion focus almost exclusively on the first: the record-sealing applicant must be asking for "two or more offenses [that were the] result of or in connection with the same act" to be sealed. Little attention was paid to the implications of the second condition: "at least one of the charges [must have] a final disposition that is different than the final disposition of the other charges." Mr. Pariag was convicted of driving under suspension, but his charges for drug possession and

drug-paraphernalia possession were dismissed. If dispositions for all of those charges had instead been convictions, R.C. 2953.61 would not have applied. Instead, the trial court would have had to turn to R.C. 2953.31. There, it is clear that convictions for minor-misdemeanor drug-possession and driving-under-suspension would not be counted for record-sealing-eligibility purposes.¹ Assuming his only remaining conviction was a fourth-degree misdemeanor for drug-paraphernalia possession, there is no doubt that Mr. Pariag would have been eligible to have both that and the minor misdemeanor sealed. R.C. 2953.31(A). For Mr. Pariag and anyone else in his position, this Court's new, expansive reading of R.C. 2953.61 means they cannot get dismissed charges sealed, but could get the same charges sealed if they had been convicted of those charges. The legislature could not have intended such a result when it created the criminal-record-sealing scheme in R.C. 2953.31-2953.61.

¹ "For the purposes of... this division, a conviction for a minor misdemeanor, [or] for a violation of any section in Chapter... 4510... of the Revised Code... is not a conviction." R.C. 2953.31(A). Driving under suspension is a violation of R.C. 4510.11(A). Though this traffic offense does not count as a conviction, it is also may not be sealed, according to R.C. 2953.36(B). By contrast, assuming the applicant otherwise meets the "eligible offender" definition of R.C. 2953.31(A), a minor misdemeanor for drug possession may be sealed.

There is a way to interpret R.C. 2953.61 so as to avoid much of this unreasonableness. The Tenth District did so by reading that statute together with the non-conviction-sealing statute:

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.

In re Application of Pariag, 10th Dist. Franklin No. 11AP-569, 2012-Ohio-1376, ¶21. While this Court has, in its recent decision, essentially rejected that in-pari-materia reading, it did so without having heard the strongest argument in favor of that reading:

interpreting R.C. 2953.61 as being about more than the mere timing of record-sealing applications ultimately results in dismissed charges from a completely separate case number *not* being sealed where the same charges *would be* sealed if they had resulted in convictions. Because this is an absurd result, the Court should re-open this case and reconsider its holding.

B. Wrong case: a statewide ruling was not necessary

As is explained in section III, below, this Court did not have the benefit of hearing vigorous argumentation from Mr. Pariag's side in this case. Not only did this mean the Court was not presented with the merits argument above, it also meant the Court lacked a robust memorandum in opposition to jurisdiction at the outset. Strong

advocacy at that stage would have illuminated why this case is a poor vehicle through which to announce the new rule created here.

Throughout this case, the State has wrongly argued that this Court's decision in *State v. Futrall*, 123 Ohio St.3d 498, 2009-Ohio-5590, is more controlling than it actually is. *See, e.g.*, Appellant's Memorandum in Support of Jurisdiction at 9. *Futrall* applies in situations where sealable and non-sealable convictions have been filed under the same case number. *Futrall* did not directly deal with R.C. 2953.61 because that case was concerned with five misdemeanors, all convictions and all filed under a single case number. Mr. Pariag's charges had different dispositions and were filed under different case numbers. *Futrall* is inapposite; nothing in the Tenth District's decision below contradicts *Futrall*.

The State makes much of the practical concerns discussed in *Futrall*. These concerns were focused on the difficulty of a *clerk of courts* in sealing some charges from a single case while not being able to seal other charges. *Id.* at ¶19. This Court is well aware of these practical realities—indeed this Court creates some of these realities through its Rules of Superintendence. *See, e.g.*, Sup.R. 43 (dealing with how cases are numbered by municipal and county courts). As the State correctly pointed out, a criminal-record-sealing order is often sent to several state entities outside of the court, such as local law-enforcement and children-services agencies. But then, to invent some basis for calling this an issue of statewide concern, the State speculated that these other agencies would

face the same impossibilities faced by clerks of courts in sealing records for a criminal charge that was initiated at the same time as a traffic offense, *even if* those charges were filed under separate case numbers. Appellant's Memo. in Supp. of Juris. at 1-2; *see also* Appellant's Merit Br. at 8 *and* Oral argument in Ohio Supreme Court case no. 2012-0819, held Apr. 9, 2013, <http://www.ohiochannel.org/MediaLibrary/Media.aspx?fileId=138612>, (accessed Sept. 27, 2013, at 12:39–13:47 of the video).

Ohio Revised Code 2953.61 was enacted 25 years ago and has not been amended since. Curiously, undersigned counsel's research has not revealed any amici briefs, in cases similar to this one, from the other entities supposedly burdened by the difficulties the State raises here. The State also did not cite to a single published report indicating that the kind of relief Mr. Pariag requested from the trial court is a genuine challenge for these agencies. In other words, this case does not appear to actually raise a significant issue of statewide concern. Had competent counsel been present to shine a brighter light on the complete absence of evidence supporting the State's speculation, this Court may have not accepted this case to begin with.

III. This Court has not heard both sides of this issue

Mr. Pariag entered the criminal justice system innocent until proven guilty. Yet, as even the State acknowledged in oral argument, the ubiquitously available digital record of his dismissed drug charges will have serious employment consequences. Oral argument, Ohio S.Ct. case no. 2012-0819, <http://www.ohiochannel.org/MediaLibrary>

/Media.aspx?fileId=138612 (8:25-9:40 of the video). This Court is best equipped to make such a significant ruling when presented with vigorous adversarial advocacy. Our justice system “is premised on the well-tested principle that truth—as well as fairness—is best discovered by powerful statements on both sides of the question.” *Penon v. Ohio*, 488 U.S. at 84. Due to several misunderstandings, described below, no such vigorous debate occurred. This Court should, therefore, reconsider its September 19th decision in Mr. Pariag’s case.

A. Mr. Pariag’s side of this issue was not argued at all

Soon after he had his record sealed by the Franklin County Municipal Court, Mr. Pariag moved to South Carolina. Affidavit of Marlon Pariag (attached), ¶2. After he moved, he received notice that the State was appealing to the Tenth District. *Id.* Though he did not retain his trial attorney, Andrew Jones, for the appeal, he did contact Mr. Jones by email to get an understanding of what he should do in response. *Id.* at ¶3. Mr. Jones did ultimately advise Mr. Pariag to seek another attorney to handle the appeal. However, his email exchange with Mr. Jones left Mr. Pariag with the impression that Mr. Pariag could, but did not need to, respond to the State’s appeal. *Id.*

Mr. Pariag was aware that the Tenth District had decided in his favor in March 2012 and that the State was again appealing. *Id.* at ¶2. However, his earlier email exchange with his trial attorney and the fact that he won the appeal without having taken any action, left him unsure whether his active participation was essential for a just result to

be achieved in this Court. *Id.* at ¶6. Rather than taking action to pursue the appeal directly, he merely asked his trial attorney, who was no longer representing him, about getting the Tenth District's and the Supreme Court's online records sealed during the pendency of the appeal. *Id.* at 5. He then tried to address this particular concern on his own, by filing an unfortunately ill-founded "Motion to Seal" with this Court shortly after receiving the State's merit brief in November 2012. *Id.* at ¶9. He did not retain counsel and did not file a brief.

In February 2013, several months after his merit brief would have been due, Mr. Pariag sought an appellate-attorney referral from his trial attorney. He was directed to the Columbus Bar Association's online attorney-search services. *Id.* at ¶7. Through those services, he tried to contact three appellate attorneys by email and voicemail, but never received a response. At that point, he believed that he did not have any more options. *Id.* at ¶8.

There may indeed be valid critiques of how Mr. Pariag responded to his trial attorney's advice or to the procedural events of these appeals. Nonetheless, it is clear he did not understand the legal significance of what was happening as his case progressed through the court of appeals and this Court. This Court should not announce such a consequential new interpretation of criminal-record-sealing law without the benefit of thorough and competent advocacy on both sides.

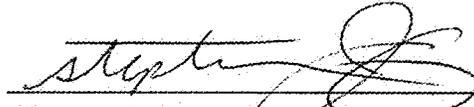
B. The absence of other respected voices on this issue

To ensure that important issues of criminal law are fully briefed and argued, this Court had required the Ohio Public Defender (OPD) to be notified of any appeal “involving a felony.” S.Ct.Prac.R. 14.2(A)(3) (version in effect at time the notice of appeal was filed in this case). OPD did not receive notice through this official channel, however, because this appeal involved only misdemeanors.

It appears OPD was not alerted to the importance and criminal nature of this case through unofficial channels either. When significant criminal appeals come before this Court, OPD and the Ohio Association of Criminal Defense Lawyers regularly file merit or amici briefs in the absence of, or in addition to, the argument of competent counsel. Such briefing serves the important function of giving the Court a more complete perspective on all the implications of criminal-law-related appeals. These voices were notably absent here. This may be because the case-acceptance announcement listed this case as simply “In re application of Pariag. Franklin App. No. 11AP-569, 2012-Ohio-1376.” *See* Case Announcements, Sept. 5, 2012, 2012-Ohio-4021, at 9. There was no indication that the State was a party to that appeal or that it was criminal-law related. Thus, those who unofficially monitor Ohio Supreme Court activity related to criminal law and alert others about it through professional networks may have not seen reason to look further into this case.

IV. Conclusion

This case appears to have been missed or misunderstood by anyone who might have spoken for Mr. Pariag or record-sealing applicants generally, until it was almost too late. The result is that this Court lacked any presentation from the defense side of the issue, both before and after the Court accepted jurisdiction. This Court now has the opportunity to receive the benefit of fully adversarial advocacy on this important matter. Given the unforeseen absurd result created by the current decision and the State's earlier specious argument in favor of jurisdiction, this Court should take this opportunity and reconsider this case.



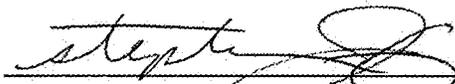
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Certificate of Service

I certify that I emailed an accurate digital copy of this document to Melanie R. Tobias, appellant's counsel of record, at mrtobias@columbus.gov on September 30, 2013.



Stephen Johnson Grove (0078999)

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State of Ohio,

Case No. 2012-0819

Appellant

vs.

On Appeal from
the Franklin County Court of Appeals, Tenth
Appellate District

Marlon G. Pariag,

Appellee

Court of Appeals case no. 11AP-569

Affidavit of Marlon G. Pariag

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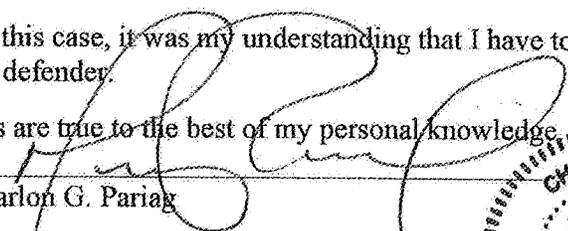
I, Marlon G. Pariag, am of sound mind and state the following facts based on my own personal knowledge and under penalty of perjury:

1. I was the defendant in Franklin County Municipal Court case no. 2011 CRX 50583 and the appellee in this case, Supreme Court case no. 2012-0819.
2. The Franklin County Municipal Court ordered my record sealed for the dismissed drug charges under case no. 2011 CRX 50583 in June 2011. About one ^{month} later, I moved from Ohio to South Carolina, where I currently live. Throughout the appeals in this case, all mail that was sent to my former Ohio address was forwarded to my South

Carolina address. There was usually about a week delay between when any of the court documents were sent to my Ohio address and when I received them in South Carolina.

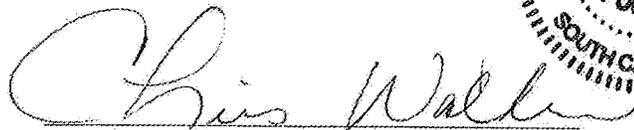
3. My trial attorney for the record-sealing application was Andrew Jones (0078697). In July 2011, Mr. Jones notified me of the city's notice of appeal to the Tenth District and the deadline for my brief, if I was going to file one. Over the course of several emails with Mr. Jones in September 2011, he first told me he was willing to represent me on that appeal; then he told me he had no experience with such appeals and he advised me to look for another appellate attorney. Then he told me that he had spoken with the trial judge and that I did not necessarily need to respond to the appeal by the city. While I cannot swear to or affirm the truth of Mr. Jones's statements, I can say that my email exchanges with him in September 2011 left me with the understanding that it was not really necessary for me to do anything regarding my appeal.
4. Mr. Jones was no longer representing me after September 2011.
5. I later found out that, though I won the Tenth District appeal, the city was then appealing to the Ohio Supreme Court. I emailed Mr. Jones in October 2012 to ask if there was some way to keep my name from being associated with the Tenth District and Supreme Court appeals because it was very easy to find this information with a simple Google search of my name. I did not receive a response from him about this.
6. Since I won the Tenth District appeal without having responded, I was not sure at first whether I needed to respond to the Supreme Court appeal.
7. In February 2013, I emailed Mr. Jones to ask for a referral to an appellate attorney to help with the Supreme Court appeal. He pointed me to the Columbus Bar Association.
8. Using the Columbus Lawyer Finder and Lawyer Referral Service available on the website of the Columbus Bar Association, I contacted two attorneys that seemed to handle appeals by email or web form. I do not remember their names and never received a call back. I left a voicemail for a third attorney I identified using those same services on the Columbus Bar Association website; I also received no call back from that attorney. When I did not receive any callbacks, I decided that because of the nature of my case or because I now lived in another state, no Ohio appellate attorney would likely be willing to take my appeal. I did not know what else to do at that point.
9. After receiving the city's Supreme Court brief, I tried to get all the online records of the Tenth District and Supreme Court appeals sealed because they were so easy to find and were harming my employment prospects. I filed a "Motion to Seal" with the Supreme Court. It was denied.
10. While I am not wealthy, throughout this case, it was my understanding that I have too much income to qualify for a public defender.

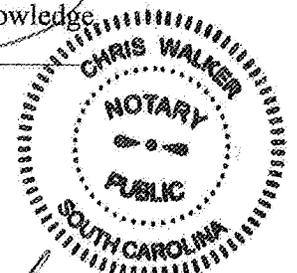
I solemnly affirm that all the foregoing facts are true to the best of my personal knowledge.


Marlon G. Pariag

The entire foregoing affidavit was solemnly affirmed and subscribed to in my presence on

9-28-13





My Commission Expires
April 14, 2021