

ORIGINAL

IN THE OHIO SUPREME COURT

State of Ohio, :

Appellant, : Case No. 2012-0819

v. : On Appeal from the Franklin County

Marlon G. Pariag, : Court of Appeals, Tenth Appellate

Appellee. : District, Case No. 11AP-569

**Memorandum in Support of Appellee’s Motion for Reconsideration of Amici Curiae  
the Office of the Ohio Public Defender, the Cuyahoga County Public Defender’s  
Office, and the Ohio Association of Criminal Defense Lawyers**

**CITY OF COLUMBUS,  
DEPARTMENT OF LAW**

Richard C. Pfeiffer, Jr. (0021982)  
City Attorney  
Lara N. Baker-Moorish (0063721)  
City Prosecutor

Melanie R. Tobias (0070499)  
Director – Appellate Unit  
(Counsel of Record)

375 S. High St., 17th Fl.  
Columbus, OH 43215-4350  
(614) 645-8876  
(614) 645-6548 (fax)

*Counsel for the State of Ohio*

**OHIO JUSTICE & POLICY CENTER**

Stephen JohnsonGrove (0078999)  
(Counsel of Record)  
Pamela H. Thurston (0039467)

215 E. Ninth St., Ste. 601  
Cincinnati, OH 45202  
(513) 421-1108 x14  
(513) 562-3200 (fax)  
sjohnsongrove@ohiojpc.org

*Counsel for Marlon G. Pariag*

**FILED**  
SEP 30 2013  
CLERK OF COURT  
SUPREME COURT OF OHIO

**OHIO ASSOCIATION OF  
CRIMINAL DEFENSE LAWYERS**

Matthew Bangerter (0081898)  
(Counsel or Record)

1360 W. 9<sup>th</sup> St., Suite 200  
Cleveland, Ohio 44113  
(216) 574-9170

*Counsel of Record for Amicus Curiae the  
Ohio Association of Criminal Defense  
Lawyers*

**CUYAHOGA COUNTY PUBLIC  
DEFENDER'S OFFICE**

Jeff Gamso (438691)  
Assistant Public Defender  
(Counsel of Record)

Erika Cunliffe (0074480)  
Assistant Public Defender

310 Lakeside Avenue, Suite 400  
Cleveland, Ohio 44113-1201  
(216) 443-7223

*Counsel of Record for Amicus Curiae the  
Cuyahoga County Public Defender's  
Office*

**OFFICE OF THE OHIO PUBLIC  
DEFENDER**

E. Kelly Mihocik (0077745)  
Assistant State Public Defender  
(Counsel of Record)

250 East Broad Street -- Suite 1400  
Columbus, Ohio 43215  
(614) 466-5394  
(614) 752-5167 (Fax)  
kelly.mihocik@opd.ohio.gov

*Counsel of Record for Amicus Curiae the Office  
of the Ohio Public Defender*

## I. Introduction.

This Court only takes important cases. *See Williamson v. Rubich*, 171 Ohio St. 253, 254, 168 N.E.2d 876 (1960) (stating that the Ohio Supreme Court only accepts a case if it presents “a question of public or great general interest as distinguished from questions of interest primarily to the parties.”) And yet, Marlon Pariag proceeded pro se - as a de facto representative of a large class of similarly situated persons - never bothering to file a merit brief or attend oral argument. Consequently, this Court was forced to make a decision without hearing both sides of the argument, having the issues fully fleshed out, or being presented with its potential implications. And as a result, the rights of hundreds or thousands of low-level offenders were affected, trial courts have been stripped of some of their discretion, and there is a significant risk that people will now have their records unsealed.<sup>1</sup> This could not be what the legislature intended when it drafted R.C. 2953.32, 2953.36, 2953.52, and 2953.61. The Office of the Ohio Public Defender, the Cuyahoga County Public Defender’s Office, and the Ohio Association of Criminal Defense Lawyers as amici curiae file this memorandum in support of Mr. Pariag’s motion for reconsideration of this Court’s September 19, 2013 decision and urges this Court to order further briefing.

---

<sup>1</sup> If sealing records under these circumstances is contrary to law, then the sealing court may have acted without jurisdiction, and the act would be void. *See State v. Fischer*, 128 Ohio St.3d 92, 2010-Ohio-6238, 942 N.E.2d 332, ¶ 23-24.

**II. This case has the potential for significant, unintended, far-reaching consequences that were never presented to this Court for consideration.**

This Court's decision was rendered without the usual safeguards of the adversarial process. Consequently, this Court was not presented with the arguments and information needed to fully consider the issues and effects of its decision. Because Mr. Pariag's position was not advocated at all to this Court, let alone by competent legal counsel, many significant matters were left open, which have the potential for far-reaching and devastating consequences, including:

- creating Equal Protection concerns because there is no rational basis for treating traffic offenders differently than non-traffic offenders;
- opening the floodgates to the unsealing of records;
- making it harder for persons similarly situated to Mr. Pariag to find employment;
- stripping trial courts of their discretion in determining what is in the best interests of an offender and the public;
- acting as a disincentive for persons similarly situated to Mr. Pariag to comply with law;
- discouraging plea bargaining; and
- reaching the absurd result that Mr. Pariag would have been in a better position if he had pleaded guilty to the drug related charges and allowed the traffic offense to be dismissed.

If the briefing is reopened, this Court may consider these consequences, as well as the nuanced legal arguments that went unadvocated.<sup>2</sup>

Indeed, this case turned on the complicated task of determining the legislature's intent when drafting Chapter R.C. 2953.32, 2953.36, 2953.52, and 2953.61. And more specifically, whether the legislature intended for traffic offenders who are simultaneously charged with sealable offenses to be treated differently than non-traffic offenders who commit the same offenses. The lynchpin of this Court's decision was the interpretation of "same act" - a phrase that has baffled courts and litigants throughout the State. *See generally State v. Rance*, 85 Ohio St.3d 632, 1999-Ohio-291, 710 N.E.2d 699, *overruled by State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, 942 N.E.2d 1061. *See State v. Pariag*, --- Ohio St.3d ---, 2013-Ohio-4010, (Pfieffer, J. dissenting; O'Donnell, and O'Neill, JJ., dissenting); R.C. 2953.31(A) (defining "first offender" and noting a distinction between "same act" and "offenses committed at the same time"). Had Mr. Pariag proceeded with counsel, this argument, among others, could have been presented to this Court. And while Mr. Pariag was able to choose whether to retain counsel to represent his interests, the class that he in effect represented had no choice.

---

<sup>2</sup> The adversarial process is crucial. Courts rely on the parties to present them with the facts, issues, implications, and other necessary information that should be considered in judicial decision making. *See, e.g., Justice Dept. Admits Error in Not Briefing Court*, New York Times, July 3, 2008, [http://www.nytimes.com/2008/07/03/us/03scotus.html?\\_r=0commenting](http://www.nytimes.com/2008/07/03/us/03scotus.html?_r=0commenting) (accessed on September 28, 2013) (commenting on *Kennedy v. Louisiana*, 554 U.S. 407, 128 S.Ct. 2641, 171 L.Ed.2d 525 (2008), in which the United States Supreme Court based its decision, in part, on a factually incorrect assertion in the briefs of the parties).

And that class had no reasonable way to know that this case was pending, and no way to understand the consequences that it could have on them. *See Powell v. Alabama*, 287 U.S. 45, 64, 53 S.Ct. 55, 77 L.Ed. 158 (1932) (stating that "[e]ven the intelligent and educated layman has small and sometimes no skill in the science of law.") Moreover, courts rely on parties to brief the competing issues, facts, and perspectives. While this Court has already devoted time and resources to this case, the potential risks to the public,<sup>3</sup> and the potential unintended consequences, far outweigh the additional burdens imposed by allowing additional briefing and arguments in this case.

### **III. Exceptional circumstances establish good cause for delay.**

The unique administrative circumstances that applied to these proceedings provide this Court with good grounds for reopening the briefing in this case. The Ohio Public Defender seeks to protect the rights of indigent clients in matters arising from criminal proceedings. And it ordinarily monitors this Court's docket so that it may offer a broader perspective on cases that bear on important criminal law related issues. Indeed, this Court recognizes the important role that the Ohio Public Defender plays in assisting with criminal matters. *See* S.Ct.Prac.R. 3.11(A)(3) (requiring the State to serve the Ohio Public Defender with its notice of appeal in all cases that involve a felony).

---

<sup>3</sup> According to one website, Ohio issues more traffic tickets each year than any other state. Statistic Brain, *Driving Citation Statistics*, <http://www.statisticbrain.com/driving-citation-statistics/> (accessed on September 28, 2013).

But because of the administrative processes applicable to this case, its significance went unrecognized.

More specifically, this case arose from a misdemeanor, and there is no rule that requires the State to serve the Ohio Public Defender in non-felony cases. Moreover, the Ohio Public Defender's lack of formal notice of this case was compounded by the original case caption, which was *In re Application of Pariag* – a captioning style that is not ordinarily associated with criminal cases. See Sept. 5, 2012, Entry. Consequently, this case did not receive the time, attention, or analysis that would generally be given to other pending criminal law-related matters. But given the unusual circumstances of this case and the crucial issues involved, this Court should exercise its authority to reconsider its September 19, 2013 decision and order further briefing in this case. See generally *State v. Martello*, 96 Ohio St.3d 1482, 2002-Ohio-4448, 774 N.E.2d 272 (appointing counsel and granting leave to file appellee's brief); 96 Ohio St.3d 1509, 2002-Ohio-4950, 775 N.E.2d 852 (granting second oral argument).

#### **IV. Conclusion.**

Because the argument presented to this Court was one sided, the issues were not fleshed out, and this Court was not presented with the information necessary to fully consider the potential implications, the Office of the Ohio Public Defender, the Cuyahoga County Public Defender's Office, and the Ohio Association of Criminal

Defense Lawyers ask this Court to reconsider its September 19, 2013 decision and allow further briefing in this case.

Respectfully submitted,

**OHIO ASSOCIATION OF  
CRIMINAL DEFENSE LAWYERS**

**OFFICE OF THE OHIO PUBLIC  
DEFENDER**

*MATTHEW BANGERTER PER AUTH. E. Kelly Mihocik*  
Matthew Bangerter (0081898)  
(Counsel or Record)

1360 W. 9<sup>th</sup> St., Suite 200  
Cleveland, Ohio 44113  
(216) 574-9170

*Counsel of Record for Amicus Curiae the  
Ohio Association of Criminal Defense  
Lawyers*

E. Kelly Mihocik (0077745)  
Assistant State Public Defender  
(Counsel of Record)

250 East Broad Street – Suite 1400  
Columbus, Ohio 43215  
(614) 466-5394  
(614) 752-5167 (Fax)  
kelly.mihocik@opd.ohio.gov

*Counsel of Record for Amicus Curiae the Office  
of the Ohio Public Defender*

**CUYAHOGA COUNTY PUBLIC  
DEFENDER'S OFFICE**

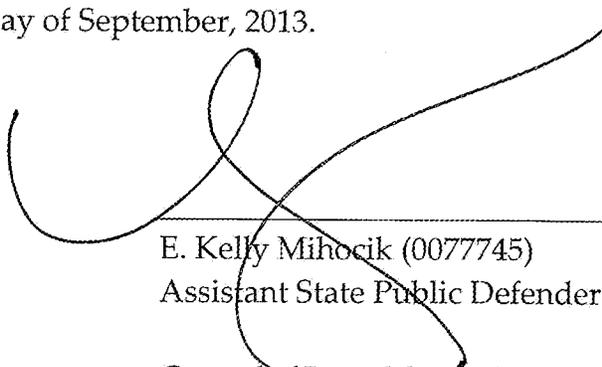
*JEFF GAMSO per authority by E. Kelly Mihocik*  
Jeff Gamso (438691)  
Assistant Public Defender  
(Counsel of Record)

310 Lakeside Avenue, Suite 400  
Cleveland, Ohio 44113-1201  
(216) 443-7223

*Counsel of Record for Amicus Curiae the  
Cuyahoga County Public Defender's  
Office*

## CERTIFICATE OF SERVICE

I certify a copy of the foregoing was sent by regular U.S. Mail, to OHIO JUSTICE & POLICY CENTER, Stephen JohnsonGrove , 215 E. Ninth St., Ste. 601, Cincinnati, OH 45202, and Melanie R. Tobias, Director – Appellate Unit, 375 S. High St., 17th Fl., Columbus, OH 43215-4350 on this 30th day of September, 2013.



---

E. Kelly Mihocik (0077745)  
Assistant State Public Defender

*Counsel of Record for Amicus Curiae the Office of  
the Ohio Public Defender*

#403384