

**IN THE SUPREME COURT OF OHIO**

|                              |   |  |
|------------------------------|---|--|
| <b>MICHAEL GYUGO,</b>        | ) | <b>Case No. 2016-0564</b>                        |
|                              | ) |  |
| <b>Plaintiff-Appellant,</b>  | ) | <b>On Appeal from the</b>                        |
|                              | ) | <b>Tenth Appellate District Court of Appeals</b> |
| <b>v.</b>                    | ) | <b>Franklin County</b>                           |
|                              | ) | <b>Case No. 15AP-150</b>                         |
| <b>FRANKLIN COUNTY BOARD</b> | ) |  |
| <b>OF DEVELOPMENTAL</b>      | ) |  |
| <b>DISABILITIES,</b>         | ) |  |
|                              | ) |  |
| <b>Defendant-Appellee.</b>   | ) |  |

**MERIT BRIEF OF AMICUS CURIAE, OHIO ASSOCIATION OF COUNTY BOARDS  
OF DEVELOPMENTAL DISABILITIES, IN SUPPORT OF APPELLEE**

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**TABLE OF CONTENTS**

|   | <b><u>Page</u></b> |
|---|--------------------|
| TABLE OF CONTENTS.....  | i                  |
| TABLE OF AUTHORITIES .....  | ii                 |
| STATEMENT OF INTEREST OF AMICUS .....   | 1                  |
| STATEMENT OF THE CASE AND FACTS .....   | 1                  |
| LAW AND ARGUMENT .....  | 2                  |
| <b>Appellant’s Proposition of Law:</b> An applicant with a criminal conviction that has been sealed pursuant to R.C. 2953.32 is not obliged to disclose it in response to an application question posed in violation of R.C. 2953.33(B)(1) and may not be disciplined for declining to do so..... | 2                  |
| I.    Abuse and Neglect of Individuals With Developmental Disabilities – The Scope of the Problem .....   | 2                  |
| II.   The Public Policy Behind Protecting Developmentally Disabled Individuals Outweighs the Purpose of Ohio’s Expungement Statutes .....   | 4                  |
| III.  As Applied to Gyugo, the Questions Regarding His Conviction History Were Not Overly Broad .....   | 7                  |
| IV.   Gyugo Was Required to Answer the Questions Regarding His Prior Convictions Truthfully, Regardless of Whether He Believed the Questions Violated R.C. 2953.33(B)(1) .....  | 8                  |
| CONCLUSION.....   | 10                 |
| CERTIFICATE OF SERVICE .....  | 11                 |

**TABLE OF AUTHORITIES**

|   | <u>Page</u> |
|---|-------------|
| <b><u>CASES</u></b>   |             |
| <i>Carter v. Gestalt Inst. of Cleveland, Inc.</i> , 8th Dist. Cuyahoga No. 99738, 2013-Ohio-5748 .....                                    | 9           |
| <i>City of Pepper Pike v. Doe</i> , 66 Ohio St. 2d 374, 421 N.E.2d 1303 (1981) .....  | 5           |
| <i>Columbus-Suburban Coach Lines, Inc. v. Pub. Util. Comm.</i> , 20 Ohio St. 2d 125, 254<br>N.E.2d 8 (1969).....                          | 10          |
| <i>Gyugo v. Franklin County Board of Developmental Disabilities</i> , 10th Dist. Franklin No.<br>15AP-150, 2016-Ohio-823 .....            | 1, 5, 8     |
| <i>State ex rel. Ganoom v. Franklin County Bd. of Elections</i> , __ Ohio St.3d __, Slip Opinion<br>No. 2016-Ohio-5864, __ N.E.3d __..... | 10          |
| <b><u>STATUTES</u></b>  |             |
| R.C. 2953.32(D).....  | 5           |
| R.C. 2953.33(B)(1) .....  | passim      |
| R.C. 2953.55(A).....  | 9           |
| <b><u>REGULATIONS</u></b>   |             |
| Ohio Adm.Code 5123:2-5-04(D).....   | 5, 8        |

## **STATEMENT OF INTEREST OF AMICUS**

The Ohio Association of County Boards of Developmental Disabilities (“OACB”) is a non-profit organization specializing in providing information, continuing education, and acting as legislative liaison to Ohio’s 88 County Boards of Developmental Disabilities (“County Boards of DD”). All 88 Ohio County Boards of DD are members of OACB.

OACB presents this brief in support of the well-being of the more than 90,000 developmentally disabled children and adults in Ohio who receive services from local County Boards of DD each year. OACB has a strong interest in legal and legislative developments impacting their members, including developments that impact the hiring and registration of individuals who provide vital services to this vulnerable population.

OACB urges this Court to affirm the Tenth District’s decision in *Gyugo v. Franklin County Board of Developmental Disabilities*, 10th Dist. Franklin No. 15AP-150, 2016-Ohio-823, which held that Appellee, Franklin County Board of Developmental Disabilities (“Franklin County”), was justified in terminating Appellant, Michael Gyugo (“Gyugo”), for failing to disclose a sealed conviction in response to questions about his criminal history. Gyugo and Amicus Curiae Ohio Association of Criminal Defense Lawyers (“Amicus Defense Lawyers”) argue that Franklin County did not ask Gyugo about his criminal conviction history in the manner set forth in the expungement statute (R.C. 2953.33(B)(1)), and thus, Gyugo was relieved of any obligation to answer truthfully. Neither policy reasons nor the plain language of the statute support that result.

## **STATEMENT OF THE CASE AND FACTS**

OACB defers to the Statement of the Case and the Statement of Facts as set forth in Appellee’s Brief, but wishes to emphasize the fact that Gyugo has stipulated in this matter that he was convicted of a “disqualifying offense.” Appellant Supp. 1-2; *Gyugo* at ¶¶ 2, 26. The

disqualifying offense – regardless of whether it was sealed – would have statutorily disqualified Gyugo from his position with Franklin County at the time he was hired unless Franklin County had determined that he was rehabilitated. Appellant Supp. 1-2; Appellee Supp. 18, 24-27.

## LAW AND ARGUMENT

**Appellant’s Proposition of Law:** An applicant with a criminal conviction that has been sealed pursuant to R.C. 2953.32 is not obliged to disclose it in response to an application question posed in violation of R.C. 2953.33(B)(1) and may not be disciplined for declining to do so.

### **I. Abuse and Neglect of Individuals With Developmental Disabilities – The Scope of the Problem**

#### **Caregiver accused of sexually abusing disabled woman**

A Williamsville man who worked as a caregiver for People Inc. is accused of sexually abusing a woman with severe developmental disabilities...<sup>1</sup>

#### **Caregiver Charged With Abuse of Intellectually Disabled Man**

A house manager at a group home for adults with intellectual disabilities has been charged with multiple counts of assault and reckless endangerment for abusing a male resident of the home...<sup>2</sup>

#### **Camera catches caregiver abusing cerebral palsy client**

The video shows the caregiver striking the 24-year-old client with a plastic toy container...<sup>3</sup>

Too often we read headlines in the news like these about developmentally disabled individuals who are the victims of abuse or neglect at the hands of a caregiver – sometimes a caregiver who may have had a criminal history of similar offenses or who may be otherwise unfit to care for these individuals. Unfortunately, abuse of this vulnerable population is prevalent and pervasive in our society. Studies have shown that developmentally disabled individuals are abused or neglected at a much higher rate than other citizens, are abused for longer periods of

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<sup>1</sup> The Buffalo News, <http://buffalonews.com/2015/10/15/caregiver-accused-of-sexually-abusing-disabled-woman/> (last accessed October 12, 2016).

<sup>2</sup> NBC Washington, <http://www.nbcwashington.com/news/local/Caregiver-Charged-With-Abuse-Of-Intellectually-Disabled-Man-189709791.html> (last accessed October 12, 2016).

<sup>3</sup> The Gainesville Sun, <http://www.gainesville.com/news/20150910/aso-camera-catches-caregiver-abusing-cerebral-palsy-client> (last accessed October 12, 2016).

time, are more likely to be abused by a caregiver or someone they know, and often are repeatedly abused by the same person.<sup>4</sup>

In 2012, the Disability and Abuse Project conducted a nationwide survey focusing on incidents of, responses to, and attitudes toward abuse and victimization of both adults and children with disabilities.<sup>5</sup> The results of this survey were staggering. More than 70 percent of respondents with disabilities reported that they had been abused in some manner (i.e., verbal abuse, physical abuse, sexual abuse, neglect, financial abuse).<sup>6</sup> More than 90 percent of these individuals had experienced abuse on more than one occasion, and of these victims, 46 percent experienced abuse more frequently than they could count.<sup>7</sup>

Compounding the problem, individuals with developmental disabilities are less likely to report abuse or neglect than the general population.<sup>8</sup> More than 41 percent of those surveyed who were sexually abused did not report the abuse.<sup>9</sup> The survey also showed 58 percent of those interviewed did not report an assault because they believed nothing would happen; 38 percent had been threatened or were otherwise afraid; and 33 percent did not know how or where to

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<sup>4</sup> See BJS.gov, *Crime Against Persons with Disabilities, 2009-2013 – Statistical Tables (Summary May 2015)*, [https://www.bjs.gov/content/pub/pdf/capd0913st\\_sum.pdf](https://www.bjs.gov/content/pub/pdf/capd0913st_sum.pdf) (last accessed October 12, 2016); Disability Justice, *Abuse and Exploitation of People with Developmental Disabilities*, <http://disabilityjustice.org/justice-denied/abuse-and-exploitation/> (last accessed October 12, 2016); Disability and Abuse Project, *A Report on the 2012 National Survey on Abuse of People with Disabilities*, <http://disability-abuse.com/survey/survey-report.pdf> (last accessed October 12, 2016).

<sup>5</sup> Disability and Abuse Project, *A Report on the 2012 National Survey on Abuse of People with Disabilities*, <http://disability-abuse.com/survey/survey-report.pdf> at p. 1 (last accessed October 12, 2016). Approximately 7,300 people, including approximately 2,501 people with all types of disabilities, participated in the survey.

<sup>6</sup> *Id.* at p. 3.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

report it.<sup>10</sup> These statistics underscore the importance of protecting this vulnerable population from abuse and neglect.

Unfortunately, developmentally disabled individuals are uniquely vulnerable to victimization because they are frequently isolated and dependent on others, such as caregivers, drivers, and therapists, for assistance with basic physical needs. This assistance is frequently provided in unsupervised settings with little or no oversight. Developmentally disabled individuals are often unable to defend themselves, may have limited communication skills or cognitive abilities, and are more likely to accept inappropriate behavior without questioning or understanding the motive behind it. Thus, it is critical that organizations like Franklin County have the utmost confidence that their staff is qualified, trustworthy, and capable of caring for this vulnerable population.

One of the ways to ensure caregivers are qualified and to reduce the risk of abuse and neglect of developmentally disabled individuals is through background checks in the hiring and registration process. These checks are critical in screening applicants and preventing abuse, neglect, and exploitation of developmentally disabled individuals.

## **II. The Public Policy Behind Protecting Developmentally Disabled Individuals Outweighs the Purpose of Ohio's Expungement Statutes**

In arguing for reversal of the Tenth District's decision, Gyugo and Amicus Defense Lawyers focus heavily on the public policy reasons behind Ohio's expungement statutes. They argue that if individuals like Gyugo are required to disclose sealed convictions in response to questions that do not strictly conform to the wording of R.C. 2953.33(B)(1), the purpose behind Ohio's expungement statutes will be eviscerated and employers will be permitted to discriminate against applicants with criminal convictions. OACB disagrees.

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<sup>10</sup> *Id.*

While the expungement statutes do serve an important purpose in rehabilitating criminal offenders, expungement is not an absolute privilege, nor is it a substantive right. More importantly, expungement does not otherwise eradicate or erase the conviction itself. *See City of Pepper Pike v. Doe*, 66 Ohio St. 2d 374, 378, 421 N.E.2d 1303 (1981) (“[E]xpungement does not literally obliterate the criminal record.”). As the Tenth District correctly noted, an individual’s sealed conviction is still accessible for certain specific purposes, including criminal background checks for certain types of employment. *Gyugo* at ¶16; R.C. 2953.32(D).

Indeed, the General Assembly has determined that certain offenses automatically disqualify an applicant from working in certain industries, such as those industries that provide care and services to vulnerable populations (e.g., children, elderly, disabled). By definition, these disqualifying offenses bear a direct and substantial relationship to the position sought. *Gyugo* was convicted of such an offense. Although *Gyugo* was later able to seal the record of that conviction, the Ohio Department of Developmental Disabilities (the “Department”) recognized that the need for full disclosure of disqualifying offenses, which is necessary to protect Ohio’s developmentally disabled children and adults from abuse, neglect, and exploitation, heavily outweighs any prejudice an applicant may suffer from revealing the sealed convictions. Accordingly, the Department adopted rules that require applicants to “disclose a conviction for a disqualifying offense, ***including a conviction that has been sealed.***” Ohio Adm. Code 5123:2-5-04(D) (Emphasis added.).

The Department imposed this requirement because it determined that applicants who seek to work with developmentally disabled individuals – individuals who are substantially more likely to be abused than the general population – should be subject to a more thorough inquiry



into their criminal conviction history. In other words, these applicants are held to a higher standard.

While Amicus Defense Lawyers spend considerable time discussing the impact a criminal conviction may have on an individual and the prejudice of employers who refuse to hire individuals with criminal convictions, those examples carry little weight under the circumstances presented here. This is not a case involving clerical positions, data entry, warehouse workers, delivery drivers, sales clerks – occupations where there are no statutory bans or public policy concerns about protecting individuals from abuse and neglect.

Rather, this is a case where Gyugo's criminal conviction – regardless of whether it was sealed – would have statutorily disqualified him from his position with Franklin County. His offense bore a direct and substantial relationship to his position that involved caring for developmentally disabled individuals. Only if Franklin County had determined that Gyugo was rehabilitated would he have been permitted to remain in his position. Franklin County, however, was never given the opportunity to exercise that right because Gyugo failed to disclose that he had been convicted of a disqualifying offense. Prior to and throughout his employment with Franklin County, Gyugo was asked *five* times whether he had any criminal convictions – and *five* times, Gyugo answered “no,” even in the face of questions that specifically asked for sealed convictions.

As argued in Section IV below, regardless of whether Gyugo believed that the criminal conviction questions conformed to the wording in the statute, nothing in the expungement statutes permitted Gyugo to deny the existence of his sealed conviction. Thus, any answer other than “yes” in response to the questions of whether he had any felony or misdemeanor convictions, including those that were sealed, was dishonest and grounds for termination.

Organizations like Franklin County have an obligation to protect the vulnerable population it serves on a daily basis. In order to do that, they must be able to trust their employees. With regard to Gyugo, Franklin County had a right to know that he had been convicted of a disqualifying offense, regardless of whether it was sealed. Gyugo, by contrast, did not have a right to withhold that information, regardless of whether he deemed the questions to be valid. The Tenth District's decision does not threaten the purpose of Ohio's expungement laws. Rather, it protects Ohio's developmentally disabled population by requiring that applicants answer criminal background questions truthfully. The public policy reasons for protecting disabled individuals from abuse, neglect, and exploitation, which require full disclosure of certain disqualifying offenses, outweigh Gyugo's concerns about revealing sealed convictions. The Tenth District's decision should be affirmed.

**III. As Applied to Gyugo, the Questions Regarding His Conviction History Were Not Overly Broad**

Ohio Revised Code 2953.33(B)(1) provides that a person may be asked about a sealed conviction “[i]n any application for employment, license, or other right or privilege...[if] the question bears a direct and substantial relationship to the position for which the person is being considered.” Gyugo argues that the questions posed to him regarding his conviction history were overly broad because they asked for all felony and misdemeanor convictions, and not just those convictions that bore a direct and substantial relationship to the position for which he applied.

As applied to Gyugo, however, the question was not overly broad because he had been convicted of a disqualifying offense, which Gyugo stipulated to during the proceedings before the State Personnel Board of Review. As the Tenth District correctly concluded, a “disqualifying offense” is one that bears a “direct and substantial relationship” to the position sought. *Gyugo* at

¶24. Thus, by definition, Gyugo’s offense was directly and substantially related to his position at Franklin County.

Under the applicable administrative regulations, Gyugo was required to disclose his disqualifying offense to Franklin County even though it had been sealed and regardless of the way the questions were posed to him. Ohio Admin. Code 5123:2-5-04(D) provides that “[a]pplicants for or holders of registration or certification shall disclose a conviction for a disqualifying offense, *including a conviction that has been sealed.*” (Emphasis added.)

While the Tenth District surmised that the questions posed to Gyugo could have potentially posed a disclosure issue for an applicant who had a non-disqualifying criminal conviction that was sealed, “[A]ppellant is not such an individual.” *Gyugo* at ¶26. Gyugo stipulated that his sealed conviction was for a disqualifying offense. Thus, under the facts of this case, Gyugo had a duty to disclose his sealed conviction regardless of how broadly or narrowly the question was worded. The Tenth District’s decision should not be overturned on this ground.

**IV. Gyugo Was Required to Answer the Questions Regarding His Prior Convictions Truthfully, Regardless of Whether He Believed the Questions Violated R.C. 2953.33(B)(1)**

Gyugo and Amicus Defense Lawyers argue that Franklin County could not lawfully require Gyugo to disclose his sealed conviction because the questions posed to him did not bear a direct and substantial relationship to the position for which he applied. They even go one step further and argue that the expungement statutes unambiguously provide that he was *not* required to disclose his sealed conviction.

First, neither Gyugo nor Amicus Defense Lawyers point to any legal authority supporting their argument that the failure to use the exact wording of R.C. 2953.33(B)(1) rendered the question “legally ineffective” such that Gyugo was not required to answer the questions honestly.

More importantly, R.C. 2953.33(B)(1) does not unambiguously provide that Gyugo was not required to disclose his sealed conviction. Indeed, nothing in that statute actually addresses Gyugo's conduct in responding to such questions. Rather, the plain language of the statute only addresses a third party's questioning of an applicant. It states, in relevant part:

In any application for employment, license...a person may be questioned only with respect to convictions not sealed...unless the question bears a direct and substantial relationship to the position for which the person is being considered.

R.C. 2953.33(B)(1).

Had the General Assembly intended to give an applicant the right to deny the existence of his sealed conviction, it would have included express language to that effect in the statute, similar to the language found in R.C. 2953.55(A), another expungement statute, which governs the sealing of records after a finding of "not guilty." That section provides, in relevant part:

In any application for employment, license...a person may not be questioned with respect to any record that has been sealed pursuant to section 2953.52 of the Revised Code. ***If an inquiry is made in violation of this section, the person whose official record was sealed may respond as if the arrest underlying the case to which the sealed official records pertain and all other proceedings in that case did not occur***, and the person whose official record was sealed shall not be subject to any adverse action because of the arrest, the proceedings, or the person's response.

R.C. 2953.55(A) (Emphasis added.).

Unlike R.C. 2953.33(B)(1), it is clear that the General Assembly intended to permit an applicant to deny the existence of sealed records in response to a question posed in violation of R.C. 2953.55(A). *See Carter v. Gestalt Inst. of Cleveland, Inc.*, 8th Dist. Cuyahoga No. 99738, 2013-Ohio-5748, ¶¶ 23-24. That statute addresses conduct of an applicant in responding and unequivocally states that "[i]f an inquiry is made in violation of this section, the person whose official record was sealed may respond as if the arrest...and all other proceedings in that case did not occur[.]" R.C. 2953.55(A).

Similar language, however, is *not* found in R.C. 2953.33(B)(1). The Court “may not include language in a statute that the General Assembly omitted.” *State ex rel. Ganoom v. Franklin County Bd. of Elections*, \_\_ Ohio St.3d \_\_, Slip Opinion No. 2016-Ohio-5864, ¶ 21, \_\_\_ N.E.3d\_\_\_ ¶ 21 (O’Connor, C.J., concurring); *see also Columbus-Suburban Coach Lines, Inc. v. Pub. Util. Comm.*, 20 Ohio St. 2d 125, 127, 254 N.E.2d 8 (1969) (“it is the duty of this court to give effect to the words used [in a statute], not to...insert words not used”).

Had the General Assembly intended to permit applicants to deny the existence of sealed conviction records to questions posed in violation of R.C. 2953.33(B)(1), it would have included language in the statute giving applicants express permission to do so. It did not. Thus, Gyugo was obligated to truthfully respond to Franklin County’s prior conviction questions, regardless of whether he deemed the questions to be valid.

### CONCLUSION

The Tenth District’s decision does not place Ohio’s expungement laws in jeopardy. Instead, it protects Ohio’s developmentally disabled population by requiring applicants like Gyugo to answer criminal background questions truthfully. Gyugo cannot escape his legal obligation to disclose his sealed conviction of a disqualifying offense by claiming that Franklin County’s criminal history question did not strictly conform to the wording in R.C. 2953.33(B)(1). Neither policy reasons nor the plain language of the statute support that result.

For the foregoing reasons, Amicus Curiae Ohio Association of County Boards of Developmental Disabilities request that the Court affirm the Tenth District’s decision.

Respectfully submitted,

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