No. 21-0124

IN THE
SUPREME COURT OF OHIO

STATE OF OHIO,
Plaintiff-Appellant,

v.

G.K.,
Defendant-Appellee.

JURISDICTIONAL APPEAL FROM THE
EIGHTH APPELLATE DISTRICT
CUYAHOGA COUNTY, OHIO
CASE NO. 109058

BRIEF OF *AMICUS CURIAE* OHIO CLERK OF COURTS ASSOCIATION IN SUPPORT OF APPELLANT, STATE OF OHIO, AND REVERSAL

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I. INTRODUCTION

> "[T]he General Assembly appears to have recognized the inherent difficulty of sealing only some convictions in one case. Partial sealing would have to be attempted for everything from arrest records to written statements to transcripts to journal entries. 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."
>
> *State v. Futrall*, 123 Ohio St.3d 498, 2009-Ohio-5590, 918 N.E.2d 497, ¶20.

This case is before the Court to address the issue of whether Ohio law permits individual counts in a criminal case to be sealed where the criminal case is not eligible for sealing. In a 2-1 decision, the Eighth District Court of Appeals has held that partial sealing of a criminal case is permitted and that dismissed charges in an indictment can be sealed pursuant to R.C. 2953.52 and R.C. 2953.61 even though one charge which resulted in a conviction based upon a guilty plea was not eligible for sealing. *State v. G.K.*, 8th Dist. Cuyahoga No. 109058, 2020-Ohio-5083, ¶56. The Eighth District did not address the "impractical realit[ies]" or resolve the "inherent difficulty" that partial sealing will pose by its decision. This Court accepted the discretionary appeal of Appellant, State of Ohio. *04/13/2021 Case Announcements*, 2021-Ohio-1201.

Case law from this Court and other courts of appeal have interpreted Ohio's sealing statutes as unambiguously prohibiting partial sealing of criminal cases, contrary to what is now allowed by the Eighth District. *State v. Pariag*, 137 Ohio St.3d 81, 2013-Ohio-4010, 998 N.E.2d 401, ¶ 21. To do what the Eighth District opinion mandates "would be impossible." *Futrall*, ¶ 19.

Amicus Curiae, Ohio Clerk of Courts Association, files this *amicus* brief in support of reversal of the Eighth District's split decision allowing partial sealing of a criminal case not because it opposes any particular policy objectives raised in the opinion. Rather, reversal is sought

because the Eighth District opinion is wrongly decided and the county common pleas clerks would not be able to legally and practically perform those duties required by the appellate court's opinion. In addition, significant and costly programming changes would be required to the various case management systems maintained by the Clerks in Ohio's 88 counties to comply with the opinion. Finally, the Eighth District opinion usurps the constitutional role and responsibility of the General Assembly as the arbiter of Ohio's public policy. Because the issue of partial sealing of criminal cases is a matter of public policy and cost allocation, how that should be accomplished, if at all, needs to be addressed and resolved by the General Assembly, not the judiciary.

II. INTEREST OF THE *AMICUS CURIAE*

Amicus Curiae, Ohio Clerk of Courts Association ("OCCA"), is uniquely qualified to provide this Court with a broad perspective on the issues and difficulty in allowing partial sealing of criminal cases as permitted by the Eighth District Court of Appeals. The OCCA has been an organization since 1940. The OCCA exists to assist Clerks in all 88 of Ohio's counties and to exercise influence and insight on the laws of Ohio that affect each of the county clerks. The Clerk of Courts office plays a vital role in serving the interests of justice. This role includes filing, docketing, indexing, and preserving all court pleadings for civil, felony criminal, domestic relations, and court of appeals cases. In this regard, the OCCA is dedicated to helping the Clerks fulfill these duties and provide the best possible service to the citizens in each county.

The outcome of this case will have a significant impact on each office of the Clerks in all 88 counties in Ohio. OCCA appears as *amicus* in this case and submits this *amicus* brief in support of the Appellant, State of Ohio, because the county Clerks would not be able to legally and practically perform the duties required by the appellate court's opinion. In addition, significant and costly programming changes would be required to modify or replace the various case management

systems in use to comply with the opinion.

III. STATEMENT OF THE CASE AND FACTS

OCCA adopts the statement of case and facts from Appellant State of Ohio's Merit Brief.

IV. ARGUMENT IN SUPPORT OF THE PROPOSITION OF LAW

Proposition of Law: If A Criminal Case Is Not Eligible For Sealing, Individual Dismissed Counts Within That Case Cannot Be Sealed.

Because R.C. 2953.61 precludes Defendant-Appellee G.K. ("Appellee") from having the partially dismissed indictment sealed, and R.C. 2953.52 provides for the sealing of cases, not individual charges within a case, the Eighth District's opinion must be reversed.

A. The Court of Appeals Opinion Was Wrongly Decided.

Appellee entered a plea bargain on the day of trial, September 27, 2010, in which he pleaded guilty to one of several charges in the indictment. On that same day, the state *nolled* the remaining charges in exchange for his plea. In 1996, Appellee was convicted of a first-degree felony possession of drugs. He admits he cannot have his conviction for obstruction of justice sealed because he is an ineligible offender under R.C. 2953.32, the statute that provides for the sealing of convictions.

After the indictment in the case at bar, Appellee filed several motions that shed light on the basis of the indicted charges. The sexual assault charges in the indictment were based upon statements from the victim that Appellee participated when her father raped her in the kitchen. The victim is the codefendant's 37-year-old cognitively impaired daughter. According to Appellee's Supplemental Motion for Separate Trials, his cousin and codefendant provided a statement to the police that Appellee was present and left alone for a period of time with the victim on the day of

the incident.

In 2015, at the first hearing on the motion to seal at issue in this appeal, the trial judge listened to the arguments, and wavered on finding that the charges were "false" or that DNA evidence "exonerated" Appellee. The trial judge did opine that "if" that were the case, then he could not see public policy furthered by not sealing the charges dismissed in this case, but allowed the parties to provide supplemental briefing and caselaw.

In 2019, at the second hearing on the motion before a successor judge, Appellee testified that the charges were "false" – which testimony formed the basis of the majority opinion of the Eighth District This case has a limited record regarding the basis of the underlying charges other than witness statements filed with the court and Appellee's motions referencing the statement of the codefendant that Appellee was present. Lacking is any explanation from the state as to why the plea agreement was reached, leaving no clear record of why the charges were dismissed — were the allegations "false" or was the state left without evidence to prove the charges beyond a reasonable doubt.

However, the legal issue of whether *nolled* charges can be sealed in a case where unsealable convictions remain has arisen in the past, and courts reviewing the statutory structure have found the law does not allow for the sealing of the charges.

In his Motion to Seal Records Related to Dismissed Charges, Appellee asked to seal only those charges dismissed as part of his plea bargain. R.C. 2953.52, entitled "Sealing of official records after not guilty finding, dismissal of proceedings or no bill," provides that

> [a]ny 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 the person's 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.

R.C. 2953.52(A)(1).

The statute therefore permits "[a]ny person" to apply to seal the records of a dismissed complaint "at any time" after the dismissal, subject only to R.C. 2953.61. However, R.C. 2953.61 precludes the sealing of a partially dismissed indictment where a conviction under that indictment cannot be sealed. Appellee admits that his conviction for obstruction of justice cannot be sealed because he is not an eligible offender due to his past conviction. Regardless of whether an applicant is an ineligible offender to have his conviction sealed, or the conviction sought to be sealed is precluded from sealing under R.C. 2953.36, R.C. 2953.61 precludes the sealing of dismissed charges where they arose in conjunction with the conviction that cannot be sealed.

In *State v. Pariag*, 137 Ohio St.3d 81, 2013-Ohio-4010, 998 N.E.2d 401, ¶ 7, this Court found that a dismissed charge could not be sealed when it "arises 'as a result of or in connection with the same act'; that supports a conviction when the records are not sealable under R.C. 2953.36, regardless of whether the dismissed charge and conviction are filed under separate case numbers." The Supreme Court in *Pariag* explained the meaning of R.C. 2953.61:

> In other words, when multiple offenses have different dispositions, an application to seal a record may be filed only when the applicant is able to apply to have the records of all the offenses sealed. *Thus, if the record of one charge cannot be sealed, any charges filed as a result of or in connection with the act that resulted in the unsealable charge cannot be sealed.*

Id., ¶ 17 (emphasis added.).

The Supreme Court remanded the case to the trial court to determine if the drug charges arose "'as the result of or in connection with the same act'" as the traffic violation. *Id.*, ¶ 22, quoting R.C. 2953.61. This Court noted that R.C. 2953.61 "focuses not on when separate offenses occurred, but on whether they arose from the same conduct of the applicant." *Id.*, ¶ 20.

In this case, the trial court found, "[t]he obstruction of justice charges [sic] at issue arose in conjunction with the charges that were dismissed." It is apparent that the obstruction of justice charge and the tampering with evidence charge related to the same conduct. Moreover, the charges are "as a result of or in connection with" the allegations of rape. In other words, Appellee would not have been charged with obstruction of justice had there not been a rape investigation. As even noted by the Eighth District majority, Appellee's conviction for obstruction of justice and the dismissal of the charge of tampering with evidence cannot be sealed. *State v. G.K.*, *supra*, ¶49. Therefore, pursuant to R.C. 2953.61, the partially dismissed indictment in this case is not subject to sealing.

In addition to being ineligible for sealing under R.C. 2953.61, the charges *nolled* by the plea bargain are not subject to sealing where the sealing would order only part of his case record to be sealed. In *State v. Futrall*, 123 Ohio St.3d 498, 2009-Ohio-5590, 918 N.E.2d 497, ¶ 21, this Court held that an applicant with multiple convictions in one case may not partially seal his or her record, pursuant to R.C. 2953.32, when one of the convictions is statutorily exempt from being sealed under R.C. 2953.36. In so holding, this Court explained the "impractical reality" of sealing only certain convictions within a case, and it concluded that the "General Assembly[ ] intend[ed] to authorize the sealing of cases, not the sealing of individual convictions within cases." *Id.*, ¶ 20.

Reiterating the General Assembly's intent to authorize the sealing of cases, rather than charges within a single case, several courts of appeal have read Ohio's sealing statute to preclude partial sealing of records. Following *Futrall*, the Tenth District Court of Appeals explained:

> R.C. 2953.52(B)(4) states that, when a person is found not guilty in a case, or where a complaint, indictment, or information in a case is dismissed, or where a no bill is returned by a grand jury, and the applicant otherwise satisfies the requirements of R.C. 2953.52, "the court shall issue an order directing that all official records pertaining to the case be sealed and that * * * the proceedings in the case be deemed not to have occurred." R.C. 2953.52(B)(4) specifically states

> that all official records pertaining to the case must be sealed; it does not state that records pertaining to an individual charge may be sealed. It would not be possible for the trial court in the instant case to seal all of the official records pertaining to case No. 12CRB-27701, while at the same time ordering that the official records of the open container charge contained within case No. 12CRB-27701 be maintained. R.C. 2953.61 also provides that, when R.C. 2953.61 is applicable, the applicant 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." * * * *Thus, R.C. 2953.52 and 2953.61 demonstrate the General Assembly's intent to authorize the sealing of cases, and not the sealing of individual charges within a case*.

In Re K.J., 10th Dist. Franklin No. 13AP-1050, 2014-Ohio-3472, ¶ 31 (emphasis added), citing *Futrall* at ¶ 20; *see also State v. C.K.J.*, 2016-Ohio-5637, 70 N.E.3d 1087, ¶ 24 (10th Dist.).

This interpretation of the law is consistent with other districts as well. In *State v. Selesky*, 11th Dist. Portage No. 2008-P-0029, 2009-Ohio-1145, ¶ 22, the Eleventh District Court of Appeals held that an applicant who had a charge that could not be sealed pursuant to R.C. 2953.36(B), could not have other parts of the case sealed because he could not "satisfy the requirement of R.C. 2953.61, 'to apply to the court *and* have all of the records in all of the cases pertaining to those charges sealed' (Emphasis added.)" In *State v. Capone*, 2d Dist. Montgomery No. 20134, 2004-Ohio-4679, ¶ 8, the Second District Court of Appeals held that because the defendant's case was not dismissed, "his records could not be expunged. Therefore, under R.C. 2953.61, [the defendant's] records could not be sealed because all of the charges in the case did not qualify to be sealed[.]" In *State ex rel. Lewis v. Lawrence Cty.*, 95 Ohio App.3d 565, 568, 642 N.E.2d 1166 (4th Dist.1994), the court found that

> [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.

Prior courts interpreting the sealing statutes in a case such as this one where the defendant seeks sealing some charges in a case, have not found the statutes to be ambiguous. Nor have the

amendments to R.C. 2953.32 rendered R.C. 2953.52 or 2953.61 ambiguous. Am.Sub.S.B. No. 143, 2014 Ohio Laws File 140, effective September 19, 2014, changed the language of R.C. 2953.32, not R.C. 2953.52. If the General Assembly intended to change R.C. 2953.52 or 2953.61 to allow for sealing charges under an indictment dismissed in a case where the remaining charges could not be sealed, the legislature could have done so. It did not explicitly do so.

The issue of whether *nolled* charges in a case where convictions remain unsealable arises frequently. This case highlights the complexity of the statutes and unique nature of each case. Because the plain language of the statutes regarding sealing dismissed indictments are not ambiguous, and given the above-cited Ohio Supreme Court analysis on the issue, the Eighth District's opinion was wrongly decided and should be reversed.

B. Unworkable Burdens Are Imposed Upon Clerks by The Court of Appeals Opinion.

The OCCA's opposition to the Eighth District's decision allowing partial sealing of a criminal case is not related to any particular policy objectives raised in the opinion. Rather, the OCCA is opposed to the Eighth District's decision because the county common pleas clerks would not be able to legally and practically perform the duties required by the appellate court's opinion, particularly in the counties that are required to maintain only electronic documents in a case file. In addition, significant and costly programming changes would be required by various case management vendors in order to comply with the opinion due to the fact that, currently, the Clerks do not have the ability to partially seal documents within their existing case management systems.

According to the most recent statistics reported by this Court, "[b]eginning in 2016, * * * the number of incoming criminal cases each year climbed steadily. In 2019, the courts reported a total of 91,476 incoming criminal cases, an increase of 17 percent over the 10-year low of 78,112

cases in 2015." Ohio Supreme Court, *2019 Ohio Courts Statistical Summary* 28.[1] It is not known how many separate charges were filed in those 91,476 cases – but, likely, exponentially many more. That is because when different or multiple charges are made under various counts in a single indictment by a grand jury, only one case number is assigned. While specific figures may not be readily available, the potential exists for a partial sealing request to be made in many of these cases. If allowed to stand, because the Eighth District's decision is the first to permit partial sealing, it will open a Pandora's Box by permitting requests for partial sealing to be made in cases long since closed. The Eighth District opinion creates procedural issues associated with partially sealing cases and will impose significant administrative burdens and costs on the clerks of courts who will be required to somehow redact certain portions of a criminal record, often manually, and without having the benefit of guidance from the General Assembly on the important questions and unaddressed problems raised by a ruling like the Eighth District's allowing partial sealing.

Currently, there is no statewide case management system. The difficulty with the Eighth District's opinion is that most case management systems do not allow for the partial sealing of cases. The systems may be able to seal an entire document or an entire case, but most cannot partially seal a document. Even if a case management system could allow for partially sealing of a case, there will be associated IT programming costs that will be incurred and, once those IT issues are resolved, this would still require a clerk – who will not be familiar with the underlying facts of a case and who has no legal training – to determine what portions of a case file – oftentimes voluminous – are subject to being partially sealed and to then use a black out tool to manually redact text on documents. This deputy clerk would be making determinations on what should and

[1] Available at https://www.supremecourt.ohio.gov/Publications/annrep/19OCSR/2019OCS.pdf (last accessed July 1, 2021). The actual criminal case numbers of new filings from 2010 through 2019 are reported at page 55 of the *2019 Ohio Courts Statistical Summary*.

should not be redacted. How are untrained deputy clerks supposed to make a determination of what is to be redacted and what is not? Also, if you have one incident with multiple charges all intertwined, how are you supposed to redact/seal a particular charge if they are connected to one incident?

If the particular county common pleas clerk is paperless, partially sealing is not really an option at all. The only solution to this would be to print the documents and use a black marker to redact certain parts that are to be sealed. And again this determination would be done by deputy clerks.

C. The Courts Of Ohio Do Not Second-Guess The General Assembly's Policy Choices Regarding Ohio's Sealing Statutes In R.C. Chapter 2953.

"The legislative process and accountability are the cornerstones of the democratic process which justify the General Assembly's role as lawmaker." *Chambers v. St. Mary's School*, 82 Ohio St.3d 563, 567, 697 N.E.2d 198 (1998). It is this Court's constitutional role under Section 1, Article IV of the Ohio Constitution to interpret the intent of the General Assembly. As this Court noted in *Jacobson v. Kaforey*, 149 Ohio St.3d 398, 2016-Ohio-8434, 75 N.E.3d 203, ¶67-68:

> "[O]ur role, as members of the judiciary, requires fidelity to the separation-of-powers doctrine." *State v. South*, 144 Ohio St.3d 295, 2015-Ohio-3930, 42 N.E.3d 734, ¶ 28 (O'Connor, C.J., concurring). Therefore, "we must respect that the people of Ohio conferred the authority to legislate solely on the General Assembly." *Id.*, citing *Sandusky City Bank v. Wilbor*, 7 Ohio St. 481, 487–488 (1857), and Article II, Section 1, Ohio Constitution.
>
> As this court stated in *Stetter v. R.J. Corman Derailment Servs., L.L.C.*, 125 Ohio St.3d 280, 2010-Ohio-1029, 927 N.E.2d 1092, ¶ 35:
>
> > It is not the role of the courts "to establish legislative policies or to second-guess the General Assembly's policy choices. '[T]he General Assembly is responsible for weighing [policy] concerns and making policy decisions * * *.' " *Groch v. Gen. Motors Corp.*, 117 Ohio St.3d 192, 2008-Ohio-546, 883 N.E.2d 377, ¶ 212, quoting *Arbino* [*v. Johnson & Johnson*], 116 Ohio St.3d 468, 2007-Ohio-6948, 880 N.E.2d 420, at ¶ 113.

This judicial function differs from the judicial function employed by the Eighth District and urged by the Appellee here. The decision below suggests that courts can decide which statutes must be interpreted and yield to judicially perceived public policy. However, the legislature is the final arbiter of public policy, unless its acts contravene the state or federal Constitutions. The Ohio Constitution vests the legislative power to resolve policy issues in the General Assembly. Section 1, Article II, Ohio Constitution. If courts could decide a case based upon the individual judge's view of the public policy, it could effectively rewrite or even repeal the statute being reviewed.

Because the role of members of the judiciary is not to declare that the General Assembly, by way of inadvertence or inattention made a slip of the pen, in an attempt to rewrite a statute in a manner that is more pleasing to the judiciary, courts must adhere to the plain language of the statute. As this Court noted in *State ex rel. Clay v. Cuyahoga Cnty. Med. Examiner's Office*, 152 Ohio St.3d 163, 2017-Ohio-8714, 94 N.E.3d 498, ¶40: "If after reflection on our decision, the General Assembly finds that its original intention was not accomplished in the words that it chose, then it, and it alone, has the constitutional authority to amend the statute to conform to its intention." This Court spoke on the issue of whether R.C. 2953.32 permitted partial sealing of criminal cases in *Futrall* and found that partial sealing "would be impossible." 2009-Ohio-5590, ¶19. If the General Assembly believed to the contrary, it would be up to the legislators to amend the Ohio sealing statutes. *State v. Southern*, 144 Ohio St.3d 295, 2015-Ohio-3930, 42 N.E.3d 734, ¶34 (O'Connor, C.J., concurring). "If the General Assembly is dissatisfied with our interpretation, it may amend the Revised Code." *Anderson v. Barclay's Capital Real Estate, Inc.*, 136 Ohio St. 3d 31, 2013-Ohio-1933, 989 N.E.2d 997, ¶25. Since *Futrall* was decided over a 12 years ago in 2009, the General Assembly has not acted to allow for partial sealing of criminal cases as mandated

by the Eighth District opinion here.

But, even if the laws in Revised Code Chapter 2953 regarding sealing of criminal cases were to be amended by the General Assembly to allow for the partial sealing mandated in the Eighth District opinion, the fact remains that the Clerks do not have the ability to partially seal documents within the existing case management systems they operate under.

V. CONCLUSION

The Clerks in Ohio's 88 counties have neither the trained and experienced personnel nor the case management systems in place to partially seal documents in criminal cases. "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." *State v. Futrall*, 123 Ohio St.3d 498, 2009-Ohio-5590, 918 N.E.2d 497, ¶20 (emphasis added). The "inherent difficulty" of sealing only some documents – or only portions thereof – in a criminal case makes it "impossible" for Ohio's Clerks to do what the Eighth District opinion now compels them to do. *State v. Pariag*, 137 Ohio St.3d 81, 2013-Ohio-4010, 998 N.E.2d 401, ¶18.

Amicus Curiae Ohio Clerk of Courts Association respectfully requests this Court to reverse the Eighth District Court of Appeals, adopt the proposition of law of Appellant State of Ohio, and hold that where a criminal case is not eligible for sealing, individual dismissed counts within that case cannot be sealed.

Date: July 6, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

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