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INTERNAL MEMORANDUM

From: Bryan Penick

Re: Proposed legislative testimony addressing revisions to R.C. § 2953.61

Chairman Lang, Vice Chair Plummer, Ranking Member Leland, and members of the Criminal Justice Committee, thank you for the opportunity to present sponsor testimony in support of House Bill 87, which seeks to amend Section 2953.61 of the Ohio Revised Code, which addresses the Effect of multiple offenses with different dispositions has on a person's application to seal his/her records.

Under the current version of section 2953.61, individuals who enter into and successfully complete an intervention program stemming from drug related offenses are precluded from later sealing the records of those offenses if they are also convicted of a related traffic charge under Sections 4511.19 or 4511.194.

The proposed legislation seeks to give Ohio courts the ability to seal the record of a person who has successfully completed an Intervention in Lieu of Conviction program ("ILC") despite having been also convicted of a violation contained in either sections 4511.19¹ or 4511.194² of the Revised Code.

The rationale for the amendment to the statute in question is because it treats similarly situated people differently and has an unfair, if not absurd, result. To understand that, one must necessarily take into account the purpose of the ILC statute itself.

The ILC statute is found in section 2951.041 of the Revised Code. The relevant section of that statute is found in subsection (E), which states, in pertinent part:

"...Successful completion of the intervention plan and period of abstinence under this section shall be without adjudication of guilt and is not a criminal conviction for purposes of any disqualification or disability imposed by law and upon conviction of a crime, and the court may order the sealing of records related to the offense in question in the manner provided in sections 2953.31 to 2953.36 of the Revised Code.

¹ Ohio's Driving while under the influence of alcohol or drugs ("OVI") statute.

² Ohio's Physical control of vehicle while under the influence statute.

It is at this point where section 2953.61, as presently written, creates the problem. To illustrate the problem I offer two scenarios.

SCENARIO 1:

A person is charged with five (5) felonies that are drug related offenses completes an ILC program. After the passage of the requisite period of time, this person is eligible³ to seal his/her record.

SCENARIO 2:

A person is charged with a single misdemeanor (or felony) drug offense and successfully completes an ILC program. In addition, the person is also convicted of a non-eligible offense contained in either section 4511.19 or 4511.194 of the Revised Code. The person in this scenario is NOT eligible to seal the ILC related charge.

As you can see, the person in scenario 1 was charged with multiple felony offenses, but is eligible to seal their record. In scenario 2, the person had a single misdemeanor (or felony) charge, but is not eligible to seal his/her record, ever.

The intended purpose of the ILC statute was to give Ohio citizens an incentive to seek and complete treatment, avoid a conviction, and give court's the discretion to seal a person's record in the appropriate circumstance. In scenario 2, section 2953.61 prevents a court from considering that option.

In *State v Futrall*, the Ohio Supreme Court affirmed an appellate court's decision to deny the sealing of an applicant's record when one of the convictions is exempt from being sealed. The Supreme Court held: "[b]ased on R.C. 2953.31, 2953.61, and 2953.32, we hold that 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." *State v. Futrall*, 2009-Ohio-5590, ¶ 21, 123 Ohio St. 3d 498, 501-02, 918 N.E.2d 497, 500

However, Chief Justice Moyer recognized the inherent problem with the statutory scheme and invited the legislature to address the issue in his concurring opinion.

"MOYER, C.J., concurring.

{¶ 22} I concur because the majority correctly analyzes R.C. 2953.31, 2953.32, 2953.36, and 2953.61 and draws the proper conclusion that none of appellant's convictions in this case may be expunged. Still, our path in this case is dimly lit by the existing statutory framework. No Ohio statute directly answers

³ Ohio Rev. Code Ann. § 2953.31(A)(1): "Eligible offender" means either of the following:

(a) Anyone who has been convicted of one or more offenses, but not more than five felonies..."

the question before us. For that reason, we have been required to fashion interstitial law, covering the gap between the existing law and the issue in this case by tugging at the edges of several closely related statutes. See *S. Pacific Co. v. Jensen* (1917), 244 U.S. 205, 221, 37 S.Ct. 524, 61 L.Ed. 1086 (Holmes, J., dissenting). But an opinion of this court is not the preferred method of lawmaking. At issue is the ability of a person to expunge the record of his past offenses. Such an issue is better resolved in the General Assembly. Therefore, I write separately to urge the General Assembly to address the issues posed in this case.”

State v. Futrall, 2009-Ohio-5590.

It needs to be pointed out that *Futrall* case did not deal with an ILC case that the applicant had successfully completed. Rather it dealt with multiple misdemeanor convictions of which one conviction was not eligible to be sealed, making none of the convictions eligible to be sealed. This case illustrates the problem with section 2953.61, which prevents a person from having his ILC record sealed where another offense that is not part of the ILC program is not eligible to be sealed. The *Futrall* case does, however, highlight the pressing need to address the sealing statutes so that Ohio courts will have better guidance when addressing this type of issue.

If section 2953.61 is amended as requested, it will clarify the existing statutory scheme as Chief Justice Moyer called for and provide Ohio courts with the discretion to seal an ILC record in the appropriate case even where an OVI conviction occurs. The amended language does not create any mandatory or automatic result in any given scenario.

Finally, the amendment is not intended to create a situation where an OVI conviction is sealed. Rather, the intent is to allow Ohioans to take advantage of the ILC statute which allows ILC records to be sealed in the appropriate case.

Thank you for the opportunity to testify in support of House Bill 87. I am happy to answer any questions you may have.