

**Statement of the Muskingum County Prosecutor's Office
In Opposition to H.B. 5**

**Before the House Judiciary Committee
Representative Jim Thomas, Chair**

Chairman Thomas, Vice Chair Matthews, Ranking Member Isaacsohn, and members of the House Judiciary Committee. Thank you for the opportunity to present testimony on behalf of the Muskingum County Prosecutor's Office.

My name is John Connor Dever. I have been an assistant prosecutor for Muskingum County since September 2020. In that time, I have litigated sealing and expungement matters at both the trial- and appellate-court levels as well as prosecuting both misdemeanors and felonies.

In light of that practice, I will highlight two issues with H.B. 5's auto-sealing provision: first that it will result in more unlawful sealings and second that it will hamper applying recidivist statutes across Ohio and other jurisdictions.

Unlawful sealings will slip through the cracks

Determining if convictions are lawfully sealable under H.B. 5 will many times be a legal-research-heavy, fact-intensive task imposed against Ohio's busy sentencing courts and prosecutor offices. And when considering the large number of sealing determinations that sentencing courts and prosecutor offices will be asked to field under H.B. 5, mistakes are inevitable.

For a legal-research-heavy example, under H.B. 5's proposed R.C. 2953.321(D)(3), courts must always determine if an offender has been convicted of a felony offense of violence. Simple enough if the offender is an Ohio-only offender. But when the offender has felonies that are out-of-state convictions, courts will have to determine if those out-of-state convictions are substantially equivalent to an Ohio felony offense of violence. Normally in litigation, the state has the burden to prove substantial equivalence. *State v. Lloyd*, 2012-Ohio-2015, ¶ 46. But if the prosecution does not object under H.B. 5, the court will have to do this on its own.

For a fact-intensive example, under R.C. 2953.61, courts cannot order sealing when there are multiple offenses connected to the same act and those multiple offenses had different dispositions until every offense is eligible for sealing. Yet sometimes, the multiple offenses connected to the same act are contained in different accusatory instruments. See *State v. Pariag*, 2013-Ohio-4010, ¶ 22. Thus, to determine if *Pariag* permits sealing of a conviction under R.C. 2953.61, courts or prosecutors must carefully

analyze the specific facts of that conviction to determine if another complaint contains an offense that prevents sealing. Under H.B. 5, *Pariag* issues will be hard to identify if the prosecutor does not object.

H.B. 5 also leaves ambiguous if courts are required to order partial-sealing of records when an offender is convicted of a mix of eligible and ineligible offenses under the same accusatory instrument. While the Ohio Supreme Court in *State v. Futrall*, 2009-Ohio-5590, determined that partial sealing was unworkable and unlawful, its ruling did not turn on the specific language of the Ohio Revised Code. H.B. 5 does not directly address *Futrall*'s partial-sealing conundrum. Thus, its unclear if H.B. 5's proposed R.C. 2953.321 will require partial sealing; thus, its likely some courts will order *Futrall*-violative sealings.

It will hamper applying recidivist statutes

Ohio and other jurisdictions have an interest in prior convictions because those jurisdictions frequently impose harsher penalties on repeat offenders. H.B. 5 itself contains such increased penalties. Yet H.B. 5 will increase the number of unlawfully sealed or against-the-public-interest convictions. Thus, Ohio and other state jurisdiction may not be able to find an improperly sealed OVI even if their laws permit sealed convictions to enhance penalties. *See United States v. Thompson*, S.D. Ohio No. 2:21-CR-173(1), 2024 U.S. Dist. LEXIS 186138 (federal government could not find an Ohio sealed offense through traditional databases). Requiring hearings before every sealing will help identify legal and factual issues that would render an offense ineligible for sealing.

Respectfully submitted.

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On behalf of

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