ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO	)	**CASE NO.** 12-0808
	)	
Appellee,	)	On Appeal from the Court of Appeals, Ninth Appellate District, Summit County, Ohio
vs.	)	
	)	
MONTOYA L. BOYKIN	)	Court of Appeals Case No. 25752
Appellant.	)	
	)	
CITY OF AKRON	)	
	)	
Appellee,	)	On Appeal from the Court of Appeals, Ninth Appellate District, Summit County, Ohio
vs.	)	
	)	
MONTOYA L. BOYKIN	)	Court of Appeals Case No. 25845
Appellant.	)	

FILED
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CLERK OF COURT
SUPREME COURT OF OHIO

APPELLANT MONTOYA L.BOYKIN'S MEMORANDUM IN SUPPORT OF JURISDICTION

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EXPLANATION OF WHY THIS CASE INVOLVES BOTH A QUESTION OF PUBLIC OR GREAT GENERAL INTEREST AND A CONSTITUTIONAL QUESTION

Former Ohio governor Ted Strickland granted 319 clemency requests or nearly 20% of the 1615 clemency applications he considered during his term in office. Johnson, *Strickland Clears Desk of Requests, Grants 152 Pardons,* The Columbus Dispatch, January 7, 2011. The large number of clemency applications presented to the governor, and his ultimate grant of pardons, reflects a growing reality in this state. Ex-offenders need a remedy to escape the civil disabilities that attend their convictions - the inability to find a job or housing. Many cannot turn to the expungement statute to seal their criminal convictions because it only applies to first offenders. R.C. 2953.31. Unable to use the expungement process, a number of ex-offenders seek a pardon as the only available remedy.

The extent of the problem is reflected in the number of ex-offenders in Ohio. An estimated 1.9 million Ohioans or nearly sixteen percent of the residents of this state have a felony or misdemeanor conviction. McCarty, *Criminal Records Keeping Millions of Ohioans Jobless,* Dayton Daily News, June 25, 2011. These Ohioans suffer real and lasting consequences from their convictions. As Justice Lundberg Stratton noted in her concurring opinion in *Cleveland Hts. v. Lewis,* 2011-Ohio-2673,

129 Ohio St. 3d 389, 395 (2011), "[g]one are the days when a misdemeanor conviction resulted in little or no real collateral consequences. Rather, the collateral consequences resulting from a misdemeanor conviction today are real and significant."

This case involves the question of the legal impact of a pardon once granted, and the trial court's role in evaluating a request to seal a pardoned conviction. A pardon results in the recipient being placed in the same position as if the conviction never occurred, *State ex rel. Gordon v. Zangerle,* 136 Ohio St. 371, 376, 26 N.E.2d 190(1940), and relieves the recipient of the disabilities accompanying the pardoned conviction. *State ex rel. Atty. Gen. v. Peters* 43 Ohio St. 629, 650, 4 N.E. 81 (1885). The sentencing court automatically should seal the pardoned conviction to secure the pardon's intended purpose. Absent this sealing, the pardoned conviction will remain available to all to view and will result in the recipient continuing to suffer the collateral consequences of the pardoned conviction.

To allow the sentencing court any discretion to seal the pardoned conviction implicates the separation of powers' doctrine. The Court of Appeals below concluded that a "trial court may exercise its authority to order judicial expungement," to seal a pardoned conviction, but "this authority should only be exercised "'where such unusual and exceptional circumstances

make it appropriate to exercise jurisdiction over the matter.'" *State of Ohio v. Montoya Boykin,* 9th Dist. Nos. 25752 and 25845, 2012-Ohio-1381, ¶15, quoting *Pepper Pike v. Doe*, 66 Ohio St.2d 374 (1980), paragraph two of syllabus. By engaging in this analysis, the trial court necessarily must review the circumstances of the pardon to determine if it is an "unusual or exceptional circumstance" warranting the court's review. This intrudes on the governor's exclusive constitutional right to grant a pardon and violates the separation of powers' doctrine.

The governor's grant of a pardon should conclusively entitle the recipient to have her pardoned conviction sealed. Appellant Boykin requests that this Court grant review, and reverse the decision of the Ninth District Court of Appeals.

STATEMENT OF THE CASE AND FACTS

On January 22, 2007, Montoya Boykin filed a pardon application with the Ohio Parole Board. Ms. Boykin requested a pardon for four convictions. The first involved a 1992 receiving stolen property conviction in Summit County Common Pleas Court, a felony of the fourth degree. She also requested a pardon for two convictions in the Akron Municipal Court: a 1991 theft charge, a misdemeanor of the first degree, and a 1996 theft charge, a misdemeanor of the first degree. The fourth conviction was a theft charge in Cuyahoga Common Pleas Court and is not at issue in this appeal.

On June 26, 2007, the Ohio Parole Board conducted a hearing to determine the pardon request. The Ohio Parole Board then issued its report to the governor unanimously recommending that the governor grant Ms. Boykin's pardon request.

Governor Ted Strickland granted a full and unconditional pardon to Montoya Boykin on November 23, 2009. (App. at B). The pardon applied to all of the convictions in her pardon application.

Upon receiving the governor's pardon, Ms. Boykin filed a motion to seal her pardoned convictions. She filed her motion to seal her misdemeanor theft convictions in the Akron Municipal Court on June 22, 2010. On September 1, 2010, the judge conducted an in-chambers conference to discuss Ms. Boykin's

Motion to Seal. (App. at C-1). On February 14, 2011, the Court denied Ms. Boykin's motion to seal her pardoned convictions. (App. at C-1). In denying the motion, the court concluded that while "a criminal record may prevent Defendant from pursuing some activities or employment [it] does not overcome the State's significant interest in keeping records of a repeat offender, who demonstrated a disregard of the law." (App. at C-12).

Ms. Boykin also filed a motion on June 23, 2010, in the Summit County Common Pleas Court to seal her pardoned felony conviction. The State of Ohio filed no response to the motion. The trial court denied the motion without hearing, Ms. Boykin's motion to seal the conviction on December 10, 2010. (App. at D).

In denying the motion, the trial court stated that Ms. Boykin's conviction had been pardoned "for reasons unknown to this Court," and that her conviction was "technically eligible for sealing." (App. at D). The trial court then performed a balancing test, finding that the State's interests outweighed Ms. Boykin's interest in having her pardoned conviction sealed. (App. at D).

Ms. Boykin timely appealed both decisions to the Ninth District Court of Appeals. On May 9, 2011, Ms. Boykin filed a motion to consolidate both cases for argument and decision. The court granted the motion and consolidated the cases on May 27, 2011.

The Ninth District Court of Appeals held oral argument on December 15, 2011. It issued its decision on March 30, 2012. In a 2-1 decision, the Court affirmed, concluding that a trial court may exercise its authority to seal a pardoned conviction through judicial expungement, but a pardon does not require that the pardoned conviction automatically be sealed. (App. at A-8). The dissenting judge found that a pardoned conviction must be sealed "to give full effect" to the pardon. (App. at A-11).

On April 12, 2012, Ms. Boykin filed in the Ninth District Court of Appeals a Motion to Certify Conflict arguing that the court's decision was in conflict with *State v. Cope*, 111 Ohio App.3d 309 (1st Dist. 1996). The motion is still pending.

ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

Proposition of Law: A pardon conclusively entitles the recipient to have her pardoned convictions sealed.

The governor has the exclusive constitutional authority to grant a pardon. Ohio Constitution, Article III, Section 11. Using his exclusive constitutional power in this case, the governor granted Montoya Boykin a full and unconditional pardon finding "[a]fter careful and diligent examination of the totality of the materials available… that Montoya Boykin has demonstrated that she has been rehabilitated and has assumed the responsibilities of citizenship." (App. at B).

The governor's pardon operated as "a reversal of the judgment, a verdict of acquittal, and a judgment of discharge." *Knapp v. Thomas*, 39 Ohio St.377, 381, 644 N.E 369(1883). It also "purge[d] away all guilt and le[ft] the recipient from a legal standpoint, in the same condition as if the crime had never been committed." *Zangerle,* 136 Ohio St. at 376, 26 N.E.2d 190. Further, the pardon not only "release[d] the offender from the entire punishment prescribed for [the] offense," but also "from all the disabilities consequent on his conviction." *Peters* 43 Ohio St. at 650, 4 N.E. 81; *See Ex parte Garland* 71 U.S. 333, 380-81, 18 L. Ed. 366 (1866). ("[I]f [a pardon is]granted after conviction, it removes the penalties and disabilities, and restores him to all his civil rights; it makes him, as it were,

a new man, and gives him a new credit and capacity."). R.C. 2967.04(B) similarly states that an unconditional pardon "relieves the person to whom it is granted of all disabilities arising out of the conviction or convictions from which it is granted."

Once Ms. Boykin received the full and unconditional pardon, she was entitled to all of the legal benefits of the pardon. This included the right to be relieved of the civil disabilities that attended her pardoned convictions. In order to accomplish this aim, it was critical that she also have her criminal record sealed. As the court stated in *Cope*, 111 Ohio App.3d at 312, "[a] pardon without expungement is not a pardon," quoting *Com. v. C.S.* 517 Pa. 89, 93, 534 A.2d 1053(Pa.1987).

While the court below recognized that "trial courts have the authority to grant judicial expungement when a pardon is at issue," it concluded that judicial expungement is not required for a pardoned conviction. *Boykin* at ¶8. The court then concluded that the authority to order judicial expungement "should not be exercised as a matter of course, but 'where such unusual and exceptional circumstances make it appropriate to exercise jurisdiction over the matter.'" *Boykin* at ¶15, quoting *Pepper Pike v. Doe*, 66 Ohio St.2d 374, 421 N.E.2d 1303 (1980), paragraph two of syllabus.

To allow a trial court to engage in this analysis, invades the governor's exclusive power to grant a pardon. The trial court necessarily would have to consider the circumstances surrounding each of the pardoned convictions and the pardon applicant's reasons for the sealing request. The governor has already done both before granting a pardon. In this case, it was his evaluation of these very circumstances that led him to grant Ms. Boykin's pardon. (App. at B).

The trial court's role in considering the request to seal the pardon conviction is limited once the governor issues the pardon. "[C]ourts may not review the substantive decision of the Governor on whether to exercise clemency in a particular case[; however,] courts may consider whether constitutionally authorized limitations on the clemency power have been respected." *State ex rel. Maurer v. Sheward* (1994), 71 Ohio St. 3d 513, 546, 644 N.E.2d 369, n.3. *See also, Ohio Adult Parole Authority, et al. v. Eugene Woodard* 523 U.S. 272, 277, 118 S.Ct.1244, 140 L.Ed.2d 387(1998), quoting *Connecticut Bd. of Pardons v. Dumschat* (1981), 452 U.S. 458, 101 S.Ct. 2460, 69 L.Ed.2d 158. ("[P]ardon and commutation decisions have not traditionally been the business of courts; as such, they are rarely, if ever, appropriate subjects for judicial review," internal citation omitted.) *See Knapp at* 391 ("[A]ny attempt of the courts to interfere with the governor in the exercise of the

pardoning power, would be [a] manifest usurpation of authority.").

When the trial court is required as part of its review to analyze the circumstances surrounding the governor's decision to grant a pardon, that review undermines the integrity of the clemency process and violates the historical principle of separation of powers. "The essential principle underlying the policy of the division of powers of government into three departments is that powers properly belonging to one of the departments ought not to be directly and completely administered by either of the other departments, and further that none of them ought to possess directly or indirectly an overruling influence over the others." *State v. Bodyke*, 126 Ohio St. 3d 266, 2010-Ohio-2424, 933 N.E.2d 753, ¶44, quoting *State ex rel. Bryant v. Akron Metro. Park Dist. of Summit County* (1929), 120 Ohio St. 464, 473, 166 N.E. 407. Further, "'the Judicial Branch [should] neither be assigned nor allowed tasks that are more properly accomplished by [other] branches.'" *Bodyke* at ¶53, quoting *Morrison v. Olson* (1988), 487 U.S. 654, 680-681, 108 S.Ct.2597, 101 L. Ed.2d 569.

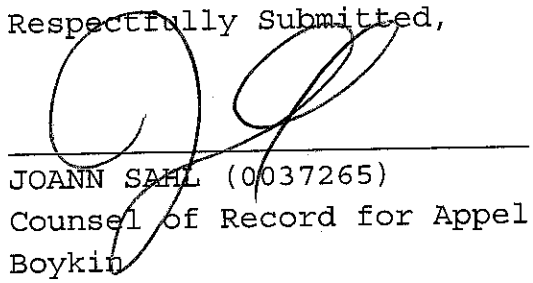
The highest executive of the State found that the State's interests compelled the conclusion that Ms. Boykin be granted a pardon. To allow the trial court to reevaluate this decision through a judicial expungement process violates the separation

of powers' doctrine. This Court should hold that the trial court does not have discretion to seal a pardoned conviction; rather, the pardon conclusively entitles the recipient to have the pardoned conviction sealed by the sentencing court.

CONCLUSION

WHEREFORE, for the above stated reasons, this Court should grant review.

Respectfully Submitted,



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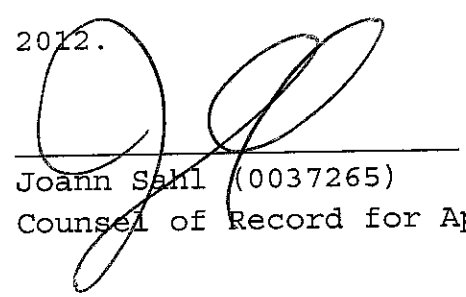
CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Memorandum in Support of Jurisdiction was hand delivered to Michael J. Defibaugh, Assistant Prosecuting Attorney, 161 S. High Street, Suite 202, Akron, OH 44308 and Sheri Bevan Walsh, Summit County Prosecutor, 53 University Avenue, Akron, OH 44308 on this 8th day of May, 2012.



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COURT OF APPEALS
DANIEL V. ...
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STATE OF OHIO))ss: COUNTY OF SUMMIT)	IN THE COURT OF APPEALS NINTH JUDICIAL DISTRICT
STATE OF OHIO Appellee v. MONTOYA L. BOYKIN Appellant	C.A. No. 25752 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO CASE No. CR 92 03 0635
CITY OF AKRON Appellee v. MONTOYA L. BOYKIN Appellant	C.A. No. 25845 APPEAL FROM JUDGMENT ENTERED IN THE AKRON MUNICIPAL COURT COUNTY OF SUMMIT, OHIO CASE Nos. 87 CRB 05482 91 CRB 07522 96 CRB 14102

DECISION AND JOURNAL ENTRY

Dated: March 30, 2012

CARR, Judge.

{¶1} Appellant, Montoya Boykin, appeals orders of the Summit County Court of Common Pleas and Akron Municipal Court that denied her motions to seal the record of her convictions. We affirm.

I.

{¶2} In 1992, Boykin pled guilty to one count of receiving stolen property in a case originating in the Summit County Court of Common Pleas. She moved to seal her record in

1996 and 2000, and the trial court denied both motions. In 1996, she pled no contest to and was convicted of two counts of theft by the Akron Municipal Court. In 2009, Governor Ted Strickland pardoned Boykin for these three offenses. Boykin moved both courts to seal her record, arguing that the trial courts were required to exercise their inherent judicial authority to do so by virtue of the pardon. Both motions were denied, and Boykin appealed. This Court consolidated the appeals for oral argument and decision.

II.

ASSIGNMENT OF ERROR

THE TRIAL COURT ERRED BY DENYING APPELLANT BOYKIN'S MOTION TO SEAL HER PARDONED CONVICTIONS.

{¶3} Boykin's assignment of error is that the trial courts erred by denying her motions to seal her records. Specifically, she has argued that the existence of the executive pardon required the trial court to do so as an exercise of its inherent judicial powers.

JUDICIAL EXPUNGEMENT

{¶4} Underlying Ms. Boykin's argument is the assumption that a trial court has the inherent authority to seal criminal records when the defendant has been pardoned, even when the defendant is not eligible under the relevant statute. This is not, however, a foregone conclusion, nor is it an insignificant issue in this case. Boykin concedes that she is not eligible to have her records sealed under the relevant statutes. If the trial courts did not have the authority to seal her records from some other source, then our inquiry need go no further.

{¶5} A first offender may move to have the record of conviction of eligible offenses sealed under R.C. 2953.32. *See also* R.C. 2953.36 (describing the convictions that preclude sealing). R.C. 2953.52 also permits the official record of a criminal case to be sealed if the defendant was acquitted, the case was dismissed, or a grand jury returned a no bill. Apart from

these statutes, a record of conviction may be sealed only "where such unusual and exceptional circumstances make it appropriate to exercise jurisdiction over the matter[.]" *Pepper Pike v. Doe*, 66 Ohio St.2d 374 (1981), paragraph two of the syllabus. In *Pepper Pike*, the Ohio Supreme Court considered whether the case record of a defendant could be sealed when the charges against her were dismissed with prejudice before trial. *Id.* at paragraph one of the syllabus. Because the predecessor of the current statutes only provided for expungement of a conviction, the Court considered whether trial courts had authority to grant expungement without statutory authorization. *Id.* at 377. The Court concluded that trial courts have the inherent authority to expunge records apart from the statutes when justified by "unusual and exceptional circumstances" founded on constitutional guarantees of the right to privacy. *Id.* The Court emphasized, however, that this judicial power should not be exercised as a matter of course:

> Again, this is the exceptional case, and should not be construed to be a carte blanche for every defendant acquitted of criminal charges in Ohio courts. Typically, the public interest in retaining records of criminal proceedings, and making them available for legitimate purposes, outweighs any privacy interest the defendant may assert.

Id., citing *Chase v. King*, 267 Pa.Super. 498 (1979). The Court also concluded that exercise of this discretionary power should, for purposes of consistency, not obliterate the fact of the criminal record, but that a record so expunged "will remain an historical event," available for inspection and use as provided in the expungement statute then in place. *Id.* at 378.

{¶6} *Pepper Pike* has not been broadly applied. Before the enactment of R.C. 2953.52(A), for example, this Court held that trial courts did not have the authority to expunge the records of individuals who had been acquitted of the charges against them. *See State v. Stadler*, 14 Ohio App.3d 10, 11 (9th Dist.1983). Other courts concluded that judicial expungement was not available to defendants who had been convicted of a crime but were

ineligible for statutory expungement. *See State v. Netter*, 64 Ohio App.3d 322, 325-326 (4th Dist.1989); *State v. Weber*, 19 Ohio App.3d 214, 217-218 (1st Dist.1984); *State v. Moore*, 31 Ohio App.3d 225, 227 (8th Dist.1986). *See also State v. Spicer*, 1st Dist. No. C-040637, 040638, 2005-Ohio-4302, ¶ 12 ("Prior to the passage of R.C. 2953.52, expungement was an equitable remedy reserved for extraordinary cases in which the defendant was not only acquitted, but also factually exonerated."). In other words, courts concluded that "[w]here there has been a conviction, only statutory expungement is available." *State v. Davidson*, 10th Dist. No. 02AP-665, 2003-Ohio-1448, ¶ 15.

{¶7} Nonetheless, "the judicial power to grant an expungement request still exists, * * * [but] it is limited to cases where the accused has been acquitted or exonerated in some way and protection of the accused's privacy interest is paramount to prevent injustice." *State v. Chiaverini*, 6th Dist. No. L-00-1306, 2001 WL 256104, *2 (Mar. 16, 2001). Despite the enactment of R.C. 2953.32 and 2953.52, exercise of judicial authority to expunge records is warranted in exceptional cases:

> [w]hile it may be argued that it is inappropriate for courts to supersede legislative judgment by granting judicial expungement where the legislature has specifically removed statutory expungement as a remedy, it is in such situations where the judicial expungement remedy may well be most appropriate. Judicial expungement is a *constitutional* remedy, and it is elementary that although the legislature has freedom to provide greater protections, it has no authority to place limits on rights guaranteed under the Constitution.

(Emphasis in original.) *In re Application to Seal Record of No Bill*, 131 Ohio App.3d 399, 403 (3d Dist.1999). It therefore stands to reason that, the limitations of R.C. 2953.32 notwithstanding, a trial court has the authority to grant judicial expungement in situations in which an executive pardon is at issue.

EFFECT OF PARDON

{¶8} Given that trial courts have the authority to grant judicial expungement when a pardon is at issue, the question remains whether the nature of the executive pardon itself requires them to do so in every case. We conclude that it does not.

{¶9} The Ohio Constitution gives the governor "power, after conviction, to grant reprieves, commutations, and pardons * * * upon such conditions as the governor may think proper[.]" Ohio Constitution, Article III, Section 11. A "pardon" is defined as "the remission of penalty by the governor in accordance with the power vested in the governor by the constitution." R.C. 2967.01(B). It "relieves the person to whom it is granted of all disabilities arising out of the conviction or convictions from which it is granted." R.C. 2967.04(B). The recipient of a pardon is, therefore, relieved of the disabilities imposed by R.C. 2961.01(A)(1) and is no longer "incompetent to be an elector or juror or to hold an office of honor, trust, or profit." R.C. 2961.01(A)(2).

{¶10} Noting that a pardon restores the civil rights of the recipient, the Ohio Supreme Court has described the effect of pardons:

> "In contemplation of law it so far blots out the offense, that afterwards it cannot be imputed to him to prevent the assertion of his legal rights. It gives him a new credit and capacity, and rehabilitates him to that extent in his former position", and hence its effect "is to make the offender a new man." It is, in effect, a reversal of the judgment, a verdict of acquittal, and a judgment of discharge thereon, to this extent, that there is a complete estoppel of record against further punishment pursuant to such conviction.

(Internal citations omitted.) *Knapp v. Thomas*, 39 Ohio St. 377, 381 (1883). Context is key to understanding the Court's explanation in *Knapp*, which Boykin cites in support of her assignment of error. A careful reading of the Court's language, however, leads to the conclusion that a pardoned individual is "a new man" insofar as the restoration of competency and the

further imposition of punishment are concerned. *See id.* A pardon, so understood, does not wipe away all traces of the criminal case.

{¶11} Current laws support this conclusion. For example, R.C. 2961.01(A)(2) provides:

> [t]he full pardon of a person who under division (A)(1) of this section is incompetent to be an elector or juror or to hold an office of honor, trust, or profit restores the rights and privileges so forfeited under division (A)(1) of this section, *but a pardon shall not release the person from the costs of a conviction in this state, unless so specified.*

(Emphasis added.) R.C. 2961.01 does not provide that a pardon restores the recipient's competency under R.C. 2961.01(B) to "circulate or serve as a witness for the signing of any declaration of candidacy and petition, voter registration application, or nominating, initiative, referendum, or recall petition," although such a person may be restored by operation of R.C. 2967.16(C). 2010 Ohio Atty.Gen.Ops. No. 2010-002, 2010 WL 292684, *2. A pardon does not automatically remove the recipient's disability with respect to carrying a concealed weapon. *See* R.C. 2923.14(C) (requiring an individual to petition the court of common pleas for the removal of the disability, reciting "any partial or conditional pardon granted" as well as "facts showing the applicant to be a fit subject for relief[.]").

{¶12} Consistent with the definition of a pardon as "remission of penalty," as set forth in R.C. 2967.01(C), it is also apparent that an executive pardon does not eradicate the fact of the underlying conduct. Despite a pardon, for example, the character of an offense may be relevant for purposes of employment. *See State ex rel. Atty. Gen. v. Hawkins*, 44 Ohio St. 98, 117 (1886) ("Whatever the theory of the law may be as to the effect of a pardon, it cannot work such moral changes as to warrant the assertion that a pardoned convict is just as reliable as one who has constantly maintained the character of a good citizen."). An attorney who has been indefinitely suspended from practicing law is not automatically entitled to reinstatement when the underlying

offense has been pardoned. *See In re Bustamante*, 100 Ohio St.3d 39, 2003-Ohio-4828, ¶ 3-5 (requiring an attorney to complete the prerequisites for reinstatement that had been set by the Supreme Court of Ohio notwithstanding a presidential pardon.). A pardoned offense may be considered in subsequent prosecutions. *Carlesi v. New York*, 233 U.S. 51, 59 (1914). Although evidence of a conviction is not generally admissible in Ohio to impeach a witness, it may be admitted if the witness subsequently committed certain crimes. Evid.R. 609(C).

{¶13} If it is to be maintained that "in the eye of the law, [a pardoned] offender is as innocent as if he had never committed the offense," these examples of collateral consequences that remain after a pardon lead us to agree with one commentator, who has observed that in that case, "the eyesight of the law is very bad." Williston, *Does a Pardon Blot Out Guilt?*, 28 Harv.L.Rev. 647, 648 (1918), quoting *Ex Parte Garland*, 71 U.S. 333 (1866). We conclude, therefore, that a pardon does not conclusively entitle the recipient to have the record sealed. This conclusion is in accord with the majority of courts that have considered the question. *See U.S. v. Noonan*, 906 F.2d 952, 960 (3d Cir.1990); *R.J.L. v. State*, 887 So.2d 1268 (Fla.2004); *State v. Blanchard*, 100 S.W.3d 226, 228 (Tenn.App.2002); *State v. Aguirre*, 73 Wash.App. 682, 690 (Wash.App.1994); *State v. Skinner*, 632 A.2d 82 (Del.1993); *State v. Bachman*, 675 S.W.2d 41, 52 (Mo.App.1984); *Commonwealth v. Vickey*, 381 Mass. 762, 771 (Mass.1980); *People v. Glisson*, 69 Ill.2d 502, 506 (Ill.1978).

{¶14} We recognize that a minority of courts that have addressed the issue disagree. *See State v. Cope*, 111 Ohio App.3d 309 (1st Dist.1996); *State v. Bergman*, 558 N.E.2d 1111, 1114 (Ind.App.1990); *Commonwealth v. C.S.*, 517 Pa. 89, 92 (Pa.1987). Nonetheless, we conclude that this result is correct. In Ohio, the legislature has not provided for sealing records of a

pardoned individual by statute. Some other jurisdictions have done so. *See R.J.L.*, 887 So.2d at 1279 fn4. In this respect, we must defer to the legislative process.

CONCLUSION

{¶15} A pardon under Article III, Section 11, of the Ohio Constitution does not automatically entitle the recipient of the pardon to have the record of conviction sealed. A trial court may exercise its authority to order judicial expungement but, as the Ohio Supreme Court concluded in *Pepper Pike*, this authority should not be exercised as a matter of course, but "where such unusual and exceptional circumstances make it appropriate to exercise jurisdiction over the matter[.]" *Pepper Pike*, 66 Ohio St.2d 374 at paragraph two of the syllabus. In this case, Boykin's motions to seal her record relied exclusively on her position that she was entitled to relief by virtue of the pardon, and the record on appeal does not contain evidence beyond that argument. Consequently, consideration of whether her motions should have been granted under the analysis set forth above is premature, and this Court takes no position in that respect.

III.

{¶16} Boykin's assignment of error is overruled, and the judgments of the Summit County Court of Common Pleas and the Akron Municipal Court are affirmed.

Judgments affirmed.

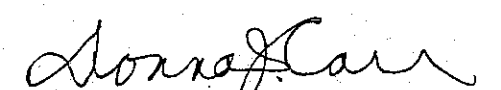
There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas and Akron Municipal Court, County of Summit, State of Ohio, to carry this judgment into

execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(C). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.



DONNA J. CARR
FOR THE COURT

DICKINSON, J.
CONCURS.

BELFANCE, P. J.
DISSENTING.

{¶17} I respectfully dissent. The question presented to this Court is whether a person who has received a full and unconditional pardon for certain offenses is entitled to have the public records of those convictions sealed.

{¶18} As an initial matter, and as discussed by majority, I agree that the trial court has inherent authority to order the sealing. *See Pepper Pike v. Doe*, 66 Ohio St.2d 374, 377-378 (1981).

{¶19} Even prior to the existence of statutory sealing provisions, the Supreme Court of Ohio discussed the effect and breadth of an unconditional pardon. It has stated that:

> a pardon reaches both the punishment prescribed for the offense and the guilt of the offender. It obliterates, in legal contemplation, the offense itself. In contemplation of law it so far blots out the offense, that afterwards it cannot be imputed to him to prevent the assertion of his legal rights. It gives him a new credit and capacity, and rehabilitates him to that extent in his former position and hence its effect is to make the offender a new man. It is, in effect, a reversal of the judgment, a verdict of acquittal, and a judgment of discharge thereon, to this extent, that there is a complete estoppel of record against further punishment pursuant to such conviction.

(Internal quotations and citations omitted.) *Knapp v. Thomas*, 39 Ohio St. 377, 381 (1883). The legal effect of a pardon is grounded upon the Supreme Court's recognition of the executive's constitutional authority to make a pardon. *See* Ohio Constitution, Article III, Section 11. The Ohio Supreme Court has more recently reiterated the principle that a full pardon has the effect of removing both the punishment and guilt of the offender. In *State ex rel. Gordon v. Zangerle,* 136 Ohio St. 371 (1940), it stated "[a] full pardon purges away all guilt and leaves the recipient from a legal standpoint, in the same condition as if the crime had never been committed." *Id.* at 376. If a full pardon leaves a person from a legal standpoint as if the crime had never been committed, and obliterates the offense itself, it is difficult to envision how a public document that contains the imposition of guilt could appropriately remain in the public domain.

{¶20} In examining whether sealing is appropriate subsequent to a full and unconditional pardon, I find the reasoning and analysis of the First District's *State v. Cope*, 111 Ohio App.3d 309 (1st Dist.1996), to be very logical and persuasive. As noted in *Cope*, R.C. 2967.04(B) provides that "[a]n unconditional pardon relieves the person to whom it is granted of *all* disabilities arising out of the conviction or convictions from which it is granted." (Emphasis added.) *See Cope* at 311. While the majority concludes that a pardon relieves a person of only those disabilities imposed by R.C. 2961.01(A)(1), R.C. 2967.04(B) does not reference R.C. 2961.01(A)(1), nor does it include limiting language. I would interpret the word "all" to mean

just that, *all disabilities*. I think any reasonable person would agree that having a conviction be part of public record for all to see is a disability. Moreover, I do not find the majority's recitation of actions that persons granted pardons must take to restore themselves to full competency to be a compelling argument in support of its position. The fact that someone has to take action to receive the full benefits of the pardon does not necessitate the conclusion that the person is not entitled to those benefits. Thus, in my view, it is logical that sealing the public records of a conviction would go hand in hand with a full and unconditional pardon. As the Court in *Cope* stated, "[a] pardon without expungement is not a pardon." (Internal quotations and citation omitted.) *Cope* at 312. Furthermore, even though a public court record might be sealed, it does not mean that is destroyed. *See, e.g., Pepper Pike,* 66 Ohio St.2d at 378. ("[E]xpungement does not literally obliterate the criminal record * * * [as] [t]he sealed record of the case may be inspected by any law enforcement authority or prosecutor to aid in the decision to file charges on any subsequent offenses involving the defendant.").

{¶21} Accordingly, the only way to give full effect to the broad language of Supreme Court precedent and the statute, and thus the pardon itself, is to order the sealing of the records of a person who has received a full and unconditional pardon. Thus, I respectfully dissent.

APPEARANCES:

JOANN SAHL, Appellate Review Office, School of Law, The University of Akron, for Appellant.

SHERRI BEVAN WALSH, Prosecuting Attorney, and HEAVEN DIMARTINO, Assistant Prosecuting Attorney, for Appellee.

CHERI B. CUNNINGHAM, Director of Law, and DOUGLAS J. POWLEY, Chief City Prosecutor, for Appellee.

TED STRICKLAND
GOVERNOR
STATE OF OHIO

WARRANT OF PARDON

1. Montoya Boykin was convicted of three counts of the crime of Theft and one count of Receiving Stolen Property and was sentenced by the Cuyahoga County Common Pleas Court, Akron Municipal Court, and the Summit County Common Pleas Court.

2. As of the date of this document Montoya Boykin has completed her sentence.

3. After careful and diligent examination of the totality of the materials available to me, I believe that Montoya Boykin has demonstrated that she has been rehabilitated and has assumed the responsibilities of citizenship. A full and unconditional pardon is warranted.

4. By virtue of the authority vested in the Governor by the Constitution and the laws of this state, I do hereby direct that the conviction of Montoya Boykin for the crimes of Theft and Receiving Stolen Property be pardoned.

5. I signed this Warrant of Pardon on November 23, 2009, in Columbus, Ohio

Ted Strickland

Ted Strickland, Governor

IN THE MUNICIPAL COURT OF AKRON
SUMMIT COUNTY, OHIO

FILED
FEB 14 11 10 AM '11
AKRON MUNICIPAL COURT
CLERK

CITY OF AKRON,	)	CASE NO.: 87 CRB 05482
	)	91 CRB 07522
Plaintiff,	)	96 CRB 14102
	)	
vs.	)	
	)	
MONTOYA L. BOYKIN,	)	
	)	
Defendant.	)	JUDGE McCARTY

ORDER

This matter came before the Court upon Defendant's Motion to Seal filed on July 6, 2010. The City of Akron filed a response to Defendant's Motion to Seal on July 8, 2010. Subsequently, both Defendant and the City of Akron filed addenda to their original Motions. A second Hearing was held on September 1, 2010. At that time, the Court granted leave to Defendant leave until September 7, 2010 and the City of Akron leave until September 13, 2010 to file any amendments or supplements to their original Motion to Seal and Response. The Court has reviewed both parties' filings as well as the case file. For the reasons that follow, Defendant's Motion to Seal is hereby **DENIED**.

In order to rule on Defendant's Motion to Seal, it is necessary for the Court to examine Defendant's criminal record. In 1987, Defendant pled guilty to a charge of Petit Theft, a misdemeanor of the first degree in the Akron Municipal Court.[1] Defendant was further held in contempt of court in 1988 for failure to pay fines and court costs associated with that case. On March 8, 1991, Defendant was convicted of another charge of Petit Theft in the Cuyahoga

[1] Case No. 87 CRB 05482, Akron Municipal Court.

County Court of Common Pleas.[2] Defendant again pled guilty to a charge of Petit Theft in the Akron Municipal Court on August 7, 1991.[3] On April 23, 1992, Defendant pled guilty to one count of Receiving Stolen Property in the Summit County Court of Common Pleas, a felony of the 4th Degree.[4] Defendant was again convicted of Petit Theft on December 13, 1996.[5] On February 23, 1998, The Akron Municipal Court found Defendant to be in contempt for failure to pay fines and costs associated with the 1996 conviction of Petit Theft. Additionally, Defendant was convicted of Disorderly Conduct, a minor misdemeanor, on March 23, 2007.[6]

In 1999, Defendant applied for a pardon with the Ohio Adult Parole Board. The Court notes that in her application, Defendant did not request that the 1987 Petit Theft conviction be pardoned and did not inform the Parole Board of the contempt charges arising from that case.[7] Defendant also failed to inform the Ohio Adult Parole Board of the 1998 contempt charges for failure to pay fines and costs arising from the 1996 Petit Theft conviction. Furthermore, Defendant failed to disclose her 2007 conviction of Disorderly Conduct to the Ohio Adult Parole Board at the time of the initial application for pardon.[8] The Ohio Adult Parole Board, after conducting a review of Defendant's record, recommended that the Defendant receive a pardon. On November 23, 2009, former Ohio Governor Ted Strickland granted Defendant a full and unconditional Warrant of Pardon. Specifically, the language contained in the Warrant of Pardon

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[2] Case No. CR-91-261705-A, Cuyahoga County Court of Common Pleas. Although initially charged with a Felony Theft and Possession of Criminal Tools, Defendant entered a guilty plea to the reduced charge of Theft, a misdemeanor of the first degree. The remaining charges were dismissed.
[3] Case No. 91 CRB 07522, Akron Municipal Court.
[4] Case No. CR-1992-03-0635, Summit County Court of Common Pleas.
[5] Case No. 96 CRB 14102, Akron Municipal Court.
[6] Case No. 07 CRB 02414, Akron Municipal Court.
[7] The Court does note that the September 28, 2007 Clemency Report does list this conviction as part of Defendant's prior record. See September 27, 2007 Clemency Report attached to Defendant's Supplemental Addendum filed on September 3, 2010. This conviction is not listed among the offenses for which Defendant requested clemency. See Ohio Parole Board Application for Executive Clemency attached to Defendant's Supplemental Addendum filed on September 3, 2010.

states that Defendant was "convicted of three counts of the crime of Theft and one count of Receiving Stolen Property" in the Cuyahoga County Common Pleas Court, Akron Municipal Court and the Summit County Common Pleas Court.[9] The document goes on to state that Defendant's "conviction for the crimes of Theft and Receiving Stolen Property are to be pardoned". [10]The language of the Warrant of Pardon does not seem to extend to either the 1987 conviction of Petit Theft or the 2007 conviction of Disorderly Conduct. [11]

Defendant originally filed a Motion to Seal on June 22, 2010. In her first Motion to Seal, Defendant requested that the Court seal Defendant's convictions of Theft in case numbers 91-CRB-07522 and 96-CRB-14102. On June 28, 2010, Defendant filed an Amended Motion to Seal Criminal Record. In that Motion, Defendant requested that the Court seal Defendant's Theft conviction in case number 87-CV-05482 along with the two previously referenced cases. Defendant filed an Application for Sealing of Convictions with the Court on July 7, 2010. In her Application, Defendant requests to seal the convictions for the cases numbered 87-CRB-05482, 91-CRB-07522, and 96-CRB-14102. Although Defendant initially requested that case number 87-CRB-05482 be included in the sealing, the Court notes that, because this case was not included in the pardon, Defendant dismissed her request that this case be sealed.[12] Given that fact, the Court must now address Defendant's Motion to Seal with respect to case 91-CRB-07522 and case 96-CRB-14102 only. Defendant's Motion to Seal is now limited only to the two cases arising out of this Court that were included in the Warrant of Pardon. Accordingly, the

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[8] On June 5, 2007 Defendant did sent a letter to the Ohio Adult Parole Board informing it of the 2007 conviction of Disorderly Conduct. See Letter attached to Defendant's Supplemental Addendum filed on September 3, 2010. There is no evidence as to whether or not the Ohio Adult Parole Board received this letter.
[9] See November 23, 2009 Warrant of Pardon.
[10] See November 23, 2009 Warrant of Pardon.
[11] In Defendant's Supplemental Memorandum, Defendant concedes that the 1987 Petit Theft Conviction was not pardoned. See Defendant's Supplemental Memorandum filed on July 16, 2010.
[12] See Defendant's Supplemental Memorandum filed on July 16, 2010.

Court must now determine whether the pardon granted to Defendant entitles her to records expunction.

In Ohio, the authority for the sealing or expungement of a criminal record exists in two ways: one is statutory (R.C. 109.60, R.C. 2953.31 *et seq.*, and R.C. 2953.52 *et seq.*) and one is judicial. See *Pepper Pike v. Doe* (1981), 66 Ohio St.2d 374, 20 O.O.3d 334, 421 N.E.2d 1303. R.C. 109.60 is limited to the return of fingerprints and identification of a defendant, to persons found not guilty, or to cases that are dismissed. *Id.* R.C. 2953.32 allows a first offender to apply to the sentencing court and request the sealing of the conviction record. R.C. 2953.32(A). R.C. 2953.52 allows for a person acquitted of a crime to make an application for sealing. R.C. 2953.52(A). The Court notes that Defendant is not requesting that her convictions be expunged pursuant to any of these statutes.[13] Even if Defendant was requesting a sealing pursuant to statutory means, that request could not be granted because Defendant was neither acquitted of the charges, nor is she a first offender as defined by R.C. 2953.31 due to the 1987 conviction for Petit Theft. See R.C. 2953.31.

Although she is not requesting expungement pursuant to statutory provisions, Defendant is requesting that the Court employ its inherent judicial authority to assist her in obtaining relief from the disabilities arising out of her pardoned convictions. Relying on *State v. Cope*, 111 Ohio App.3d 309 (1st Dist.), Defendant argues that the pardon she received automatically entitles her to records expunction. Defendant additionally argues that the specific facts of this case allow the Court can use its inherent judicial power as set forth in *Pepper Pike* to grant Defendant's Motion to Seal. The Court will address each argument in turn.

The Court must first determine whether or not the Court is compelled, by virtue of the pardon granted to Defendant, to grant her Motion to Seal. The power to issue pardons is granted,

to the Governor by Constitution of the State of Ohio and is also referenced in the Ohio Revised Code. See R.C. 2967.01 *et. seq*. While it is undisputed that the Governor has the power to grant pardons, the complete ramification of a pardon remains unclear. This is especially true with regards to the expungement of criminal records for a pardoned offense. R.C. 2967.04 outlines the effect of a pardon. This statute specifically states that an unconditional pardon relieves the person of all disabilities arising out of the conviction or convictions from which it is granted. R.C. 2967.04(B). This statute is silent as to the effect of a pardon on the sealing of a criminal record. The Ohio Revised Code addressed the sealing of a record of conviction in R.C. 2953.31 *et. seq*. However, these statutory provisions also fail to address sealing of a record relating to pardoned convictions. Thus, the court must look to common law to determine what effect, if any, the Governor's pardon has on Defendant's Motion to Seal.

It is not settled law in Ohio whether or not the granting of a full pardon entitles a Defendant to a sealing of the record of conviction. In fact, only nine jurisdictions throughout the country have addressed this specific issue directly and there is a lack of general consensus among these jurisdictions as to whether a pardon automatically makes an individual eligible for sealing of records. A minority of these courts has determined that a pardoned individual is automatically entitled to records expunction. See *State v. Bergman*, 558 N.E.2d 1111, 1114 (Ind.Ct.App,1990); *State v. Cope*, 111 Ohio App.3d 309, 676 N.E.2d 141, 143 (1996); and *Commonwealth v. C.S.*, 517 Pa. 89, 534 A.2d 1053, 1054 (1987). These decisions are based on language contained in *Ex Parte Garland*, where the Supreme Court stated that a full pardon "releases the punishment and blots out the existence of guilt, so that in the eye of the law, the offender is as innocent as if he had never committed the offense". *Ex Parte Garland*(1866), 71 U.S. (4 Wall.) at 380-381, 18 L.Ed. 366. The Supreme Court went on to say that "A Pardon

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[13] See Defendant's Supplemental Memorandum filed on July 16, 2010.

removes penalties and disabilities and restores defendant to all his civil rights". *Id.* The courts in the minority of jurisdictions addressing the issue presently before this Court have concluded that, based upon the language of *Garland*, when a person is pardoned, they are to be treated as if they never committed the crime. *R.J.L. v. State of Florida*, 887 So.2d 1268, 1278-79. Because a person is to be treated as such, a pardon would carry with it the attendant right of records expunction. *State v. Bergman*, 558 N.E.2d 1111, 1114 (Ind.Ct.App. 1990). Therefore, "a pardon without expungement is not a pardon". *Commonwealth v. C.S.*, 517 Pa. 89, 534 A.2d 1053, 1054 (1987). However, the majority of courts addressing this issue have not reached to this same conclusion.

Six out of the nine jurisdictions that examined this issue have held that a pardoned individual is *not* entitled to records expunction because the pardon does not blot out the existence of guilt and does not have the effect of eliminating the fact of the conviction. See *State v. Skinner*, 632 A.2d 82, 87 (Del.1993); *People v. Glisson*, 69 Ill.2d 502, 14 Ill.Dec. 473, 372 N.E.2d 669, 671 (1978); *Commonwealth v. Vickey*, 381 Mass. 762, 412 M.E.2d 877, 883 (1980); *State v. Bachman*, 675 S.W.2d 41, 52 (Mo.Ct.App. 1984); *State v. Blanchard*, 100 S.W.3d 226, 228 (Tenn.Crim.App.2002); and *State v. Aguirre*, 73 Wash.App. 682, 871 P.2d 616, 620 (1994). These decisions are rooted on the fact that the language contained in *Garland* has since been found to be dictum and therefore, a pardon does not necessarily erase the fact that the crime occurred or the guilt associated with it. See *Harscher v. Commonwealth of Kentucky*, 327 S.W.3d 519 citing *In Re North*, 62 F.3d 1434 (D.C.Cir.1994). Because these Courts concluded that a pardon does not eliminate the existence of guilt, a pardoned individual is not automatically entitled to record expunction.

The Ohio Supreme Court has held that a pardon "purges away all guilt and leaves the recipient from a *legal standpoint*, in the same condition as if the crime had never been committed." *State ex rel. Gordon v. Zangerle* (1940), 136 Ohio St. 371, 376, 16 O.O. 536, 538, 26 N.E.2d 190, 194, *emphasis added.* However, this case is silent as to whether a pardon erases the *fact* of the conviction itself. Purging away guilt and placing an individual, from a legal standpoint, in the same condition as if the crime had never been committed does not change the historical fact that the crime itself occurred. A pardon essentially restores the civil rights of an individual and removes punishment associated with the crime; it involves forgiveness and not necessarily forgetfulness of the act itself. For this reason, this Court concludes that the holding in *Gordon* does not imply that a court is required to treat a pardoned offense as if it never occurred; a court is merely required to treat the pardoned individual, from a legal standpoint, as if they were never found guilty of the pardoned offense.

After careful review of the established case law, this Court agrees with the majority of courts that have ruled on this issue and finds that, absent statutory clarification, a pardon does not automatically entitle a petitioner to a sealing of the conviction because the pardon does not have the effect of erasing the conviction itself. Although the First District of Ohio has ruled contrary to this position, the Court notes that it is not bound by that holding. Additionally, the statutory scheme governing sealing of records provides additional support for this conclusion. Even in cases where the Revised Code permits an individual to seek expungement, the statute lists several factors that a court must consider before the record can be sealed. See R.C. 2953.32. The fact that the statutes require a court to consider the unique circumstances surrounding each case when an individual is expressly permitted to seek expungement, further persuades the Court to

decline to adopt a blanket rule providing for an automatic sealing of any conviction that was pardoned.

As stated before, the Ohio Revised Code is silent as to how to address a case where the applicant has received a pardon and wishes to seal the record of the conviction. Therefore, Court must next determine whether or not it possesses the inherent authority to seal a criminal record absent statutory authorization. The Court's inherent authority to seal a criminal record was first expressly recognized in *City of Pepper Pike v. Doe*, 66 Ohio St.2d at 377, 20 O.O.3d at 335, 421 N.E.2d at 1306. Specifically the Ohio Supreme Court held that "trial courts in Ohio have jurisdiction to order expungement and sealing of records in a criminal case *where the charges are dismissed with prejudice prior to trial* by the party initiating the proceedings. *Pepper Pike v. Doe* (1981), 66 Ohio St.2d 374, 20 O.O.3d 334, 421 N.E.2d 1303, paragraph one of syllabus (*Emphasis added*). Additionally, they stated that trial courts have authority to order expungement only where such unusual and exceptional circumstances make it appropriate to exercise jurisdiction over the matter. *Pepper Pike v. Doe* (1981), 66 Ohio St.2d 374, 20 O.O.3d 334, 421 N.E.2d 1303, paragraph two of the syllabus.

Pepper Pike dealt with an individual who was charged with a crime and later acquitted of that offense. At the time the court ruled on that case, no such exception for that particular circumstance existed in the Ohio Revised Code. The holding in *Pepper Pike* was later codified in R.C. § 2953.52 *et. seq*. The *Pepper Pike* decision was formed to address the inequality that resulted due to the former statutory scheme. Under the former provisions of the Revised Code a convicted first offender could request expungement, but those who were acquitted of an offense had no such option. *City of Pepper Pike v. Doe*, 66 Ohio St.2d at 377, 20 O.O.3d at 335, 421 N.E.2d at 1306. *Pepper Pike*, however, does not grant a trial court broad authority to order

expungement whenever it deems appropriate. The rule stated in *Pepper Pike* has since been limited; the inherent authority of the court may be cautiously exercised only in those instances where the Revised Code is silent on the matter. See *Bound v. Biscotti*, 76 Ohio Misc.2d 6, 663 N.E.2d 1376 (Holding that the Court's inherent judicial authority to order expungement is limited to those situations not addressed by the statutory scheme for expungement). See also *State v. Stadler*, 14 Ohio App.3d 10, 469 N.E.2d 911, *State v. Weber*, 19 Ohio App.3d 214, 484 N.E.2d 207, and *State v. Netter*, 64 Ohio App.3d 322, 581 N.E.2d 597 (All holding that a trial court cannot use its inherent authority to seal a conviction where the applicable statute would not permit such action). The Ohio Supreme Court has made it clear that such an exception is rare. *Pepper Pike v. Doe*, 66 Ohio St.2d at 377, 20 O.O.3d at 335, 421 N.E.2d at 1306. The court's use of its inherent authority would merely be an extension of the same principle of *Pepper Pike, supra*, which is to only provide relief to a class of persons that are not provided for by a statute. *Bound v. Biscotti*, 76 Ohio Misc.2d 6 at *10, 663 N.E.2d 1376.

Because the Ohio Revised Code does not provide guidance on the sealing of a conviction of an applicant who has been pardoned of the offense, this Court finds the rationale that was the basis of the Supreme Court's decision in *Pepper Pike, supra*, applies equally to the case at hand. Having determined that this instance is one of "unusual and exceptional circumstances" as discussed in *Pepper Pike, supra*, this Court must now use the balancing test set forth in that case to determine if expungement is proper for the Defendant. Specifically, this Court will weigh the interest of the Defendant in her good name and right to be free from unwarranted punishment against the legitimate need of government to maintain records. *State v. Stadler*, 14 Ohio App.3d at 11, 14 OBR at 14, 469 N.E.2d at 913 citing *City of Pepper Pike v. Doe*, 66 Ohio St.2d at 377, 20 O.O.3d at 335, 421 N.E.2d at 1306. An individual's constitutionally protected right to

privacy is the basis for a trial court to order a judicial expungement, if the equities of the case demand it. *City of Pepper Pike v. Doe*, 66 Ohio St.2d at 377, 20 O.O.3d at 335, 421 N.E.2d at 1306. The Court must balance this individual right of privacy against governmental interests including the promotion of effective law enforcement, the public interest in promoting general safety and welfare of the community, continuing investigation of a specific crime and investigation of future criminal activity. *State v. Greene, supra,* 61 Ohio St.3d at 141, 573 N.E.2d at 113 (Moyer, C.J., concurring in part and dissenting in part). See, also, *State v. Grove* (1986), 29 Ohio App. 3d 318, 320, 29 OBR 418, 420, 505 N.E.2d 297, 299. The public's need to know is also a relevant, legitimate governmental need which must be considered. *Id.* Therefore, this Court can order Defendants' convictions sealed only if the application of this balancing test weighs in her favor.

In applying the balancing test outlined by the Ohio Supreme Court in *Pepper Pike* to the facts of this case, it is the opinion of this Court that the equities do not weigh in favor of the Defendant. The two cases at issue in this proceeding are not the only convictions that Defendant has on her record. She has been convicted of theft related offenses in other jurisdictions along with the convictions from this jurisdiction. The offenses occurred over the better part of a decade. Defendant additionally was held in contempt on two different cases for failing to pay fines and costs. The occurrence of numerous similar offenses over such a long a period of time establishes a pattern of criminal behavior that evidences disrespect for, and disregard of, the laws of this State.

The Court also notes that Defendant denied ever having any alcohol or substance abuse issues in her life on the forms submitted to the Ohio Adult Parole Board. Yet, in documents submitted to this Court, Defendant states that her criminal past is related to a conquered history

of substance abuse. The Court sees this inconsistency as troubling. It is difficult to determine at this juncture whether Defendant actually suffered from a substance abuse problem, in which case she was less than candid with the Ohio Adult Parole Board.

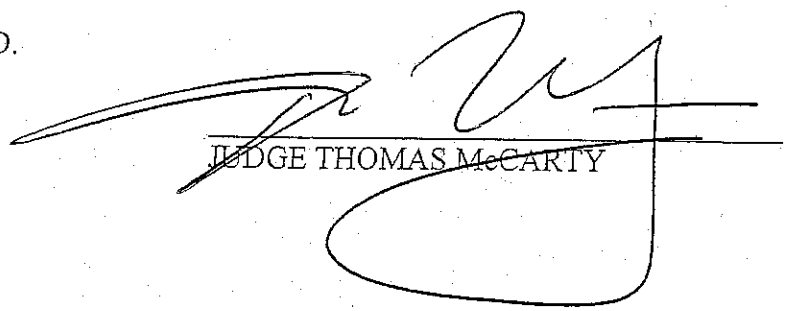
The Court also finds troubling the fact that the Defendant did not inform the Ohio Adult Parole Board of the two contempt charges accompanying Defendant's 1987 and 1996 convictions when applying for a pardon. Given the long and consistent history the Defendant had of criminal conduct, this Court sees the contempt charges as further evidence of Defendant's disregard for the law and unwillingness to face the consequences of her actions. In her statement to the Ohio Adult Parole Board, Defendant stated that she had "three misdemeanors for theft". [14] A review of Defendant's criminal record indicates that she actually had four convictions of Petit Theft. The Court also can't ignore the fact that Defendant was additionally convicted of Disorderly Conduct after initiating the process in order to obtain a pardon.

The Court has duly noted the significant changes that Defendant has made in her life over an extended period of time. The Defendant has demonstrated that she made diligent and concerted efforts to reform her conduct and to improve her life. The Court has taken note of these positive developments and has weighed them carefully in arriving at its decision. It is commendable that she is now pursuing a degree in hopes of helping others. Yet, all of the positive changes do not erase the fact that Defendant's criminal history is lengthy. It demonstrates a clear pattern of disregard of the law and for the rights of others. The Ohio Supreme Court held in *Pepper Pike* that "typically, the public interest in retaining records of criminal proceedings, and making them available for legitimate purposes, outweighs any privacy interest the defendant may assert." *City of Pepper Pike v. Doe*, 66 Ohio St.2d at 377, 20 O.O.3d at 335, 421 N.E.2d at 1306. It is true that such a record may prove to be a hindrance to the

Defendant at present and in the future. The fact that a criminal record may prevent Defendant from pursuing some activities or employment does not overcome the State's significant interest in keeping records of a repeat offender, who demonstrated a disregard of the law. The Court is confident that if Defendant continues to make progress, her criminal record, while a scar on her good name, will not prove to be a mortal wound to it.

For the reasons stated above, Defendant's Motion to Seal is hereby **DENIED**.

IT IS SO ORDERED.



JUDGE THOMAS McCARTY

cc: Douglas Powley, Esq. – Chief Prosecutor, City of Akron
Joanne Sahl, Esq. – Defendant's Counsel

2011 MAR - 3 P 12:04
FILED

[14] See Clemency Report attached to Defendant's Supplemental Addendum filed on September 3, 2010.

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DANIEL M. HORRIGAN
2010 DEC 10 PM 2:11
SUMMIT COUNTY
CLERK OF COURTS

IN THE COURT OF COMMON PLEAS
COUNTY OF SUMMIT

CASE NO. CR 92 03 0635

THE STATE OF OHIO)
)
vs.)
) **JOURNAL ENTRY**
MONTOYA L. BOYKIN

THIS DAY, to-wit: The 22nd day of November, A.D., 2010, this matter is set before the Court upon the Defendant's Motion to Seal her record in the above captioned matter.

The Defendant's prior criminal history is lengthy. However, for reasons unknown to this Court, convictions dating from 1987 through 1996 were pardoned by Governor Strickland. Therefore, the Defendant is technically eligible for sealing. However, in light of the Defendant's prior propensity for theft, the Court finds that the interests of the State in maintaining this conviction outweigh the interest of the Defendant in having her case sealed.

The Defendant's Motion to Seal is DENIED.

APPROVED:
December 7, 2010
mh

Lynne S. Callahan
LYNNE S. CALLAHAN, Judge for

BRENDA BURNHAM UNRUH, Judge
Court of Common Pleas
Summit County, Ohio

cc: Prosecutor Chad VanOrman/Jennie Shuki
Adult Probation Department
Defendant – **CERTIFIED**