

ORIGINAL

IN THE SUPREME COURT OF OHIO
Supreme Court Case Numbers 12-0808 and 12-1216

STATE OF OHIO
CITY OF AKRON

Appellees

v.

MONTOYA L. BOYKIN

Appellant

On Appeal from the Summit
County Court of Appeals
Ninth Appellate District
Court of Appeals Nos. 25752, 25845

MERIT BRIEF OF APPELLEE
STATE OF OHIO

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STATEMENT OF THE CASE AND FACTS

On June 23, 2010, Boykin moved the Summit County Court of Common Pleas to seal her conviction for Receiving Stolen Property. In support of her motion, Boykin said that in April of 1992, she pled guilty to Receiving Stolen Property, a felony of the fourth degree, but the governor pardoned the conviction on November 23, 2009. The Summit County Court of Common Pleas denied Boykin's motion to seal, stating, in light of Boykin's prior propensity for theft, as evidenced by convictions dating from 1987 through 1996, which were pardoned by Governor Strickland, the "interests of the State in maintaining this conviction outweigh the interest of the Defendant in having her case sealed."

In June 2010, Boykin also moved the Akron Municipal Court to seal two theft cases from 1991 and 1996. The trial court denied the motion.

Boykin appealed the trial courts' decisions denying her motion to seal her record for the three offenses that Governor Strickland pardoned on November 23, 2009. The Court of Appeals consolidated the cases and affirmed the trial court decisions. Boykin filed a motion to certify a conflict. The Supreme Court accepted these consolidated cases for appeal.

PROPOSITION OF LAW

WHETHER A PARDON CONCLUSIVELY ENTITLES THE RECIPIENT TO HAVE HER PARDONED CONVICTIONS SEALED.

LAW AND ARGUMENT

A PARDON CONCLUSIVELY DOES NOT ENTITLE THE RECIPIENT TO HAVE PARDONED CONVICTIONS SEALED.

Boykin argues that a pardon conclusively entitles the recipient to have her pardoned convictions sealed. The State disagrees.

In Ohio, courts derive authority to sealing or expunging records in Ohio from statutory and judicial authority. See, e.g., *Pepper Pike v. Doe*, 66 Ohio St.2d 374, 376 (1981). In this case, Boykin did not seek to seal her convictions pursuant to any of the sealing statutes and Boykin would not have qualified to have her convictions expunged, under former R.C. 2953.31, because she was not a first time offender.

Instead, Boykin sought to have her convictions sealed pursuant to the trial court's inherent authority to expunge a criminal record. The Ohio Revised Code is silent as to the effect that a gubernatorial pardon has upon the trial court's authority to expunge or seal the conviction.

The Supreme Court of Ohio has said that the "trial courts have authority to order expungement where such unusual and exceptional circumstances make it appropriate to exercise jurisdiction over the matter. When exercising this power, the court should use a balancing test which weighs the privacy interest of the defendant against the government's legitimate need to maintain records of criminal proceedings." *Pepper Pike*, supra, at paragraph two of the syllabus.

Boykin argues that the balancing test articulated in *Pepper Pike* does not apply to a gubernatorial pardon and contends, instead, that a gubernatorial pardon entitles the recipient to an automatic expungement of the conviction thereby eliminating the trial court's ability to use a

balancing test. The State argues that a pardon does not have the effect of erasing the conviction and therefore does not automatically entitle a petitioner to a sealing of the conviction.

Thus, the issue before this Court is the effect a gubernatorial pardon has upon a criminal conviction. An analysis of this issue should begin with an examination of the definition of a pardon as well as the case law surrounding pardons.

In 1833, Chief Justice Marshall said, “[a] pardon is an act of grace.” *United States v. Wilson*, 32 U.S. 150, 160; 161 (1833). A few decades later, the Supreme Court of the United States examined the effect and operation of the presidential pardoning power. See, *Ex parte Garland*, 71 U.S. 333 (1866).

In *Garland*, the Supreme Court held that a pardon obliterates the conviction and guilt, thereby, placing the offender in the same position as if she had never committed the offense. *Id.* at 351. The Supreme Court explained that a presidential pardon “reaches both the punishment prescribed for the offence and the guilt of the offender; and when the pardon is full, it releases the punishment and blots out of existence the guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offence. If granted before conviction, it prevents any of the penalties and disabilities consequent upon conviction from attaching; if 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.” *Id.* at 380-381. However, the Court noted that even a presidential pardon has limitations noting that it could “not restore offices forfeited, or property or interests vested in others in consequence of the conviction and judgment.” *Id.* at 381.

Since that time, the Supreme Court has narrowed the scope of a presidential pardon by holding that a sentencing board may consider an offender’s previously pardoned offenses.

Carlesi v. New York, 233 U.S. 51, 59 (1914). For example, in a case involving the issue of whether the President had the authority to commute a death sentence to a life sentence, Justice Holmes stated, “[a] pardon in our days is not a private act of grace from an individual happening to possess power. It is a part of the Constitutional scheme. When granted it is the determination of the ultimate authority that the public welfare will be better served by inflicting less than what the judgment fixed.” *Biddle v. Perovich*, 274 U.S. 480, 486 (1927).

Additionally, several of the Federal appellate courts, including the Third Circuit, Seventh Circuit, and the District of Columbia Circuit, have declined to follow the broad articulation of the presidential pardoning power set forth in *Garland*. See, *U.S. v. Noonan*, 906 F.2d 952, 958; 960 (Third Cir. 1990); *Bjerkan v. United States*, 529 F.2d 125, 128 n. 2 (Seventh Cir. 1975); *In re North*, 62 F.3d 1434, 1437 (D.C. Cir. 1994).

Likewise, the Ninth Circuit of Appeals has held that a pardon issued by the Texas governor did not erase the offender’s prior convictions, as if they had never occurred. *Groseclose v. Plummer*, 106 F.2d 311, 313 (Ninth Cir. 1939). In *Groseclose*, the court said that a gubernatorial pardon, “does nothing more than to abolish all restrictions upon the liberty of the pardoned one, and upon his civil rights that follow a felony conviction and sentence.” *Id.* The court explained that the pardon did not “turn back the hand of time” and, consequently, the “habit of crime was upon him.” *Id.*

Similarly, state courts that have addressed the issue have also held that a pardon does not abrogate the guilt underlying a conviction. See, e.g., *People v. Brophy*, 38 N.E. 2d 468, 470 (1941); *In re Abrams*, 689 A.2d 6, 18-19 (1997). In *Abrams*, the District of Columbia Court of Appeals offered the following analogy: “Suppose that an alcoholic surgeon performs an operation while intoxicated. He botches the surgery. The patient dies. The surgeon is convicted

of manslaughter and is sentenced to imprisonment. The President grants him a full and unconditional pardon. According to Abrams, the surgeon now has the right, as a result of the pardon, to continue to operate on other patients, without any interference from the medical licensing authorities.” *Id.* at 10-11. The Court concluded that this result would be “altogether unacceptable and even irrational.” *Id.* at 11. Although the pardon did away with the consequences of the conviction, “it could not and did not require the court to close its eyes to the fact that [the offender] did what he did.” *Id.* at 7.

When the United States District Court for the Northern District of Texas examined whether a police academy applicant who had initially pleaded guilty to a case that was later dismissed, and for which he received a gubernatorial pardon, the court held that the individual was not eligible to serve as a police officer. *Dixon v. McMullen* 527 F. Supp. 711 (N.D. Tex. 1981).

In reaching this conclusion, the *Dixon* Court held that, because the gubernatorial pardon was not issued based on proof of innocence, the underlying guilt of the offense remained. *Id.* at 718. Furthermore, the District Court recognized the separation of powers, noting that “[t]he undisputed legal effect of a pardon is to restore the civil rights to an ex-felon (suffrage, jury service, and the chance to seek public office). However, the Governor cannot overrule the judgment of a court of law. He has no “appellate” jurisdiction Regardless of the post-judgment procedural maneuvering, a final conviction does not disappear. A pardon implies guilt. Texas Courts may forgive, but they do not forget. The fact is not obliterated and there is no “wash.” * * * Moreover, the granting of a pardon does not in any way indicate a defect in the process. It may remove some disabilities, but does not change the common-law principle that a

conviction of an infamous offense is evidence of bad character.” [Internal citations omitted.] *Dixon, supra*, at 717-718.

In 2004, the Supreme Court of Florida examined the effect that a full pardon has upon expungement. See, *R.J.L.*, 887 So.2d 1268 (Fla. 2004). In *R.J.L.*, the Court held that a full pardon does not confer innocence, nor does it remove the historical fact that the crime had occurred. *R.J.L., supra*, at 1270; 1281. The Supreme Court of Florida stated that “[a] pardon is the equivalent of forgiveness for a crime, it does not declare the pardoned individual innocent of the crime. While a pardon removes the legal consequences of a crime, it does not remove the historical fact that the conviction occurred; a pardon does not mean that the conviction is gone. If a pardon had the effect of allowing an individual to declare that he had been adjudicated guilty of a crime, the end result would be that that all pardoned individuals would be eligible for expungement of their criminal histories.” *Id.* at 1281.

In light of the foregoing, the State argues that a pardon does not automatically entitle the recipient to have the record sealed. Instead, the decision falls within the discretion of the trial court and should be exercised only “where such unusual and exceptional circumstances make it appropriate to exercise jurisdiction over the matter[.]” *Pepper Pike, supra*, at paragraph two of the syllabus. Therefore, when determining whether to seal a pardoned conviction, the Court must first “use a balancing test which weighs the privacy interest of the defendant against the government’s legitimate need to maintain records of criminal proceedings.” *Id.*

The State urges this court to hold that a gubernatorial pardon does not automatically entitle the recipient to have her record sealed. A gubernatorial pardon does not erase the historical fact of the conviction. A gubernatorial pardon essentially restores the civil rights of an individual and removes the punishment associated with the crime. See, *e.g. Knapp v. Thomas*,

39 Ohio St. 377 (1883). Expunction of the crime is not a civil right. There is nothing in Ohio's Constitution that creates a civil right to expunge a criminal record.

In *Knapp*, the Court described the effect of a pardon as blotting out the offense so that it cannot later “ ‘be imputed to prevent 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). Thus, the effect of the pardon is to restore some competency and prevent further punishment. However, the pardon does not erase all traces of the conviction.

The conclusion that a pardon does not erase all traces of the conviction is supported by the Ohio Revised Code. For example, R.C. 2961.01(A)(2) provides that “[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. R.C. 2961.01(A)(2). In addition, 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. In addition, the recipient of pardon is not entitled to automatic removal of the disability to carrying a concealed weapon. *See* R.C. 2923.14(C).

An executive pardon likewise does not eradicate the fact of the underlying conduct. See 2967.01(C). For example, despite a pardon, the character of an offense may be relevant for purposes of employment. See *State ex rel. Atty. Gen. v. Hawkins*, 44 Ohio St. 98, (1886). When an attorney who has been indefinitely suspended from practicing law receives a pardon, he is not automatically entitled to reinstatement. See, *In re Bustamante*, 100 Ohio St.3d 39, 2003-Ohio-4828, ¶ 3-5. In addition, the offense, although pardoned, may still be considered in subsequent prosecutions. See, *Carlesi v. New York*, 233 U.S. 51, (1914).

A pardon does not automatically entitle the recipient to have the record sealed and the court's should exercise its discretionary authority to seal convictions only "where such unusual and exceptional circumstances make it appropriate to exercise jurisdiction over the matter[.]" *Pepper Pike, supra*, at paragraph two of the syllabus.

CONCLUSION

Pursuant to the argument offered, the State respectfully contends that the judgment of the Ninth District Court of Appeals should be affirmed.

Respectfully submitted,

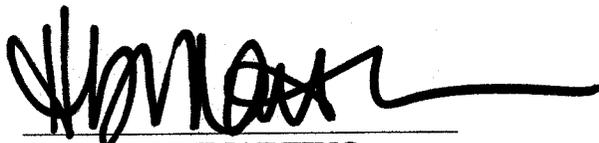
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A handwritten signature in black ink, appearing to read 'Heaven DiMartino', written over a horizontal line.

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PROOF OF SERVICE

I hereby certify that a copy of the foregoing Merit Brief was sent by regular U.S. Mail to Attorney Joann Sahl, University of Akron School of Law, Legal Clinic, Akron, Ohio 44325-2901, Counsel for Appellant Montoya L. Boykin; to Attorney Jane P. Perry, 46 Northmoor Place, Columbus, Ohio 43215, Amici Curiae for Appellant Montoya L. Boykin; and to Michael Defibaugh, Assistant Director of Law and Gertrude E. Wilms, Chief Prosecutor, City of Akron Law Department, 161 South High Street, Suite 202, Akron, Ohio 44308, Counsel for Appellee City of Akron, on the 4th day of December, 2012.



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APPENDIX

2923.14 Relief From Weapons Disability.

(A) Any person who is prohibited from acquiring, having, carrying, or using firearms may apply to the court of common pleas in the county in which the person resides for relief from such prohibition.

(B) The application shall recite the following:

(1) All indictments, convictions, or adjudications upon which the applicant's disability is based, the sentence imposed and served, and any release granted under a community control sanction, post-release control sanction, or parole, any partial or conditional pardon granted, or other disposition of each case, or, if the disability is based upon a factor other than an indictment, a conviction, or an adjudication, the factor upon which the disability is based and all details related to that factor;

(2) Facts showing the applicant to be a fit subject for relief under this section.

(C) A copy of the application shall be served on the county prosecutor. The county prosecutor shall cause the matter to be investigated and shall raise before the court any objections to granting relief that the investigation reveals.

(D) Upon hearing, the court may grant the applicant relief pursuant to this section, if all of the following apply:

(1) One of the following applies:

(a) If the disability is based upon an indictment, a conviction, or an adjudication, the applicant has been fully discharged from imprisonment, community control, post-release control, and parole, or, if the applicant is under indictment, has been released on bail or recognizance.

(b) If the disability is based upon a factor other than an indictment, a conviction, or an adjudication, that factor no longer is applicable to the applicant.

(2) The applicant has led a law-abiding life since discharge or release, and appears likely to continue to do so.

(3) The applicant is not otherwise prohibited by law from acquiring, having, or using firearms.

(E) Costs of the proceeding shall be charged as in other civil cases, and taxed to the applicant.

(F) Relief from disability granted pursuant to this section restores the applicant to all civil firearm rights to the full extent enjoyed by any citizen, and is subject to the following conditions:

(1) Applies only with respect to indictments, convictions, or adjudications, or to the other factor, recited in the application as the basis for the applicant's disability;

(2) Applies only with respect to firearms lawfully acquired, possessed, carried, or used by the applicant;

(3)

May be revoked by the court at any time for good cause shown and upon notice to the applicant;

(4) Is automatically void upon commission by the applicant of any offense set forth in division (A)(2) or (3) of section 2923.13 of the Revised Code, or upon the applicant's becoming one of the class of persons named in division (A)(1), (4), or (5) of that section.

(G) As used in this section:

(1) "Community control sanction" has the same meaning as in section 2929.01 of the Revised Code.

(2) "Post-release control" and "post-release control sanction" have the same meanings as in section 2967.01 of the Revised Code.

Amended by 129th General Assembly File No. 30, HB 54, § 1, eff. 9/30/2011.

Effective Date: 01-01-2004

2953.31 [Effective Until 9/28/2012] Sealing Of Record Of Conviction Definitions.

As used in sections 2953.31 to 2953.36 of the Revised Code:

(A) “First offender” means anyone who has been convicted of an offense in this state or any other jurisdiction and who previously or subsequently has not been convicted of the same or a different offense in this state or any other jurisdiction. When two or more convictions result from or are connected with the same act or result from offenses committed at the same time, they shall be counted as one conviction. When two or three convictions result from the same indictment, information, or complaint, from the same plea of guilty, or from the same official proceeding, and result from related criminal acts that were committed within a three-month period but do not result from the same act or from offenses committed at the same time, they shall be counted as one conviction, provided that a court may decide as provided in division (C)(1)(a) of section 2953.32 of the Revised Code that it is not in the public interest for the two or three convictions to be counted as one conviction.

For purposes of, and except as otherwise provided in, this division, a conviction for a minor misdemeanor, for a violation of any section in Chapter 4507., 4510., 4511., 4513., or 4549. of the Revised Code, or for a violation of a municipal ordinance that is substantially similar to any section in those chapters is not a previous or subsequent conviction. However, a conviction for a violation of section 4511.19, 4511.251, 4549.02, 4549.021, 4549.03, 4549.042, or 4549.62 or sections 4549.41 to 4549.46 of the Revised Code, for a violation of section 4510.11 or 4510.14 of the Revised Code that is based upon the offender’s operation of a vehicle during a suspension imposed under section 4511.191 or 4511.196 of the Revised Code, for a violation of a substantially equivalent municipal ordinance, for a felony violation of Title XLV of the Revised Code, or for a violation of a substantially equivalent former law of this state or former municipal ordinance shall be considered a previous or subsequent conviction.

(B) “Prosecutor” means the county prosecuting attorney, city director of law, village solicitor, or similar chief legal officer, who has the authority to prosecute a criminal case in the court in which the case is filed.

(C) “Bail forfeiture” means the forfeiture of bail by a defendant who is arrested for the commission of a misdemeanor, other than a defendant in a traffic case as defined in Traffic Rule 2, if the forfeiture is pursuant to an agreement with the court and prosecutor in the case.

(D) “Official records” has the same meaning as in division (D) of section 2953.51 of the Revised Code.

(E) “Official proceeding” has the same meaning as in section 2921.01 of the Revised Code.

(F) “Community control sanction” has the same meaning as in section 2929.01 of the Revised Code.

(G) “Post-release control” and “post-release control sanction” have the same meanings as in section 2967.01 of the Revised Code.

(H) “DNA database,” “DNA record,” and “law enforcement agency” have the same meanings as in section 109.573 of the Revised Code.

(I) “Fingerprints filed for record” means any fingerprints obtained by the superintendent of the bureau of criminal identification and investigation pursuant to sections 109.57 and 109.571 of the Revised Code.

R.C. § 2953.31

Amended by 128th General Assembly File No. 30, SB 77, § 1, eff. 7/6/2010.

Effective Date: 01-01-2004

This section is set out twice. See also § 2953.31, as amended by 129th General Assembly File No. 131, SB 337, § 1, eff. 9/28/2012.

2961.01 Forfeiture Of Rights And Privileges By Convicted Felons.

(A)(1) A person who pleads guilty to a felony under the laws of this or any other state or the United States and whose plea is accepted by the court or a person against whom a verdict or finding of guilt for committing a felony under any law of that type is returned, unless the plea, verdict, or finding is reversed or annulled, is incompetent to be an elector or juror or to hold an office of honor, trust, or profit.

(2) When any 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 is granted parole, judicial release, or a conditional pardon or is released under a non-jail community control sanction or a post-release control sanction, the person is competent to be an elector during the period of community control, parole, post-release control, or release or until the conditions of the pardon have been performed or have transpired and is competent to be an elector thereafter following final discharge. The 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.

(B) A person who pleads guilty to a felony under laws of this state or any other state or the United States and whose plea is accepted by the court or a person against whom a verdict or finding of guilt for committing a felony under any law of that type is returned is incompetent 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.

(C) As used in this section:

(1) "Community control sanction" has the same meaning as in section 2929.01 of the Revised Code.

(2) "Non-jail community control sanction" means a community control sanction that is neither a term in a community-based correctional facility nor a term in a jail.

(3) "Post-release control" and "post-release control sanction" have the same meanings as in section 2967.01 of the Revised Code.

Effective Date: 01-01-2004; 05-02-2006; 2008 HB195 09-30-2008

2967.16 Certificate Of Final Release.

(A) Except as provided in division (D) of this section, when a paroled prisoner has faithfully performed the conditions and obligations of the paroled prisoner's parole and has obeyed the rules and regulations adopted by the adult parole authority that apply to the paroled prisoner, the authority upon the recommendation of the superintendent of parole supervision may enter upon its minutes a final release and thereupon shall issue to the paroled prisoner a certificate of final release, but the authority shall not grant a final release earlier than one year after the paroled prisoner is released from the institution on parole, and, in the case of a paroled prisoner whose minimum sentence is life imprisonment, the authority shall not grant a final release earlier than five years after the paroled prisoner is released from the institution on parole.

(B)(1) When a prisoner who has been released under a period of post-release control pursuant to section 2967.28 of the Revised Code has faithfully performed the conditions and obligations of the released prisoner's post-release control sanctions and has obeyed the rules and regulations adopted by the adult parole authority that apply to the released prisoner or has the period of post-release control terminated by a court pursuant to section 2929.141 of the Revised Code, the authority, upon the recommendation of the superintendent of parole supervision, may enter upon its minutes a final release and, upon the entry of the final release, shall issue to the released prisoner a certificate of final release. In the case of a prisoner who has been released under a period of post-release control pursuant to division (B) of section 2967.28 of the Revised Code, the authority shall not grant a final release earlier than one year after the released prisoner is released from the institution under a period of post-release control. The authority shall classify the termination of post-release control as favorable or unfavorable depending on the offender's conduct and compliance with the conditions of supervision. In the case of a released prisoner whose sentence is life imprisonment, the authority shall not grant a final release earlier than five years after the released prisoner is released from the institution under a period of post-release control.

(2) The department of rehabilitation and correction, no later than six months after July 8, 2002, shall adopt a rule in accordance with Chapter 119. of the Revised Code that establishes the criteria for the classification of a post-release control termination as "favorable" or "unfavorable."

(C) (1) Except as provided in division (C)(2) of this section, the following prisoners or person shall be restored to the rights and privileges forfeited by a conviction:

(a) A prisoner who has served the entire prison term that comprises or is part of the prisoner's sentence and has not been placed under any post-release control sanctions;

(b) A prisoner who has been granted a final release by the adult parole authority pursuant to division (A) or (B) of this section;

(c) A person who has completed the period of a community control sanction or combination of community control sanctions, as defined in section 2929.01 of the Revised Code, that was imposed by the sentencing court.

(2)(a) As used in division (C)(2)(c) of this section:

(i) "Position of honor, trust, or profit" has the same meaning as in section 2929.192 of the Revised Code.

(ii) "Public office" means any elected federal, state, or local government office in this state.

(b) For purposes of division (C)(2)(c) of this section, a violation of section 2923.32 of the Revised Code or any other violation or offense that includes as an element a course of conduct or the occurrence of multiple acts is "committed on or after the effective date of this amendment" if the course of conduct continues, one or more of the multiple acts occurs, or the subject person's accountability for the course of conduct or for one or more of the multiple acts continues, on or after the effective date of this amendment.

(c) Division (C)(1) of this section does not restore a prisoner or person to the privilege of holding a position of honor, trust, or profit if the prisoner or person was convicted of or pleaded guilty to committing on or after the effective date of this amendment any of the following offenses that is a felony:

(i) A violation of section 2921.02, 2921.03, 2921.05, 2921.41, 2921.42, or 2923.32 of the Revised Code;

(ii) A violation of section 2913.42, 2921.04, 2921.11, 2921.12, 2921.31, or 2921.32 of the Revised Code, when the person committed the violation while the person was serving in a public office and the conduct constituting the violation was related to the duties of the person's public office or to the person's actions as a public official holding that public office;

(iii) A violation of an existing or former municipal ordinance or law of this or any other state or the United States that is substantially equivalent to any violation listed in division (C)(2)(c)(i) of this section;

(iv) A violation of an existing or former municipal ordinance or law of this or any other state or the United States that is substantially equivalent to any violation listed in division (C)(2)(c)(ii) of this section, when the person committed the violation while the person was serving in a public office and the conduct constituting the violation was related to the duties of the person's public office or to the person's actions as a public official holding that public office;

(v) A conspiracy to commit, attempt to commit, or complicity in committing any offense listed in division (C)(2)(c)(i) or described in division (C)(2)(c)(iii) of this section;

(vi) A conspiracy to commit, attempt to commit, or complicity in committing any offense listed in division (C)(2)(c)(ii) or described in division (C)(2)(c)(iv) of this section, if the person committed the violation while the person was serving in a public office and the conduct constituting the offense that was the subject of the conspiracy, that would have constituted the offense attempted, or constituting the offense in which the person was complicit was or would

have been related to the duties of the person's public office or to the person's actions as a public official holding that public office.

(D) Division (A) of this section does not apply to a prisoner in the shock incarceration program established pursuant to section 5120.031 of the Revised Code.

(E) The adult parole authority shall record the final release of a parolee or prisoner in the official minutes of the authority.

Effective Date: 07-08-2002; 2008 SB3 05-13-2008

2010 Ohio Op. Atty. Gen. 2-6,
2010 Ohio Op. Atty. Gen. No. 2010-002, 2010 WL 292684
(Ohio A.G.)

Office of the Attorney General
State of Ohio

Opinion No. 2010-002

January 15, 2010

SYLLABUS

1. R.C. 2961.01(B), as enacted by Am. Sub. H.B. 3, 126th Gen. A. (2006) (eff. May 2, 2006, with certain sections effective on other dates) and amended by Sub. H.B. 195, 127th Gen. A. (2008) (eff. Sept. 30, 2008), does not apply to a person who was convicted of a felony under the laws of Ohio prior to May 2, 2006.

2. R.C. 2967.16(C)(1)(a) restores the privilege of circulating or serving as a witness to the signing of any declaration of candidacy and petition, voter registration application, or nominating, initiative, referendum, or recall petition, which had been forfeited by operation of R.C. 2961.01(B), to a person who was convicted of a felony under the laws of Ohio on or after May 2, 2006, and who has served his entire prison term and not had any post-release control sanctions imposed upon him.

3. R.C. 2967.16(C)(1)(b) restores the privilege of circulating or serving as a witness to the signing of any declaration of candidacy and petition, voter registration application, or nominating, initiative, referendum, or recall petition, which had been forfeited by operation of R.C. 2961.01(B), to a person who was convicted of a felony under the laws of Ohio on or after May 2, 2006, and who has been granted a final release by the Adult Parole Authority pursuant to R.C. 2967.16(A) or R.C. 2967.16(B).

4. R.C. 2967.16(C)(1)(c) restores the privilege of circulating or serving as a witness to the signing of any declaration of candidacy and petition, voter registration application, or nominating, initiative, referendum, or recall petition, which had been forfeited by operation of R.C. 2961.01(B), to a person who was convicted of a felony under the laws of Ohio on or after May 2, 2006, and who has completed the period of a community control sanction or combination of community control sanctions imposed by a sentencing court.

The Honorable Jennifer Brunner
Ohio Secretary of State
180 East Broad Street, 15th Floor
Columbus, Ohio 43215-3726

Dear Secretary of State Brunner:

You have requested an opinion whether the provisions of R.C. 2967.16(C)(1) operate to restore to a person who was convicted of a felony under the laws of Ohio the privilege of circulating or serving as a witness to the signing of any declaration of candidacy and petition, voter registration application, or nominating, initiative, referendum, or recall petition. [FN1] Specifically, you ask:

1. Does R.C. 2967.16(C)(1)(a) restore the privilege of circulating or serving as a witness to the signing of any declaration of candidacy and petition, voter registration application, or nominating, initiative, referendum, or recall petition, which had been forfeited by operation of R.C. 2961.01(B), to a person who was convicted of a felony under the laws of Ohio and who has served his entire prison term and was not placed under any post-release control sanctions...

2. Does R.C. 2967.16(C)(1)(b) restore the privilege of circulating or serving as a witness to the signing of any declaration of candidacy and petition, voter registration application, or nominating, initiative, referendum, or recall petition, which had been forfeited by operation of R.C. 2961.01(B), to a person who was convicted of a felony under the laws of Ohio and who has been granted a final release by the Adult Parole Authority pursuant to R.C. 2967.16(A) or R.C. 2967.16(B)...

*2 3. Does R.C. 2967.16(C)(1)(c) restore the privilege of circulating or serving as a witness to the signing of any declaration of candidacy and petition, voter registration application, or nominating, initiative, referendum, or recall petition, which had been forfeited by operation of R.C. 2961.01(B), to a person who was convicted of a felony under the laws of Ohio and who has completed the period of a community control sanction or combination of community control sanctions imposed by a sentencing court...

Before we address your specific questions, we note that our obligation in responding to your questions is to read and apply the law as it has been enacted by the General Assembly. *See generally* 1938 Op. Att'y Gen. No. 2854, vol. II, p. 1596, at 1597 ("where legislative intent is clearly and definitely expressed, this office is bound to give effect to it and cannot, however liberal it may wish to be, nullify, change or amend by its rulings the express provisions of a statute"). This opinion therefore reflects a detailed and careful study of R.C. 2961.01(B) and R.C. 2967.16(C)(1) as enacted by the General Assembly. Whether or not a person who has been convicted of a felony under the laws of Ohio *should* be permitted to circulate or serve as a witness to the signing of any declaration of candidacy and petition, voter registration application, or nominating, initiative, referendum, or recall petition is a wholly separate question of policy that the Ohio Constitution empowers the General Assembly to decide. Any concerns about the policy reflected in the provisions of R.C. 2961.01(B) and R.C. 2967.16(C)(1) thus should be directed to the General Assembly, as that body alone has the power to change the law.

Application of R.C. 2961.01(B) to a Person Who Was Convicted of a Felony

Because all three of your questions concern the application of the provisions of R.C. 2961.01(B) and R.C. 2967.16(C)(1) to a person who was convicted of a felony under the laws of Ohio, we will consider your questions together.

In Ohio, various provisions of law may divest a person who has been convicted of a felony under the laws of Ohio the capacity to exercise a right or privilege. *See, e.g., Ohio Const. art. II, § 5;*

R.C. 2915.11(B); R.C. 2921.02(F); R.C. 2921.41(C)(1); R.C. 2923.125(D)(1)(e); R.C. 2923.13(A); R.C. 2961.02(B); R.C. 3501.27(A); R.C. 3721.07(A); R.C. 3770.05(C); R.C. 4303.29(A); R.C. 4508.04(B)(1); R.C. 4738.07(D); R.C. 4749.03(A)(1)(a); R.C. 4751.10(D). In your questions, you have specifically asked about the application of R.C. 2961.01(B) to a person who was convicted of a felony under the laws of Ohio. [FN2]

R.C. 2961.01(B), which was enacted on May 2, 2006, *see* Am. Sub. H.B. 3, 126th Gen. A. (2006) (eff. May 2, 2006, with certain sections effective on other dates), states: [FN3]

A person who pleads guilty to a felony under laws of this state or any other state or the United States and whose plea is accepted by the court or a person against whom a verdict or finding of guilt for committing a felony under any law of that type is returned is incompetent 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.

*3 R.C. 2961.01(B) thus prohibits a person who was convicted of a felony under the laws of Ohio from circulating or serving as a witness to the signing of any declaration of candidacy and petition, voter registration application, or nominating, initiative, referendum, or recall petition.

Prior to the enactment of R.C. 2961.01(B) on May 2, 2006, no statute denied a person who was convicted of a felony under the laws of Ohio and who was on parole, judicial release, a non-jail community control sanction, or a post-release control sanction, or granted a final discharge the privilege of circulating or serving as a witness to the signing of any declaration of candidacy and petition, voter registration application, or nominating, initiative, referendum, or recall petition when the person had his privilege to be an elector restored under R.C. 2961.01. [FN4] With the enactment of R.C. 2961.01(B) on May 2, 2006, the General Assembly has withheld the privilege of circulating or serving as a witness to the signing of any declaration of candidacy and petition, voter registration application, or nominating, initiative, referendum, or recall petition from a person who was convicted of a felony under the laws of Ohio and had his privilege to be an elector restored under R.C. 2961.01. [FN5]

While R.C. 2961.01(B) clearly bars a person who was convicted of a felony under the laws of Ohio on or after May 2, 2006, from circulating or serving as a witness to the signing of any declaration of candidacy and petition, voter registration application, or nominating, initiative, referendum, or recall petition, we must nevertheless determine whether R.C. 2961.01(B) applies retroactively to a person who was convicted of a felony under the laws of Ohio before R.C. 2961.01(B) became effective on May 2, 2006. *See* Ohio Const. art. II, § 28 (“[t]he general assembly shall have no power to pass retroactive laws”); R.C. 1.48 (“[a] statute is presumed to be prospective in its operation unless expressly made retrospective”).

The test for determining whether a statute may be applied retroactively or retrospectively is well settled:

[T]wo provisions of Ohio law limit the retroactive application of a statute. First, R.C. 1.48 provides that “[a] statute is presumed to be prospective in its operation unless expressly made retrospective.” *Accord Hyle v. Porter*, 117 Ohio St. 3d 165, 2008-Ohio-542, [882 N.E.2d 899,] ¶7 (2008); *State v. Consilio*, 114 Ohio St. 3d 295, 2007-Ohio-4163, 871 N.E.2d 1167, ¶9 (2007); *State v. Cook*, 83 Ohio St. 3d 404, 410, 700 N.E.2d 570 (1998). In addition, Article II, section 28 of the Ohio Constitution prohibits the General Assembly from passing

laws that retroactively impair vested substantive rights. *Hyle v. Porter*, at ¶7; *State v. Consilio*, at ¶9; see *State v. Cook*, at 410-11. Instead, the power of the General Assembly to enact retroactive legislation is limited to “legislation that is merely remedial in nature.” *State v. Consilio*, at ¶9; accord *Hyle v. Porter*, at ¶7; *State v. Cook*, at 411.

*4 As recently explained in *State v. Consilio*, at ¶10, the Ohio Supreme Court has distilled the foregoing legal provisions into the following two-part test for evaluating whether a statute may be applied retroactively:

First, the reviewing court must determine as a threshold matter whether the statute is expressly made retroactive. The General Assembly's failure to clearly enunciate retroactivity ends the analysis, and the relevant statute may be applied only prospectively. If a statute is clearly retroactive, though, the reviewing court must then determine whether it is substantive or remedial in nature. (Citations omitted.)

Accord *Hyle v. Porter*, at ¶8; *State v. Walls*, 96 Ohio St. 3d 437, 2002-Ohio-5059, 775 N.E.2d 829, at ¶10 (2002). Thus, for purposes of the retroactivity analysis, “[t]he first part of the test determines whether the General Assembly ‘expressly made [the statute] retroactive,’ as required by R.C. 1.48; the second part determines whether it was empowered to do so.” *Hyle v. Porter*, at ¶8 (citing *Van Fossen v. Babcock & Wilcox Co.*, 36 Ohio St. 3d 100, 106, 522 N.E.2d 489 (1988)). (Footnotes omitted.)

2008 Op. Att’y Gen. No. 2008-011 at 2-131 and 2-132.

We must determine first, therefore, whether R.C. 2961.01(B), as enacted by Am. Sub. H.B. 3 and amended by Sub. H.B. 195, was expressly made retroactive by the General Assembly. If R.C. 2961.01(B) is silent on the question of its retroactive application, the presumption in favor of prospective application controls. R.C. 1.48; *Hyle v. Porter*, at ¶10; *State v. Consilio*, at ¶15. In order to overcome this presumption, R.C. 2961.01(B) must “‘clearly proclaim’ its retroactive application.” *Hyle v. Porter*, at ¶10; accord *State v. Consilio*, at ¶15. Moreover, “[t]ext that supports a mere inference of retroactivity is not sufficient to satisfy this standard” since retroactivity is not to be inferred from suggestive language. *Hyle v. Porter*, at ¶10; accord *State v. Consilio*, at ¶15. See generally *Kelley v. State*, 94 Ohio St. 331, 338-39, 114 N.E. 255 (1916) (when “the intention of the legislature is to give to such repealing or amending act a retroactive effect such intention must not be left to inference or construction, but must be manifested by express provision in the repealing or amending act”).

Our review of R.C. 2961.01(B) does not disclose a clear legislative indication of retroactive application. The statute only states that “[a] person who pleads guilty to a felony under laws of this state ... and whose plea is accepted by the court or a person against whom a verdict or finding of guilt for committing a felony ... is returned is incompetent 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.” Nothing in R.C. 2961.01(B) or elsewhere in the Revised Code suggests that R.C. 2961.01(B) is to be applied retroactively. Further, neither Am. Sub. H.B. 3 nor Sub. H.B. 195, which amended R.C. 2961.01(B), see note 3, *supra*, expressly provides or indicates that R.C. 2961.01(B) is to be applied retroactively.

*5 In addition, the Ohio Supreme Court has declared that “[a] statute, employing operative language in the present tense, does not purport to cover past events of a similar nature.” Absent

more express evidence of retroactivity, the general presumption of prospective application controls.”*State v. Consilio*, at ¶17 (quoting *Smith v. Ohio Valley Ins. Co.*, 27 Ohio St. 2d 268, 276, 272 N.E.2d 131 (1971)). The use of the present tense in R.C. 2961.01(B) by the General Assembly thus does not permit us to find that R.C. 2961.01(B) is to be applied retroactively since there is no other explicit evidence of retroactivity. [FN6] See *State v. Consilio*, at ¶17; 2008 Op. Att’y Gen. No. 2008-011 at 2-133.

Finally, when the General Assembly has intended to give retroactive effect to other statutes, it has used language to refer to convictions and guilty pleas that occurred before those statutes’ effective dates. The absence of such language in R.C. 2961.01(B) demonstrates a legislative intent that R.C. 2961.01(B) not be applied retroactively. See 2008 Op. Att’y Gen. No. 2008-011 at 2-133 and 2-134. As explained in *Hyle v. Porter*, at ¶14-19:

Two previous cases serve as examples of clear expressions of retroactivity and underscore the absence of a comparable declaration in former R.C. 2950.031.

In *Van Fossen*, we based our finding of a clearly expressed legislative intent for former R.C. 4121.80 to apply retroactively on the following passage: “This section applies to and governs any action * * * pending in any court on the effective date of this section * * * notwithstanding any provisions of any prior statute or rule of law of this state.” Former R.C. 4121.80(H), 141 Ohio Laws, Part I, 736-737. *Van Fossen*, 36 Ohio St. 3d at 106, 522 N.E.2d 489.

In *State v. Cook* (1998), 83 Ohio St. 3d 404, 700 N.E.2d 570, our finding that the General Assembly specifically made R.C. 2950.09 retroactive was based in part on an express provision making the statute applicable to anyone who “was convicted of or pleaded guilty to a sexually oriented offense prior to the effective date of this section, if the person was not sentenced for the offense on or after” that date. Former R.C. 2950.09(C)(1), 146 Ohio Laws, Part II, 2620. *Id.* at 410, 700 N.E.2d 570.

Both former R.C. 4121.80(H) and former 2950.09(C)(1) expressly make their provisions applicable to acts committed or facts in existence prior to their effective dates. In addition, R.C. 4121.80(H) expressly proclaimed its applicability in spite of contrary preexisting law by including the phrase “notwithstanding any provisions of any prior statute or rule of law of this state.” Thus, both statutes include strong and unmistakable declarations of retroactivity.

These examples demonstrate that the drafters of legislation know the words to use in order to comply with the Ohio Constitution and the requirement created by the General Assembly (R.C. 1.48).

*6 The text of R.C. 2950.031, by contrast, does not feature a clear declaration of retroactivity in either its description of convicted sex offenders or its description of prohibited acts. The statute does not proclaim its applicability to acts committed or facts in existence prior to the effective date of the statute or otherwise declare its retroactive application. In the present case, the absence of a clear declaration comparable to the two excerpted above precludes the retrospective application of R.C. 2950.031.

Because R.C. 2961.01(B) lacks a clear indication of retroactive application, it may be applied only prospectively to a person who was convicted of a felony under the laws of Ohio on or after its effective date? May 2, 2006. [FN7] See R.C. 1.48; *Hyle v. Porter*; *State v. Consilio*; 2008 Op. Att’y Gen. No. 2008-011 at 2-134 and 2-135. Accordingly, R.C. 2961.01(B), as enacted by Am. Sub. H.B. 3 and amended by Sub. H.B. 195, does not apply to a person who was convicted of a

felony under the laws of Ohio prior to May 2, 2006. Cf. State ex rel. Corrigan v. Barnes, 3 Ohio App. 3d 40, 443 N.E.2d 1034 (Cuyahoga County 1982) (syllabus, paragraph 2) (“[a]n amendment to R.C. 2961.01, effective January 1, 1974, which makes the statute applicable to persons convicted of felonies under federal law, may not constitutionally be applied with respect to acts committed prior to January 1, 1974. The amendment, if applied to past acts, would constitute an *ex post facto* law, prohibited under Section 10, Article I of the United States Constitution, and would constitute a retroactive law, prohibited under Section 28, Article II of the Ohio Constitution”).

Restoration of the Privilege Forfeited by Operation of R.C. 2961.01(B)

Having concluded that R.C. 2961.01(B) applies only to a person who was convicted of a felony under the laws of Ohio on or after May 2, 2006, we must now determine whether R.C. 2967.16(C)(1) restores to such a person the privilege forfeited by operation of R.C. 2961.01(B). R.C. 2967.16(C)(1) provides:

Except as provided in division (C)(2) of this section, *the following prisoners or person shall be restored to the rights and privileges forfeited by a conviction:*

- (a) A prisoner who has served the entire prison term that comprises or is part of the prisoner's sentence and has not been placed under any post-release control sanctions;
- (b) A prisoner who has been granted a final release by the adult parole authority pursuant to division (A) or (B) of this section;
- (c) A person who has completed the period of a community control sanction or combination of community control sanctions, as defined in [R.C. 2929.01] that was imposed by the sentencing court. (Emphasis added.)

The plain language of R.C. 2967.16(C)(1) thus unequivocally provides that, except as provided in R.C. 2967.16(C)(2), any person who was convicted of a felony under the laws of Ohio and who satisfies the conditions set forth therein is restored the rights and privileges forfeited by that conviction. Consequently, our opinions have concluded that a person who was convicted of a felony under the laws of Ohio and who satisfies the conditions set forth in R.C. 2967.16(C)(1) is restored the civil rights and privileges forfeited by operation of R.C. 2961.01. 2009 Op. Att'y Gen. No. 2009-011; 2008 Op. Att'y Gen. No. 2008-011; 2006 Op. Att'y Gen. No. 2006-031; 2006 Op. Att'y Gen. No. 2006-030; *see also U.S. v. Zellars*, 334 Fed. Appx. 742, 746 (6th Cir. 2009) (a felon's “civil rights [are] restored as a matter of law upon completion of his sentence and/or upon final release. The restoration of his civil rights [is] automatic”). Accordingly, a person who was convicted of a felony under the laws of Ohio on or after May 2, 2006, is restored the privilege of circulating or serving as a witness to the signing of any declaration of candidacy and petition, voter registration application, or nominating, initiative, referendum, or recall petition, which had been forfeited by operation of R.C. 2961.01(B), when the person satisfies the conditions set forth in R.C. 2967.16(C)(1).

*7 Pursuant to R.C. 2967.01(C)(1), one of the conditions is that the person not be excepted from the application of R.C. 2967.16(C) by the language of R.C. 2967.16(C)(2). Because the exception set forth in R.C. 2967.16(C)(2) applies to restoring the privilege of holding an office of honor, trust, or profit, it has no application to the restoration of the privilege of circulating or serving as a witness to the signing of any declaration of candidacy and petition, voter registration application, or nominating, initiative, referendum, or recall petition, which had been forfeited by

operation of R.C. 2961.01(B), pursuant to R.C. 2967.16(C)(1).^[FN8] This means that a person who was convicted of a felony under the laws of Ohio on or after May 2, 2006, is restored the privilege of circulating or serving as a witness to the signing of any declaration of candidacy and petition, voter registration application, or nominating, initiative, referendum, or recall petition, which had been forfeited by operation of R.C. 2961.01(B) when the person (1) has served his entire prison term and not had any post-release control sanctions imposed upon him; (2) has been granted a final release by the Adult Parole Authority pursuant to R.C. 2967.16(A) or R.C. 2967.16(B); or (3) has completed the period of a community control sanction or combination of community control sanctions imposed by a sentencing court. R.C. 2967.16(C)(1)(a)-(c).

Whether a person who was convicted of a felony under the laws of Ohio on or after May 2, 2006, has been restored pursuant to R.C. 2967.16(C)(1) the privilege of circulating or serving as a witness to the signing of any declaration of candidacy and petition, voter registration application, or nominating, initiative, referendum, or recall petition, which had been forfeited by operation of R.C. 2961.01(B), is a question of fact that must be addressed on a case-by-case basis by local officials or, ultimately, the courts. *See* 1983 Op. Att'y Gen. No. 83-057 at 2-232 (the Attorney General does not serve as a fact-finding body). If, however, it is determined that a person who was convicted of a felony under the laws of Ohio on or after May 2, 2006, has satisfied the conditions set forth in R.C. 2967.16(C)(1), the person is restored the privilege of circulating or serving as a witness to the signing of any declaration of candidacy and petition, voter registration application, or nominating, initiative, referendum, or recall petition, which had been forfeited by operation of R.C. 2961.01(B).

Conclusions

Based upon the foregoing, it is my opinion, and you are hereby advised as follows:

1. R.C. 2961.01(B), as enacted by Am. Sub. H.B. 3, 126th Gen. A. (2006) (eff. May 2, 2006, with certain sections effective on other dates) and amended by Sub. H.B. 195, 127th Gen. A. (2008) (eff. Sept. 30, 2008), does not apply to a person who was convicted of a felony under the laws of Ohio prior to May 2, 2006.
2. R.C. 2967.16(C)(1)(a) restores the privilege of circulating or serving as a witness to the signing of any declaration of candidacy and petition, voter registration application, or nominating, initiative, referendum, or recall petition, which had been forfeited by operation of R.C. 2961.01(B), to a person who was convicted of a felony under the laws of Ohio on or after May 2, 2006, and who has served his entire prison term and not had any post-release control sanctions imposed upon him.
- *8 3. R.C. 2967.16(C)(1)(b) restores the privilege of circulating or serving as a witness to the signing of any declaration of candidacy and petition, voter registration application, or nominating, initiative, referendum, or recall petition, which had been forfeited by operation of R.C. 2961.01(B), to a person who was convicted of a felony under the laws of Ohio on or after May 2, 2006, and who has been granted a final release by the Adult Parole Authority pursuant to R.C. 2967.16(A) or R.C. 2967.16(B).
4. R.C. 2967.16(C)(1)(c) restores the privilege of circulating or serving as a witness to the signing of any declaration of candidacy and petition, voter registration application, or nominating, initiative, referendum, or recall petition, which had been forfeited by operation of R.C. 2961.01(B), to a person who was convicted of a felony under the laws of Ohio on or

after May 2, 2006, and who has completed the period of a community control sanction or combination of community control sanctions imposed by a sentencing court.

Respectfully,
Richard Cordray
Ohio Attorney General

[FN1]. You have not indicated whether the person has been granted a full pardon by the Governor or had his conviction reversed or annulled or the record of his conviction sealed. We therefore assume, for the purpose of this opinion, that the person has not been granted a full pardon or had his conviction reversed or annulled or the record of his conviction sealed.

[FN2]. Because your questions concern the restoration of the privilege of circulating or serving as a witness to the signing of any declaration of candidacy and petition, voter registration application, or nominating, initiative, referendum, or recall petition, which had been forfeited by operation of R.C. 2961.01(B), to a person who was convicted of a felony under the laws of Ohio, this opinion will limit its analysis to the restoration of the specific privilege forfeited under R.C. 2961.01(B).

[FN3]. R.C. 2961.01(B) has been amended since its enactment in 2006. *See* Sub. H.B. 195, 127th Gen. A. (2008) (eff. Sept. 30, 2008). While the language of R.C. 2961.01(B) was changed, the meaning and effect of R.C. 2961.01(B) remain the same.

[FN4]. Prior to May 2, 2006, a person who was convicted of a felony under the laws of Ohio was incompetent to be an elector and, as such, was not allowed under R.C. 3503.06 to circulate any declaration of candidacy or any nominating, initiative, referendum, or recall petition unless he had his privilege to be an elector restored under R.C. 2961.01. *See* 2001-2002 Ohio Laws, Part V, 9484, 9739 (Am. Sub. H.B. 490, eff. Jan. 1, 2004, with certain sections effective on other dates) (setting forth the version of R.C. 2961.01 that was in effect prior to May 2, 2006); 1995-1996 Ohio Laws, Part I, 549, 621 (Am. Sub. H.B. 99, eff. Aug. 22, 1995, with certain sections effective on other dates) (setting forth the version of R.C. 3503.06 that was in effect prior to May 2, 2006); 1993-1994 Ohio Laws, Part II, 2516, 2543 (Am. Sub. S.B. 300, eff. Nov. 21, 1994) (setting forth the version of R.C. 3503.21 that was in effect prior to May 2, 2006).

R.C. 2961.01, as it existed prior to May 2, 2006, restored the privilege to be an elector to a person who was convicted of a felony under the laws of Ohio when the person was on parole, judicial release, a non-jail community control sanction, or a post-release control sanction, or granted a final discharge. *See* Am. Sub. H.B. 490. Accordingly, a person who was convicted of a felony under the laws of Ohio prior to May 2, 2006, was competent to be an elector and thus allowed to circulate any declaration of candidacy or any nominating, initiative, referendum, or recall petition when the person was on parole, judicial release, a non-jail community control sanction, or a post-release control sanction, or granted a final discharge.

[FN5]. A person who was convicted of a felony under the laws of Ohio and restored the privilege to be an elector by R.C. 2961.01 is not prohibited by R.C. 3503.06(A) from circulating “any declaration of candidacy or any nominating, or recall petition” on the basis that the felony conviction disqualifies the person from being an elector.

[FN6]. Even if the language of R.C. 2961.01(B) were ambiguous concerning its retroactive application, the Ohio Supreme Court has emphasized that “ambiguous language is not sufficient to overcome the presumption of prospective application.” *Hyle v. Porter*, at ¶13.

[FN7]. Insofar as R.C. 2961.01(B) may not be applied retroactively, it is unnecessary for us in this opinion to address whether the statute is substantive or remedial in nature. See *Hyle v. Porter*, at ¶9; *State v. Consilio*, at ¶10.

[FN8]. R.C. 2967.16(C)(2)(c) states that R.C. 2967.16(C)(1) does not restore a prisoner or person to the privilege of holding a position of honor, trust, or profit if the prisoner or person was convicted of, or pleaded guilty to, committing on or after May 13, 2008, certain felony offenses. The exception set forth in R.C. 2967.16(C)(2)(c) thus does not prohibit the restoration of the privilege of circulating or serving as a witness to the signing of any declaration of candidacy and petition, voter registration application, or nominating, initiative, referendum, or recall petition, which had been forfeited by operation of R.C. 2961.01(B), pursuant to R.C. 2967.16(C)(1).

2010 Ohio Op. Atty. Gen. 2-6, 2010 Ohio Op. Atty. Gen. No. 2010-002, 2010 WL 292684 (Ohio A.G.)