

**IN THE SUPREME COURT OF OHIO  
2012**

STATE OF OHIO  
CITY OF AKRON,

Case Nos. 2012-0808  
2012-1216

Plaintiffs-Appellees,

On Appeal from the  
Summit County Court  
of Appeals, Ninth  
Appellate District

-vs-

MONTOYA BOYKIN,

Court of Appeals  
Case Nos. 25752, 25845

Defendant-Appellant.

**BRIEF OF AMICUS CURIAE FRANKLIN COUNTY PROSECUTING  
ATTORNEY RON O'BRIEN IN SUPPORT OF APPELLEES STATE OF OHIO  
AND CITY OF AKRON**

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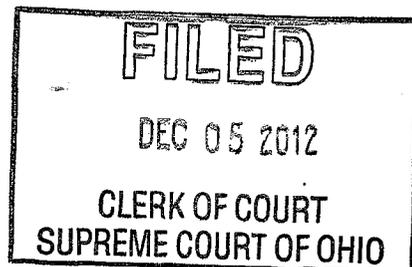
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**Certified-Conflict Question:** Whether a pardon conclusively entitles the recipient to have her pardoned convictions sealed?

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## INTRODUCTION

Appellant Montoya Boykin asks this Court to resolve a certified conflict between *State v. Cope*, 111 Ohio App.3d 309, 676 N.E.2d 141 (1st Dist.1996), and the Ninth District's decision in this case. In *Cope*, the First District held that a pardon "entitle[s]" the recipient to a judicial expungement under *Pepper Pike v. Doe*, 66 Ohio St.2d 374, 421 N.E.2d 1303 (1981), even if the pardon recipient is ineligible for a statutory sealing of records. *Cope* at 311-312. The Ninth District, on the other hand, held that a pardon does not conclusively entitle the recipient to a judicial expungement under *Pepper Pike*. *State v. Boykin*, 9th Dist. Nos. 25752, 25845, 2012-Ohio-1381, ¶ 13. Rather, according to the Ninth District, where a pardon recipient is ineligible for a statutory sealing of records, the pardon authorizes the trial court to exercise its discretion to grant a judicial expungement. *Id.* at ¶ 15.

Amicus curiae Franklin County Prosecutor Ron O'Brien offers this brief in support of a third option, one reached by the Tenth District recently in *State v. Radcliff*, 10th Dist. No. 11AP-652, \_\_\_ N.E.2d \_\_\_, 2012-Ohio-4732. After thoroughly surveying the relevant authorities, the Tenth District in *Radcliff* held that, because "a pardon neither erases the conviction nor renders the pardon recipient innocent as if the crime were never committed," and because judicial expungement under *Pepper Pike* is available only where the applicant "has not been convicted," *Radcliff* "cannot invoke the court's inherent jurisdiction to seal his records." *Id.* at ¶ 51. In other words, where a pardon recipient is ineligible for a statutory sealing of records, the pardon neither requires nor authorizes a trial court to grant a judicial expungement.

Of the three views—*i.e.*, automatic judicial expungement (*Cope*), discretionary judicial expungement (*Boykin*), and no judicial expungement (*Radcliff*)—the view taken by the Tenth District in *Radcliff* is most faithful to the modern understanding of the effect of a pardon and is most consistent with the limits of judicial expungement under *Pepper Pike*. Amicus curiae Ron

O'Brien therefore respectfully requests that this Court follow *Radcliff*. In the alternative, amicus curiae respectfully requests that this Court reject *Cope*'s "automatic judicial expungement" holding and find that, when a pardon recipient seeks a judicial expungement of a conviction that has been pardoned, the trial court must balance the privacy rights of the applicant against the government's legitimate need to maintain the records.

### STATEMENT OF AMICUS INTEREST

Every year, the office of the Franklin County Prosecutor responds to hundreds of applications to seal records of felony cases. Accordingly, Ron O'Brien has an interest in ensuring that courts apply the proper standards in assessing applications to seal records. This interest is particularly strong when an applicant seeks a judicial expungement under *Pepper Pike* because he or she fails to satisfy the strict statutory criteria for sealing of records set forth by the General Assembly in R.C. 2953.31 et seq. and R.C. 2953.51 et seq. After all, expungement is a "privilege, not a right" and thus "should be granted only when all requirements for eligibility are met." *State v. Simon*, 87 Ohio St.3d 531, 533, 721 N.E.2d 1041 (2000), quoting *State v. Hamilton*, 75 Ohio St.3d 636, 639-640, 665 N.E.2d 669 (1996).

Moreover, the Franklin County Prosecutor's office recently litigated *Radcliff* in the Franklin County Court of Common Pleas and the Tenth District Court of Appeals. The Franklin County Prosecutor is thus in a unique position to assist this Court in its consideration of this issue.

### STATEMENT OF THE FACTS

Amicus Curiae adopts the statement of facts contained in the State of Ohio's brief.

## ARGUMENT

**Proposition of Law:** A pardon is not an acquittal or dismissal and does not erase the fact of conviction. The receipt of a pardon therefore does not require or even authorize a trial court to grant a judicial expungement under *Pepper Pike v. Doe*, 66 Ohio St.2d 374, 421 N.E.2d 1303 (1981).

**Certified-Conflict Question:** Whether a pardon conclusively entitles the recipient to have her pardoned convictions sealed?

Boykin does not rely on any statutory authority to seal the records of her criminal cases. Rather, she relies exclusively on the trial court's so-called "inherent authority" to expunge records under *Pepper Pike*. Appellant's Brief, 12 ("The trial court does not need legislative authority to seal a pardoned conviction. This power to seal stems from the inherent powers of the court."); *see also*, *Boykin* at ¶ 4 ("Boykin concedes that she is not eligible to have her records sealed under the relevant statutes."). But a trial court's authority to expunge records under *Pepper Pike* is limited to cases in which there was no conviction. A pardon does not erase the fact of conviction and thus does not authorize—let alone require—a trial court to order an expungement under *Pepper Pike*.

### **I. A TRIAL COURT'S AUTHORITY TO ORDER A JUDICIAL EXPUNGEMENT UNDER *PEPPER PIKE* IS LIMITED TO CASES IN WHICH THERE WAS NO CONVICTION.**

In *Pepper Pike*, Doe was arrested on a misdemeanor assault charge, with the complaining witness being Doe's ex-husband's wife. *Pepper Pike* at 374. But the charge was ultimately dismissed with prejudice in exchange for Doe's agreement to dismiss a defamation suit filed against her ex-husband and his wife. *Id.* at 374-375. Doe later sought to expunge her arrest record *Id.* at 375. The municipal court denied the motion, and the court of appeals affirmed. *Id.*

This Court, however, reversed, holding that "[t]he 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." *Id.* at paragraph one of the

syllabus. This authority exists “where such unusual and exceptional circumstances make it appropriate to exercise jurisdiction over the matter.” *Id.* at paragraph two of the syllabus. Courts must “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.* In Doe’s case, there was “no compelling state interest or reason to retain the judicial and police records,” given that the charge arose “from a domestic quarrel and constitute[d] vindictive use of our courts.” *Id.* at 377. “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, 406 A.2d 1388 (1979).

The General Assembly has since codified *Pepper Pike* in R.C. 2953.51 et seq., which governs the sealing of records after a finding of not guilty, dismissal, or no bill. *State ex rel. Cincinnati Enquirer v. Winkler*, 101 Ohio St.3d 382, 2004-Ohio-1581, 805 N.E.2d 1094, ¶ 10 (equating analysis under R.C. 2953.52 with balancing test set forth in *Pepper Pike*). To the extent *Pepper Pike* is still relevant at all, it is limited to cases in which there was no conviction. As the Tenth District noted in *Radcliff*, “where a defendant has been convicted of an offense, expungement may be granted only as allowed by statute, and the court may not use the judicial (i.e. extra-statutory) expungement remedy used in *Pepper Pike*.” *Radcliff* at ¶ 15, quoting *State v. Bailey*, 10th Dist. No. 02AP-406, 2002-Ohio-6740, ¶ 11. Other courts have reached the same conclusion. *Radcliff* at ¶ 15 (citing cases from six appellate districts).

## **II. A PARDON DOES NOT ERASE THE FACT OF CONVICTION AND THUS DOES NOT AUTHORIZE OR REQUIRE A TRIAL COURT TO GRANT A JUDICIAL EXPUNGEMENT.**

Because judicial expungement under *Pepper Pike* is limited to cases in which there was no conviction, the next question is whether a pardon renders the recipient as having never been convicted of the offense. The answer to this question is “no.”

Under Section 11, Article III of the Ohio Constitution, the governor has “the power, after conviction, to grant reprieves, commutations, and pardons, for all crimes and offenses, except treason and cases of impeachment, upon such conditions as the governor may think proper; subject, however, to such regulations, as to the manner of applying for commutations and pardons, as may be prescribed by law.” “A full and absolute pardon releases the offender from the entire punishment prescribed for his offense, and from all the disabilities consequent on his conviction.” *State ex rel. Attorney General v. Peters*, 43 Ohio St. 629, 650, 4 N.E. 81 (1885); *see, also*, R.C. 2967.01(B) (pardon is a “remission of penalty by the governor in accordance with the power vested in the governor by constitution”); R.C. 2967.04(B) (pardon “relieves the person to whom it is granted of all disabilities arising out of the conviction or convictions from which it is granted.”). Thus, while a pardon discharges the recipient from any further punishment and removes any legal disabilities arising from the conviction, it “neither erases the conviction nor renders the pardon recipient innocent as if the crime were never committed.” *Radcliff* at ¶ 51.

**A. Modern Caselaw Refutes The View That A Pardon Erases The Fact Of Conviction.**

Nearly 130 years ago, in *Knapp v. Thomas*, 39 Ohio St. 377, 48 Am.Rep. 462 (1883), this Court stated that “a pardon reaches both the punishment prescribed for the offense and the guilt of the offender.” *Id.* at 381, quoting *Ex parte Garland*, 71 U.S. 333, 380, 18 L.Ed 366 (1866). This Court continued that a pardon “obliterates, in legal contemplation, the offense itself.” *Knapp* at 381, quoting *Carlisle v. United States*, 83 U.S. 147, 21 L.Ed. 426 (1872). “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.” *Knapp* at 381, quoting *Knote v. United States*, 95 U.S. 149, 24 L.Ed. 442 (1877).

Later, this Court relied on *Knapp* in *State ex rel. Gordon v. Zangerle*, 136 Ohio St. 371, 26 N.E.2d 190 (1940), which stated that “[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, citing *Knapp* at 381; *see also*, *State v. Morris*, 55 Ohio St.2d 101, 105, 378 N.E.2d 708 (1978) (“a full pardon not only results in a remission of the punishment and the guilt, but also a remission of the crime itself.”), citing *Knapp* at 381.

As the Tenth District noted, *Knapp* is “at the root of the pardon jurisprudence in Ohio.” *Radcliff* at ¶ 23. But, as the Tenth District also noted, this Court has clarified its holding in *Knapp*, stating that “[w]hatever 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.” *Radcliff* at ¶ 19, quoting *State ex rel. Attorney General v. Hawkins*, 44 Ohio St. 98, 117, 5 N.E. 228 (1886). This Court in *Hawkins* rejected the idea that a pardon entitled the recipients “to the same confidence as if they had never been convicted.” *Hawkins* at 98. It is a “perversion of language” to give Justice Okey’s opinion in *Knapp* “such a construction. He never meant anything of the kind.” *Id.*

Moreover, the Tenth District recognized that the United States Supreme Court cases cited in *Knapp*—*i.e.*, *Garland*, *Carlisle*, and *Knote*—do not support the conclusion that a pardon erases the fact of the conviction. For example, “[m]odern case law has dismissed the ‘blotting out’ language from *Garland* as dictum and rejected *Garland*’s expansive view of the power to pardon.” *Radcliff* at ¶ 27 (citing cases from the District of Columbia, Delaware, and four federal circuits). Subsequent United States Supreme Court cases have “eroded” *Garland*’s “broad articulation” of the pardon power by “narrowing its scope.” *Id.* at ¶ 28, quoting *In re Sang Man*

*Shin*, 125 Nev. 100, 105, 206 P.3d 91 (Nev.2009). In one such case, the United States Supreme Court observed that a pardon “carries an imputation of guilt; acceptance a confession of it.” *Radcliff* at ¶ 29, quoting *Burdick v. United States*, 236 U.S. 79, 94, 35 S.Ct. 267, 59 L.Ed 476 (1915). As for *Carlisle* and *Knote*, those cases both “acknowledg[e] that a pardon does not erase past conduct.” *Radcliff* at ¶ 30; *see also*, *Nixon v. United States*, 506 U.S. 224, 113 S.Ct. 732, 122 L.Ed.2d 1 (1993) (“a pardon is in no sense an overturning of a judgment of conviction by some other tribunal” but “is ‘[an] executive action that mitigates or set aside *punishment* for a crime’”), quoting Black’s Law Dictionary 1113 (6th Ed. 1990) (emphasis in *Nixon*).

Given the foregoing, “*Knapp*’s foundation for holding that a pardon blots out the offense and operates as a verdict of acquittal is problematic. *Carlisle* and *Knote* both indicate that a pardon cannot erase past conduct, and recent case law dismisses *Garland*’s broad articulation of a pardon as dictum.” *Id.* at ¶ 33; *see also*, *United States v. Noonon*, 906 F.2d 952 (3rd Cir.1990) (explaining that the United States Supreme Court does not accept *Garland*’s dictum that a pardon “blots out” the existence of guilt); *Bjerkan v. United States*, 529 F.2d 125 (7th Cir.1975), n. 2 (same).

This limited view of a pardon has found support in academia. *Radcliff* at ¶ 34, citing Samuel Williston, *Does a Pardon Blot Out Guilt?*, 28 Harv.L.Rev. 647, 647-648 (1915) (“when it is said that in the eye of the law [pardoned convicts] are as innocent as if they had never committed an offence, the nature rejoinder is, then the eyesight of the law is very bad.”). It has also been applied in cases involving reinstatement of disbarred attorneys and other professional-licensing contexts. *Radcliff* at ¶¶ 35-37. Accordingly, “[t]he majority of courts to consider the issue hold that a pardon does not entitle its recipient to records expungement.” *Id.* at ¶¶ 40-43 (collecting state and federal cases); *see also*, *Boykin* at ¶ 13 (also collecting cases).

**B. Ohio Statutes Further Prove That A Pardon Does Not Erase The Fact Of Conviction.**

In addition to surveying state and federal caselaw regarding the effect of a pardon, the Tenth District also discussed several Ohio statutes further proving that a pardon does not erase the fact of conviction. For example, the recipient of a pardon remains incompetent to circulate a petition. *Radcliff* at ¶ 46, citing R.C. 2961.01(A), (B). A pardon recipient also “does not release the person from the costs of a conviction in this state, unless so specified.” *Radcliff* at ¶ 46, citing R.C. 2961.01(A)(2). Plus, unless the pardon was based on a finding of innocence or rehabilitation, a pardoned conviction can still be admitted as a conviction for purposes of impeachment under Evid.R. 609(C). And a pardon does not automatically remove the recipient’s disability with respect to carrying a concealed weapon. *Radcliff* at ¶ 46, citing *Boykin* at ¶ 11, citing R.C. 2923.14(C).

Moreover, Ohio statutes specifically contemplate that a record of the pardon and the corresponding conviction be maintained. The governor must “communicate to the general assembly, at every regular session, each case of \* \* \* pardon granted, stating the name and crime of the convict, the sentence, its date, and the date of the \* \* \* pardon \* \* \* with the Governor’s reasons therefor.” *Radcliff* at ¶ 47, citing Ohio Constitution, Article III, Section 11; *see also*, R.C. 107.10(E) (requiring governor to keep a “pardon record” containing the date of each application for pardon, the name of the convict, the crime committed, in what county, the term of court where the convict was convicted, the sentence of the court, the action of the governor, the reason for that action, and the date of that action).

Copies of the warrant of pardon must also be filed with the clerk and, if applicable, with the institution if the recipient was confined. *Radcliff* at ¶ 48, citing R.C. 2967.06. The clerk must “record the warrant \* \* \* in the journal of the court, which record, or a duly certified

transcript thereof, shall be evidence of such pardon or commutation, the conditions thereof, and the acceptance of condition.” R.C. 2967.04(A).

Through these provisions, the General Assembly intended that all pardons—as well as information regarding the pardon recipients and the convictions that are the subject of the pardons—be available for public inspection. Requiring, or even authorizing, a trial court to expunge the records of a pardoned conviction would be “of questionable value if the record of conviction, accessible through the internet, continues to reveal the underlying conviction.” *Radcliff* at ¶ 52.

Furthermore, while R.C. 2953.52 provides for the sealing of records after a not guilty finding, dismissal, or no bill, the statute does not list a pardon as grounds to seal records. *Id.* at ¶ 49. This omission is significant, because “if a pardon truly rendered the defendant innocent as if the crime were never committed, the General Assembly should have included pardons with the other innocence-based reasons for expungement contained in R.C. 2953.52.” *Id.* at ¶ 52.

**C. Pardons And Expungements Are Separate Forms Of Relief—The Former Does Not Require The Latter.**

Boykin argues that anything short of an automatic judicial expungement would “undermine[] the impact of the granted pardon.” Appellant’s Brief, 9. Specifically, Boykin contends that a judicial expungement is necessary to remove the “disability” that results from having a record of conviction, otherwise the pardon recipient will have difficulty finding a job, obtaining housing, and receiving public benefits. *Id.* But the mere existence of a record of conviction is not a “disability” that is removed by a pardon. Black’s Law Dictionary 494 (8th Ed.2004) (defining “civil disability” as “[t]he condition of a person who has had a legal right or privilege revoked as a result of a criminal conviction”). Likewise, Boykin’s amicus’s argument that a judicial expungement is necessary to alleviate the various “collateral consequences” of the

conviction is misplaced. Amicus Brief, 9-26. A “collateral consequence” is not the same as a “disability.”

Boykin also argues that anything short of an automatic judicial expungement “encroaches on the governor’s exclusive constitutional authority to issue a pardon.” Appellant’s Brief, 10. But pardons and expungements are separate forms of relief. A sealing of records is an “additional avenue to restore rights and privileges” apart from a pardon. *State ex rel. Gains v. Rossi*, 86 Ohio St.3d 620, 623, 716 N.E.2d 204 (1999). A refusal to grant an expungement therefore in no way infringes on the governor’s authority to issue a pardon. Neither a pardon nor an expungement automatically requires the other. One can obtain a pardon without obtaining an expungement, and vice-versa.

Of course, this is not to say that a pardon recipient will *never* be able to obtain an expungement. Pardon recipients may be eligible for a *statutory* sealing of records under R.C. 2953.31 et seq. And Am. Sub. S.B. No. 337, effective September 28, 2012, vastly expanded the eligibility for receiving a sealing of records.

### **III. EVEN IF A PARDON AUTHORIZES A TRIAL COURT TO GRANT A JUDICIAL EXPUNGEMENT, SUCH EXPUNGEMENT IS NOT AUTOMATIC.**

For the foregoing reasons, a pardon does not erase the fact of guilt and thus does not authorize—let alone require—a trial court to grant an expungement under *Pepper Pike*. If this Court, however, does not agree with the Tenth District’s conclusion in *Radcliff*, then Amicus Ron O’Brien respectfully requests that this Court reject the “automatic judicial expungement” holding in *Cope* and require trial courts to weigh the privacy interests of the applicant against the government’s legitimate need to maintain the records. *Pepper Pike* at paragraph two of the syllabus.

Indeed, Boykin's case illustrates perfectly why judicial expungement should not be automatic. Boykin's privacy interests are minimal. She is not innocent of the crimes for which she received a pardon. She pleaded guilty to receiving stolen property and no contest to the two theft counts. Unlike the situation in *Pepper Pike*, there is no evidence that anyone "used the courts as a vindictive tool to harass" Boykin. *Id.* at 377.

On the other side of the balance, the government's need to maintain the records is compelling. In *Pepper Pike*, there was no compelling state interest in maintaining records that arose from a "vindictive use of our courts." *Id.* at 377. But the same cannot be said in the present case. While Boykin and her amicus complain that her criminal record may affect her employment, the fact that Boykin has been convicted of four theft-related offenses is exactly the type of information current or prospective employers should have access to. Boykin has no inherent right to hide her contacts with the criminal justice system from current or future employers. That Boykin was pardoned for these offenses does not eliminate the fact that she has a history of stealing—something that any employer would legitimately want to know.

As more and more businesses are concerned about the safety and security of their employees and customers, criminal record checks allow employers to determine whether a prospective employee will be suited for a particular position. By maintaining legitimate public access to the record, future employers would at least be able to question the applicant about the record and the facts underlying the charges.

Furthermore, should Boykin face charges in the future, the records would provide the court with valuable information. When an offender is sentenced, courts should have "the fullest information possible concerning the applicant's life and characteristics." *United States v. Watts*, 519 U.S. 148, 117 S.Ct. 633, 136 L.Ed.2d 554 (1997), quoting *Williams v. New York*, 337 U.S.

241, 247, 69 S.Ct. 1079, 93 L.Ed. 1337 (1949). A thorough understanding of an individual's contacts with the criminal justice system is essential information at sentencing. *State v. Burton*, 52 Ohio St.2d 21, 23, 368 N.E.2d 297 (1977).

Boykin unpersuasively argues that no judicial balancing is necessary because the governor by issuing the pardon has already concluded that the recipient's privacy interests outweigh the government's interest in maintaining the records. Appellant's Brief, 15. Governors issue pardons for any number of reasons, so it is entirely speculative to assume that the governor has conducted this balancing test when issuing a pardon. But even if this is the case, the governor's silent conclusion in this regard should not bind a court in later expungement proceedings.

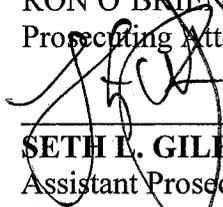
Equally misplaced is Boykin's reliance on *Winkler* for the proposition that there is no need to conduct the *Pepper Pike* balancing test. Appellant's Brief, 16. *Winkler* addressed the public's right to access records *after* a trial court had already conducted the balancing test and ordered the records sealed. It is entirely circular to argue that, because the public has no interest in sealed records, a trial court should not have to conduct a balancing test before sealing the records in the first place.

## CONCLUSION

For the foregoing reasons, amicus curiae Franklin County Prosecutor Ron O'Brien respectfully requests that this Court adopt the holding in *Radcliff* that a pardon does not erase the fact of conviction and thus does not authorize—let alone require—a trial court to order a judicial expungement under *Pepper Pike*. In the alternative, amicus curiae respectfully requests that this Court reject the “automatic judicial expungement” holding in *Cope* and hold that a pardon merely authorizes a trial court to grant a judicial expungement after conducting the balancing test set forth in *Pepper Pike*.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

This is to certify that a copy of the foregoing was sent by regular U.S. Mail this day,

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