ORIGINAL

In the Supreme Court of Ohio

STATE, *ex rel.* THE CINCINNATI ENQUIRER, a Division of Gannett Satellite Information Network, Inc. **312 Elm Street** **Cincinnati, Ohio 45202** Petitioner, vs. **HONORABLE ROBERT H. LYONS,** **Butler County** **Area I Court** **118 High St.** **Oxford, Ohio 45056** Respondent.	**Case No. 12-1924** **Original Action in Mandamus**

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SUPREME COURT OF OHIO

MERIT BRIEF OF PETITIONER

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STATEMENT OF FACTS

On October 13, 2012, Petitioner, The Cincinnati Enquirer, a division of Gannett Satellite Information Network, Inc. ("The Enquirer"), published an article concerning a flier posted on the campus of Miami University of Ohio promoting the rape of female students. (Pet'r's Evidence ("PE"), McLaughlin Aff., Ex. A.) The first article was followed by two more, describing the fallout and the First Amendment implications of criminal charges brought by Butler County Prosecuting Attorney in connection with the flier. (*Id.* at Ex. A through C.)

On November 8, 2012, The Enquirer published an article with the headline "Secrecy Cloaks Plea on MU Flier: Case Records Sealed in Butler Co. Court." Around the same time, counsel for The Enquirer obtained a copy of the redacted court order ("Order") issued by the Respondent, Judge Robert H. Lyons, sealing the record of one of the students charged in connection with the flier ("John Doe"). (Aff. of John C. Greiner.) Respondent currently serves as judge for the Butler County Area I Court. (Compl. & Answer at ¶ 2.)

Respondent's Order purported to seal John Doe's conviction record, and indicated that John Doe pleaded guilty to disorderly conduct. (Aff. of John C. Greiner.) The Order provided, in part, that "all official records of the charge . . . are hereby sealed and all Index references deleted, as provided by Ohio Revised Code Section 2953.52." (Aff. of John C. Greiner, Ex. A.)

Following receipt of the Order, The Enquirer brought the instant action in mandamus to compel Respondent to unseal the record, alleging in part that Respondent's Order was unlawful because R.C. 2953.52 did not provide authority to seal conviction records. (Compl. at ¶ 9-10.) In his answer, Respondent admitted that "he erroneously relied on §2953.52" to seal the conviction record. (Answer at ¶¶ 9-10.)

On the same day he filed his Answer, December 13, 2012, Respondent apparently conducted a hearing during which he allowed John Doe to withdraw his guilty plea under Ohio Crim. R. 32.1 on the ground of "manifest injustice." (Resp't Evidence ("RE"), Dec. 13, 2012 Hr'g Trans., at 2-7.) Following John Doe's plea withdrawal, the assistant prosecuting attorney confirmed for the court that the disorderly conduct charge would no longer be pursued by her office. (*Id.* at 7-8.)

Immediately thereafter, Respondent proceeded to conduct a hearing on John Doe's contemporaneous application to have his now record of dismissal expunged pursuant to R.C. 2953.52. (*Id.* at 8.) Respondent noted on the record that the "two interested parties" were present, and proceeded to conclude that expungement was appropriate. (*Id.* at 11.) The only finding made on the record by Respondent with respect to the application was Respondent's conclusory statement that there were no criminal charges pending against John Doe "and that the interest of the defendant outweighs the legitimate needs for the government to maintain any recording pertaining to this case." (*Id.* at 14.) The transcript of the December 13, 2012 hearing does not indicate that Respondent gave any consideration to the substantial public interest in the case, nor that he reviewed any actual evidence of what precisely was the defendant's interest in sealing the record.

Following the December 13, 2012 hearing, Respondent moved to dismiss The Enquirer's Complaint on the grounds that the plea withdrawal and sealing made the matter moot. This Court denied Respondent's motion to dismiss, and issued an alternative writ ordering the parties to submit evidence and merit briefs addressing the issues raised. The Enquirer submits the instant merit brief pursuant to that Order and in support of its petition for a writ of mandamus compelling Respondent to unseal the record of John Doe's prosecution for disorderly conduct.

ARGUMENT

Proposition of Law No. I:
Mandamus is the appropriate remedy for a violation of Ohio Superintendence Rules 44 through 47.

To be entitled to extraordinary relief in mandamus in a public access case, a relator must demonstrate: (1) a clear legal right to access the information withheld, and a corresponding clear legal duty on the part of the public office to provide access to the information; and (2) "the lack of an adequate remedy in the ordinary course of law." *See State ex rel. Vindicator Printing Co. v. Wolff* ("*Vindicator*"), 132 Ohio St.3d 481, 2012-Ohio-3328, 974 N.E.2d 89, ¶ 22. Ohio Superintendence Rule 47(B) grants a person aggrieved by a court's failure to comply with Sup.R. 44 through 47 the right to bring an action in mandamus to compel compliance. Thus, as in any public records action, a relator "need not establish the lack of an adequate remedy in the ordinary course of law" to be entitled to relief in mandamus. *See State ex rel. ACLU of Ohio, Inc. v. Cuyahoga County Bd. of Comm'rs* ("*ACLU*"), 128 Ohio St.3d 256, 2011-Ohio-625, 943 N.E.2d 553, ¶ 24. Accordingly, to be entitled to relief in mandamus in the instant action, The Enquirer need only establish that it had a clear legal right to John Doe's prosecution records, and a corresponding duty on the part of Respondent to produce them.

Proposition of Law No. II:
The record of John Doe's prosecution for disorderly conduct constitutes a "court record" for purposes of Sup.R. 45(B)(1).

Superintendence Rules 44 through 47 apply to records generated in court actions commenced after July 1, 2009. Superintendence Rule 45(B)(1) provides, in pertinent part, that "[a] court . . . shall make a *court record* available by direct access, promptly acknowledge any person's request for direct access, and respond to the request within a reasonable amount of time." (Emphasis added.) The term "court record" is defined as "both a *case document* and an

administrative document, regardless of physical form or characteristic, manner of creation, or method of storage." Sup.R. 44(B) (emphasis added).

Also defined is the term "case document," which means

> a document and information in a document submitted to a court or filed with a clerk of court in a judicial action or proceeding, including exhibits, pleadings, motions, orders, and judgments and any documentation prepared by the court or clerk in a judicial action or proceeding, such as journals, dockets, and indices.

Sup.R. 44(C)(1). The categories of documents and information excluded from the definition of "case document" are specifically enumerated in Sup.R. (C)(2) (a) through (g).

Respondent does not contest the basic proposition that The Enquirer would be entitled to the records made during John Doe's prosecution otherwise constituting "court records" but for the action of the court expunging those records. Thus, the issue the Court must resolve here is simply whether the records were made exempt from disclosure through the Respondent's various orders that purported to seal the records created during John Doe's prosecution for disorderly conduct.

For the reasons that follow, the answer to that question is an unequivocal no. The records associated with John Doe's prosecution for disorderly conduct therefore remain "court records" to which The Enquirer has a clear legal right to inspect, and for which Respondent has a clear legal duty make accessible. And any doubts that might exist in this case must be resolved in favor of The Enquirer. *See* Sup.R. 45(A) ("Court records are presumed open to public access."). *Cf. ACLU*, 128 Ohio St. 3d at 263 (observing that the public record act must be construed "liberally in favor of broad access" and that doubts must be resolved "in favor of disclosure of public records").

Proposition of Law No. III:
An unlawful order sealing a "court record" cannot be cured by subsequent unlawful maneuvers intended to deny the public its right of access.

A. Respondent's initial sealing order was unlawful.

As an initial matter, neither party disputes that Respondent's original order purporting to seal John Doe's conviction record under R.C. 2953.52 was unlawful. Respondent conceded in his answer that R.C. 2953.52—on its face—does not provide legal authority for the sealing of a conviction record. Thus, because Respondent had no authority to expunge John Doe's conviction record under R.C. 2953.52, it thus follows that his order purporting to do so under that statute had no legal effect. *See State v. Lovelace*, 2012-Ohio-3797, 975 N.E.2d 567, ¶¶ 9-25 (1st Dist.) (holding that because a court has no jurisdiction to expunge a conviction under R.C. 2953.32 for an ineligible offender, such orders are void, not merely voidable). Accordingly, because John Doe's conviction record was a "court record" within the meaning of Sup.R. 45(B)(1) when Respondent unlawfully sealed the record, Respondent's denial of access to that record was a clear violation of The Enquirer's right of access protected by Sup.R. 45(B)(1) and the First Amendment.

B. Respondent's subsequent efforts to seal John Doe's record should not be given their intended effect by this Court.

Following The Enquirer's initiation of the instant action, Respondent attempted to once again seal John Doe's record—this time by undoing the criminal process that preceded his conviction. The first step in the undoing of John Doe's prosecution was Respondent's acceptance of John Doe's plea withdrawal on the ground of "manifest injustice." Immediately following the plea withdrawal, the prosecuting attorney dropped the charge against John Doe and

Respondent heard—and granted—John Doe's application to expunge his now record of dismissal. All of this was accomplished in a brief 15 pages of hearing transcript.

The circumstances under which the hearing was conducted—and the transcript itself—undeniably demonstrate that the purpose of Respondent's efforts was to thwart The Enquirer's efforts to exercise its constitutional right of access. For this reason alone, Respondent's efforts should not be given effect. Indeed, a ruling in Respondent's favor would run the substantial risk of setting precedent that could have the effect of encouraging public employees to use similarly creative and arguably unlawful ways to deny the public its right of access to court proceedings, particularly where their own mistakes or misconduct might invite public scrutiny. *Cf. Kroeplin v. Wis. Dep't of Natural Res.*, 2006 WI App 227, ¶ 52, 297 Wis. 2d 254, 725 N.W. 2d 286 (Wis. Ct. App. 2006) (observing that "the public has a particularly strong interest in being informed about public officials who have been derelict in their duty" (internal quotations and formatting omitted)).

But even apart from the constitutional and public policy ramifications of giving Respondent's actions their intended effect, the actions themselves were insufficient to seal John Doe's record.

1. *Respondent's acceptance of John Doe's plea withdrawal was unlawful.*

Ohio Criminal Rule 32.1 provides that a court may, after a sentence has been imposed, set aside a judgment of conviction and permit a plea withdrawal "to correct manifest injustice." This Court has held that "postsentence withdrawal motion is allowable only in extraordinary cases." *State v. Smith* (1977), 49 Ohio St. 2d 261, 264, 361 N.E.2d 1324. This case does not rise to that level for at least two reasons.

First, Respondent's rationale for his finding of manifest injustice was based on representations purportedly made to him that "sealing of the record was part of the plea arrangement." (RE, Dec. 13 Hr'g Trans., at 6.) Of course, a prosecutor and criminal defendant can no more agree to deprive the public of its right of access to a court record than they can agree to bind the court to a particular sentence. The decision to expunge a record of conviction is solely within the province of the court. Thus, a defendant cannot claim "manifest injustice" if the sentence is more severe than expected. *See State v. Peterselm*, 68 Ohio App.2d 211, 213, 428 N.E.2d 863 (8th Dist. 1980) (holding that "if a plea of guilty could be retracted with ease after sentence, the accused might be encouraged to plead guilty to test the weight of potential punishment, and withdraw the plea if the sentence were unexpectedly severe" (quoting *Kadwell v. United States*, 315 F.2d 667 (9th Cir. 1963)).

Accordingly, John Doe could not have expected any more upon his application to expunge than silence or a recommendation of approval by the prosecutor. And he cannot claim "manifest injustice" based on his disappointment over the ultimate decision on expungement. It is also important to note that this Court has made clear that, at least with respect to conviction records, expungement is a privilege, not a right. *State v. Simon*, 87 Ohio St.3d 531, 533, 721 N.E.2d 1041.

Second, Respondent's alternative to pleading guilty was pleading not guilty and facing a presumptively public trial. That John Doe incorrectly believed that he could avoid publicity by pleading guilty to the charge and having his record sealed immediately thereafter does not rise to the level of "manifest injustice" required to permit a postsentence plea withdrawal.

2. *Respondent failed to comply with the requirements of R.C. 2953.52 in sealing the record of dismissal, and therefore, the second sealing order is void.*

Respondent sealed John Doe's "record of dismissal" pursuant to R.C. 2953.52, following his acceptance of the plea withdrawal. In doing so, however, Respondent failed to comply with the mandatory procedural requirements of that statute. Respondent's recorded failure to follow the procedures set forth in the statute makes his second order as unlawful as his first. *See State v. Withrow*, 10th Dist. No. 03AP-999, 2004-Ohio-3699, ¶ 6 ("Non-compliance with a mandatory statute will render the proceedings to which it relates illegal and void.").

Specifically, R.C. 2953.52(B)(1) provides that "[u]pon the filing of an application pursuant to division (A) of this section, the court shall *set a date for a hearing* and shall notify the prosecutor in the case of the hearing on the application." (Emphasis added). In the context of R.C. 2953.32, which allows expungement of conviction records for first-time offenders, several courts of appeals have held that an oral hearing must be held prior to the issuance of a decision. *Withrow*, 2004-Ohio-3699, ¶ 7 ("Numerous appellate districts, including this one, have had the opportunity to address this issue and have found that an oral hearing is mandatory prior to the issuance of a decision on the application for sealing of record."). The rationale for the hearing requirement in expungement cases is the requirement that a court hear evidence prior to rendering a decision. *State v. Haney*, 10th Dist. No. 99AP-159, 1999 Ohio App. LEXIS 5524, at **11-12.

The failure of a court to set a date for a future hearing upon receiving an application for expungement—as was done here—is to eliminate the ability of the public, and particularly the press, to observe and participate in the process. As noted by this Court, "[e]xpungement is accomplished by eliminating the general public's access to conviction information." *State v. Hamilton* (1996), 75 Ohio St. 3d 636, 640, 665 N.E.2d 669. Thus, in any expungement proceeding under R.C. 2953.52, the Court must take the public's right of access into

consideration when making its determination. *See State ex rel. Cincinnati Enquirer v. Winkler*, 101 Ohio St. 3d 382, 384, 2004-Ohio-1581, 805 N.E. 2d 1094. The only way this right may be protected is if expungement hearings are "set" for a future date upon receipt of an application.

The phrase "set a date for a hearing" is different from the phrase "conduct a hearing." Therefore, the "conducting" of a hearing does not make an adequate substitute for "setting a date." *See, e.g., McKinney v. Aultman Hosp.*, 5th Dist. No. CA-8603, 1992 Ohio App. LEXIS 2205, at *6 (opining that the requirement that a court "set a hearing" for purposes of R.C. 2323.51(B)(2)(a) was to "provide[] an opportunity for each party to submit briefs and evidentiary materials which may support their respective positions"). *See also Wilson v. Lynch & Lynch Co., L.PA.*, 99 Ohio App. 3d 760, 651 NJ.E.2d (11th Dist. 1994) (observing that the procedural requirements of R.C. 2323.51(B)(1), the frivolous conduct statute, are satisfied only when the court "(a) *sets a date* for a hearing on the motion for attorney fees; (b) gives notice of the hearing date to the parties and counsel; and (c) *conducts the hearing* and allows the parties the opportunity to present evidence on matter" (emphasis added)). The *Wilson* decision demonstrates the distinction between the two phrases.

Here, Respondent did not "set a hearing" as the language of R.C. 2953.52(B)(1) contemplates, but instead conducted a hearing immediately following his acceptance of John Doe's withdrawal of his guilty plea. As a result, The Enquirer was afforded no opportunity to observe the hearing and determine whether its rights were being protected. And indeed, the transcript of the hearing itself does not remotely suggest that Respondent gave any consideration to the public's interest in having access to the prosecution of John Doe.

Respondent was duty bound to strictly adhere to the letter of the statute to afford an opportunity to The Enquirer and other interested members of the public to observe the

expungement process. By failing to strictly adhere to these requirements, Respondent's second order sealing John Doe's record should not be given any more effect than the first. The record of John Doe's prosecution thus remains a "court record" subject to inspection under Sup.R. 45(B)(1).

In sum, the records associated with John Doe's prosecution for disorderly conduct are "court records" to which direct access must be permitted. No action of Respondent prior to, nor after The Enquirer's request, defrocked the records of their "court record" status. Consequently, The Enquirer has a clear legal right to inspect the records, and under Sup.R. 45(B)(1), Respondent has a clear legal duty to make them available. Given the foregoing, the relief in mandamus sought by The Enquirer from this Court is appropriate.

CONCLUSION

For the reasons set forth above, The Enquirer respectfully requests that the Court grant its petition for a writ of mandamus, and compel Respondent to unseal the record of conviction and subsequent dismissal of John Doe's prosecution for disorderly conduct.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing ***Merit Brief of Petitioner*** was served via regular U.S. Mail, postage prepaid, this 7th day of March, 2013, upon the following:

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APPENDIX

2323.51 Frivolous conduct in filing civil claims.

(A) As used in this section:

(1) "Conduct" means any of the following:

(a) The filing of a civil action, the assertion of a claim, defense, or other position in connection with a civil action, the filing of a pleading, motion, or other paper in a civil action, including, but not limited to, a motion or paper filed for discovery purposes, or the taking of any other action in connection with a civil action;

(b) The filing by an inmate of a civil action or appeal against a government entity or employee, the assertion of a claim, defense or other position in connection with a civil action of that nature or the assertion of issues of law in an appeal of that nature, or the taking of any other action in connection with a civil action or appeal of that nature.

(2) "Frivolous conduct" means either of the following:

(a) Conduct of an inmate or other party to a civil action, of an inmate who has filed an appeal of the type described in division (A)(1)(b) of this section, or of the inmate's or other party's counsel of record that satisfies any of the following:

(i) It obviously serves merely to harass or maliciously injure another party to the civil action or appeal or is for another improper purpose, including, but not limited to, causing unnecessary delay or a needless increase in the cost of litigation.

(ii) It is not warranted under existing law , cannot be supported by a good faith argument for an extension, modification, or reversal of existing law, or cannot be supported by a good faith argument for the establishment of new law.

(iii) The conduct consists of allegations or other factual contentions that have no evidentiary support or, if specifically so identified, are not likely to have evidentiary support after a reasonable opportunity for further investigation or discovery.

(iv) The conduct consists of denials or factual contentions that are not warranted by the evidence or, if specifically so identified, are not reasonably based on a lack of information or belief.

(b) An inmate's commencement of a civil action or appeal against a government entity or employee when any of the following applies:

(i) The claim that is the basis of the civil action fails to state a claim or the issues of law that are the basis of the appeal fail to state any issues of law.

(ii) It is clear that the inmate cannot prove material facts in support of the claim that is the basis of the civil action or in support of the issues of law that are the basis of the appeal.

(iii) The claim that is the basis of the civil action is substantially similar to a claim in a previous civil action commenced by the inmate or the issues of law that are the basis of the appeal are substantially similar to issues of law raised in a previous appeal commenced by the inmate, in that the claim that is the basis of the current civil action or the issues of law that are the basis of the current appeal involve the same parties or arise from the same operative facts as the claim or issues of law in the previous civil action or appeal.

(3) "Civil action or appeal against a government entity or employee," "inmate," "political subdivision," and "employee" have the same meanings as in section 2969.21 of the Revised Code.

(4) "Reasonable attorney's fees" or "attorney's fees," when used in relation to a civil action or appeal against a government entity or employee, includes both of the following, as applicable:

(a) The approximate amount of the compensation, and the fringe benefits, if any, of the attorney general, an assistant attorney general, or special counsel appointed by the attorney general that has been or will be paid by the state in connection with the legal services that were rendered by the attorney general, assistant attorney general, or special counsel in the civil action or appeal against the government entity or employee, including, but not limited to, a civil action or appeal commenced pro se by an inmate, and that were necessitated by frivolous conduct of an inmate represented by counsel of record, the counsel of record of an inmate, or a pro se inmate.

(b) The approximate amount of the compensation, and the fringe benefits, if any, of a prosecuting attorney or other chief legal officer of a political subdivision, or an assistant to a chief legal officer of those natures, who has been or will be paid by a political subdivision in connection with the legal services that were rendered by the chief legal officer or assistant in the civil action or appeal against the government entity or employee, including, but not limited to, a civil action or appeal commenced pro se by an inmate, and that were necessitated by frivolous conduct of an inmate represented by counsel of record, the counsel of record of an inmate, or a pro se inmate.

(5) "State" has the same meaning as in section 2743.01 of the Revised Code.

(6) "State correctional institution" has the same meaning as in section 2967.01 of the Revised Code.

(B)

(1) Subject to divisions (B)(2) and (3), (C), and (D) of this section and except as otherwise provided in division (E)(2)(b) of section 101.15 or division (I)(2)(b) of section 121.22 of the Revised Code, at any time not more than thirty days after the entry of final judgment in a civil action or appeal, any party adversely affected by frivolous conduct may file a motion for an award of court costs, reasonable attorney's fees, and other reasonable expenses incurred in

connection with the civil action or appeal . The court may assess and make an award to any party to the civil action or appeal who was adversely affected by frivolous conduct, as provided in division (B)(4) of this section.

(2) An award may be made pursuant to division (B)(1) of this section upon the motion of a party to a civil action or an appeal of the type described in that division or on the court's own initiative, but only after the court does all of the following:

(a) Sets a date for a hearing to be conducted in accordance with division (B)(2)(c) of this section, to determine whether particular conduct was frivolous, to determine, if the conduct was frivolous, whether any party was adversely affected by it, and to determine, if an award is to be made, the amount of that award;

(b) Gives notice of the date of the hearing described in division (B)(2)(a) of this section to each party or counsel of record who allegedly engaged in frivolous conduct and to each party who allegedly was adversely affected by frivolous conduct;

(c) Conducts the hearing described in division (B)(2)(a) of this section in accordance with this division, allows the parties and counsel of record involved to present any relevant evidence at the hearing, including evidence of the type described in division (B)(5) of this section, determines that the conduct involved was frivolous and that a party was adversely affected by it, and then determines the amount of the award to be made. If any party or counsel of record who allegedly engaged in or allegedly was adversely affected by frivolous conduct is confined in a state correctional institution or in a county, multicounty, municipal, municipal-county, or multicounty-municipal jail or workhouse, the court, if practicable, may hold the hearing by telephone or, in the alternative, at the institution, jail, or workhouse in which the party or counsel is confined.

(3) The amount of an award made pursuant to division (B)(1) of this section that represents reasonable attorney's fees shall not exceed, and may be equal to or less than, whichever of the following is applicable:

(a) If the party is being represented on a contingent fee basis, an amount that corresponds to reasonable fees that would have been charged for legal services had the party been represented on an hourly fee basis or another basis other than a contingent fee basis;

(b) In all situations other than that described in division (B)(3)(a) of this section, the attorney's fees that were reasonably incurred by a party.

(4) An award made pursuant to division (B)(1) of this section may be made against a party, the party's counsel of record, or both.

(5)

(a) In connection with the hearing described in division (B)(2)(a) of this section, each party who may be awarded reasonable attorney's fees and the party's counsel of record may submit to the court or be ordered by the court to submit to it, for consideration in determining the amount of

the reasonable attorney's fees, an itemized list or other evidence of the legal services rendered, the time expended in rendering the services, and whichever of the following is applicable:

(i) If the party is being represented by that counsel on a contingent fee basis, the reasonable attorney's fees that would have been associated with those services had the party been represented by that counsel on an hourly fee basis or another basis other than a contingent fee basis;

(ii) In all situations other than those described in division (B)(5)(a)(i) of this section, the attorney's fees associated with those services.

(b) In connection with the hearing described in division (B)(2)(a) of this section, each party who may be awarded court costs and other reasonable expenses incurred in connection with the civil action or appeal may submit to the court or be ordered by the court to submit to it, for consideration in determining the amount of the costs and expenses, an itemized list or other evidence of the costs and expenses that were incurred in connection with that action or appeal and that were necessitated by the frivolous conduct, including, but not limited to, expert witness fees and expenses associated with discovery.

(C) An award of reasonable attorney's fees under this section does not affect or determine the amount of or the manner of computation of attorney's fees as between an attorney and the attorney's client.

(D) This section does not affect or limit the application of any provision of the Rules of Civil Procedure, the Rules of Appellate Procedure, or another court rule or section of the Revised Code to the extent that the provision prohibits an award of court costs, attorney's fees, or other expenses incurred in connection with a particular civil action or appeal or authorizes an award of court costs, attorney's fees, or other expenses incurred in connection with a particular civil action or appeal in a specified manner, generally, or subject to limitations.

2953.32 Sealing of conviction record or bail forfeiture record.

(A)

(1) Except as provided in section 2953.61 of the Revised Code, an eligible offender may apply to the sentencing court if convicted in this state, or to a court of common pleas if convicted in another state or in a federal court, for the sealing of the conviction record. Application may be made at the expiration of three years after the offender's final discharge if convicted of a felony, or at the expiration of one year after the offender's final discharge if convicted of a misdemeanor.

(2) Any person who has been arrested for any misdemeanor offense and who has effected a bail forfeiture may apply to the court in which the misdemeanor criminal case was pending when bail was forfeited for the sealing of the record of the case. Except as provided in section 2953.61 of the Revised Code, the application may be filed at any time after the expiration of one year from

the date on which the bail forfeiture was entered upon the minutes of the court or the journal, whichever entry occurs first.

(B) Upon the filing of an application under this section, the court shall set a date for a hearing and shall notify the prosecutor for the case of the hearing on the application. The prosecutor may object to the granting of the application by filing an objection with the court prior to the date set for the hearing. The prosecutor shall specify in the objection the reasons for believing a denial of the application is justified. The court shall direct its regular probation officer, a state probation officer, or the department of probation of the county in which the applicant resides to make inquiries and written reports as the court requires concerning the applicant. If the applicant was convicted of or pleaded guilty to a violation of division (A)(2) or (B) of section 2919.21 of the Revised Code, the probation officer or county department of probation that the court directed to make inquiries concerning the applicant shall contact the child support enforcement agency enforcing the applicant's obligations under the child support order to inquire about the offender's compliance with the child support order.

(C)

(1) The court shall do each of the following:

(a) Determine whether the applicant is an eligible offender or whether the forfeiture of bail was agreed to by the applicant and the prosecutor in the case. If the applicant applies as an eligible offender pursuant to division (A)(1) of this section and has two or three convictions that 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, in making its determination under this division, the court initially shall determine whether it is not in the public interest for the two or three convictions to be counted as one conviction. If the court determines that it is not in the public interest for the two or three convictions to be counted as one conviction, the court shall determine that the applicant is not an eligible offender; if the court does not make that determination, the court shall determine that the offender is an eligible offender.

(b) Determine whether criminal proceedings are pending against the applicant;

(c) If the applicant is an eligible offender who applies pursuant to division (A)(1) of this section, determine whether the applicant has been rehabilitated to the satisfaction of the court;

(d) If the prosecutor has filed an objection in accordance with division (B) of this section, consider the reasons against granting the application specified by the prosecutor in the objection;

(e) Weigh the interests of the applicant in having the records pertaining to the applicant's conviction sealed against the legitimate needs, if any, of the government to maintain those records.

(2) If the court determines, after complying with division (C)(1) of this section, that the applicant is an eligible offender or the subject of a bail forfeiture, that no criminal proceeding is pending against the applicant, and that the interests of the applicant in having the records pertaining to the applicant's conviction or bail forfeiture sealed are not outweighed by any legitimate governmental needs to maintain those records, and that the rehabilitation of an applicant who is an eligible offender applying pursuant to division (A)(1) of this section has been attained to the satisfaction of the court, the court, except as provided in divisions (G) and (H) of this section, shall order all official records pertaining to the case sealed and, except as provided in division (F) of this section, all index references to the case deleted and, in the case of bail forfeitures, shall dismiss the charges in the case. The proceedings in the case shall be considered not to have occurred and the conviction or bail forfeiture of the person who is the subject of the proceedings shall be sealed, except that upon conviction of a subsequent offense, the sealed record of prior conviction or bail forfeiture may be considered by the court in determining the sentence or other appropriate disposition, including the relief provided for in sections 2953.31 to 2953.33 of the Revised Code.

(3) Upon the filing of an application under this section, the applicant, unless indigent, shall pay a fee of fifty dollars. The court shall pay thirty dollars of the fee into the state treasury. It shall pay twenty dollars of the fee into the county general revenue fund if the sealed conviction or bail forfeiture was pursuant to a state statute, or into the general revenue fund of the municipal corporation involved if the sealed conviction or bail forfeiture was pursuant to a municipal ordinance.

(D) Inspection of the sealed records included in the order may be made only by the following persons or for the following purposes:

(1) By a law enforcement officer or prosecutor, or the assistants of either, to determine whether the nature and character of the offense with which a person is to be charged would be affected by virtue of the person's previously having been convicted of a crime;

(2) By the parole or probation officer of the person who is the subject of the records, for the exclusive use of the officer in supervising the person while on parole or under a community control sanction or a post-release control sanction, and in making inquiries and written reports as requested by the court or adult parole authority;

(3) Upon application by the person who is the subject of the records, by the persons named in the application;

(4) By a law enforcement officer who was involved in the case, for use in the officer's defense of a civil action arising out of the officer's involvement in that case;

(5) By a prosecuting attorney or the prosecuting attorney's assistants, to determine a defendant's eligibility to enter a pre-trial diversion program established pursuant to section 2935.36 of the Revised Code;

(6) By any law enforcement agency or any authorized employee of a law enforcement agency or by the department of rehabilitation and correction as part of a background investigation of a person who applies for employment with the agency as a law enforcement officer or with the department as a corrections officer;

(7) By any law enforcement agency or any authorized employee of a law enforcement agency, for the purposes set forth in, and in the manner provided in, section 2953.321 of the Revised Code;

(8) By the bureau of criminal identification and investigation or any authorized employee of the bureau for the purpose of providing information to a board or person pursuant to division (F) or (G) of section 109.57 of the Revised Code;

(9) By the bureau of criminal identification and investigation or any authorized employee of the bureau for the purpose of performing a criminal history records check on a person to whom a certificate as prescribed in section 109.77 of the Revised Code is to be awarded;

(10) By the bureau of criminal identification and investigation or any authorized employee of the bureau for the purpose of conducting a criminal records check of an individual pursuant to division (B) of section 109.572 of the Revised Code that was requested pursuant to any of the sections identified in division (B)(1) of that section;

(11) By the bureau of criminal identification and investigation, an authorized employee of the bureau, a sheriff, or an authorized employee of a sheriff in connection with a criminal records check described in section 311.41 of the Revised Code;

(12) By the attorney general or an authorized employee of the attorney general or a court for purposes of determining a person's classification pursuant to Chapter 2950. of the Revised Code.

When the nature and character of the offense with which a person is to be charged would be affected by the information, it may be used for the purpose of charging the person with an offense.

(E) In any criminal proceeding, proof of any otherwise admissible prior conviction may be introduced and proved, notwithstanding the fact that for any such prior conviction an order of sealing previously was issued pursuant to sections 2953.31 to 2953.36 of the Revised Code.

(F) The person or governmental agency, office, or department that maintains sealed records pertaining to convictions or bail forfeitures that have been sealed pursuant to this section may maintain a manual or computerized index to the sealed records. The index shall contain only the name of, and alphanumeric identifiers that relate to, the persons who are the subject of the sealed records, the word "sealed," and the name of the person, agency, office, or department that has custody of the sealed records, and shall not contain the name of the crime committed. The index shall be made available by the person who has custody of the sealed records only for the purposes set forth in divisions (C), (D), and (E) of this section.

(G) Notwithstanding any provision of this section or section 2953.33 of the Revised Code that requires otherwise, a board of education of a city, local, exempted village, or joint vocational school district that maintains records of an individual who has been permanently excluded under sections 3301.121 and 3313.662 of the Revised Code is permitted to maintain records regarding a conviction that was used as the basis for the individual's permanent exclusion, regardless of a court order to seal the record. An order issued under this section to seal the record of a conviction does not revoke the adjudication order of the superintendent of public instruction to permanently exclude the individual who is the subject of the sealing order. An order issued under this section to seal the record of a conviction of an individual may be presented to a district superintendent as evidence to support the contention that the superintendent should recommend that the permanent exclusion of the individual who is the subject of the sealing order be revoked. Except as otherwise authorized by this division and sections 3301.121 and 3313.662 of the Revised Code, any school employee in possession of or having access to the sealed conviction records of an individual that were the basis of a permanent exclusion of the individual is subject to section 2953.35 of the Revised Code.

(H) For purposes of sections 2953.31 to 2953.36 of the Revised Code, DNA records collected in the DNA database and fingerprints filed for record by the superintendent of the bureau of criminal identification and investigation shall not be sealed unless the superintendent receives a certified copy of a final court order establishing that the offender's conviction has been overturned. For purposes of this section, a court order is not "final" if time remains for an appeal or application for discretionary review with respect to the order.

2953.52 Sealing of records after not guilty finding, dismissal of proceedings or no bill by grand jury.

(A)

(1) Any person, who is found not guilty of an offense by a jury or a court or who is the defendant named in a dismissed complaint, indictment, or information, may apply to the court for an order to seal the person's official records in the case. Except as provided in section 2953.61 of the Revised Code, the application may be filed at any time after the finding of not guilty or the dismissal of the complaint, indictment, or information is entered upon the minutes of the court or the journal, whichever entry occurs first.

(2) Any person, against whom a no bill is entered by a grand jury, may apply to the court for an order to seal his official records in the case. Except as provided in section 2953.61 of the Revised Code, the application may be filed at any time after the expiration of two years after the date on which the foreperson or deputy foreperson of the grand jury reports to the court that the grand jury has reported a no bill.

(B)

(1) Upon the filing of an application pursuant to division (A) of this section, the court shall set a date for a hearing and shall notify the prosecutor in the case of the hearing on the application.

The prosecutor may object to the granting of the application by filing an objection with the court prior to the date set for the hearing. The prosecutor shall specify in the objection the reasons the prosecutor believes justify a denial of the application.

(2) The court shall do each of the following, except as provided in division (B)(3) of this section:

(a)

(i) Determine whether the person was found not guilty in the case, or the complaint, indictment, or information in the case was dismissed, or a no bill was returned in the case and a period of two years or a longer period as required by section 2953.61 of the Revised Code has expired from the date of the report to the court of that no bill by the foreperson or deputy foreperson of the grand jury;

(ii) If the complaint, indictment, or information in the case was dismissed, determine whether it was dismissed with prejudice or without prejudice and, if it was dismissed without prejudice, determine whether the relevant statute of limitations has expired;

(b) Determine whether criminal proceedings are pending against the person;

(c) If the prosecutor has filed an objection in accordance with division (B)(1) of this section, consider the reasons against granting the application specified by the prosecutor in the objection;

(d) Weigh the interests of the person in having the official records pertaining to the case sealed against the legitimate needs, if any, of the government to maintain those records.

(3) If the court determines after complying with division (B)(2)(a) of this section that the person was found not guilty in the case, that the complaint, indictment, or information in the case was dismissed with prejudice, or that the complaint, indictment, or information in the case was dismissed without prejudice and that the relevant statute of limitations has expired, the court shall issue an order to the superintendent of the bureau of criminal identification and investigation directing that the superintendent seal or cause to be sealed the official records in the case consisting of DNA specimens that are in the possession of the bureau and all DNA records and DNA profiles. The determinations and considerations described in divisions (B)(2)(b), (c), and (d) of this section do not apply with respect to a determination of the court described in this division.

(4) The determinations described in this division are separate from the determination described in division (B)(3) of this section. If the court determines, after complying with division (B)(2) of this section, that the person was found not guilty in the case, that the complaint, indictment, or information in the case was dismissed, or that a no bill was returned in the case and that the appropriate period of time has expired from the date of the report to the court of the no bill by the foreperson or deputy foreperson of the grand jury; that no criminal proceedings are pending against the person; and the interests of the person in having the records pertaining to the case sealed are not outweighed by any legitimate governmental needs to maintain such records, or if division (E)(2)(b) of section 4301.69 of the Revised Code applies, in addition to the order

required under division (B)(3) of this section, the court shall issue an order directing that all official records pertaining to the case be sealed and that, except as provided in section 2953.53 of the Revised Code, the proceedings in the case be deemed not to have occurred.

(5) Any DNA specimens, DNA records, and DNA profiles ordered to be sealed under this section shall not be sealed if the person with respect to whom the order applies is otherwise eligible to have DNA records or a DNA profile in the national DNA index system.

Ohio Criminal Rule 32.1

A motion to withdraw a plea of guilty or no contest may be made only before sentence is imposed; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his or her plea.

Sup. R. 44. Court Records - Definitions.

In addition to the applicability of these rules as described in Sup. R. 1, Sup. R. 44 through 47 apply to the Supreme Court.

As used in Sup. R. 44 through 47:

(A) "Actual cost" means the cost of depleted supplies; records storage media costs; actual mailing and alternative delivery costs, or other transmitting costs; and any direct equipment operating and maintenance costs, including actual costs paid to private contractors for copying services.

(B) "Court record" means both a case document and an administrative document, regardless of physical form or characteristic, manner of creation, or method of storage.

(C)(1) "Case document" means a document and information in a document submitted to a court or filed with a clerk of court in a judicial action or proceeding, including exhibits, pleadings, motions, orders, and judgments, and any documentation prepared by the court or clerk in the judicial action or proceeding, such as journals, dockets, and indices, subject to the exclusions in division (C)(2) of this rule.

(2) The term "case document" does not include the following:

(a) A document or information in a document exempt from disclosure under state, federal, or the common law;

(b) Personal identifiers, as defined in division (H) of this rule;

(c) A document or information in a document to which public access has been restricted pursuant to division (E) of Sup. R. 45;

(d) Except as relevant to the juvenile's prosecution later as an adult, a juvenile's previous disposition in abuse, neglect, and dependency cases, juvenile civil commitment files, post-adjudicatory residential treatment facility reports, and post-adjudicatory releases of a juvenile's social history;

(e) Notes, drafts, recommendations, advice, and research of judicial officers and court staff;

(f) Forms containing personal identifiers, as defined in division (H) of this rule, submitted or filed pursuant to division (D)(2) of Sup. R. 45;

(g) Information on or obtained from the Ohio Courts Network, except that the information shall be available at the originating source if not otherwise exempt from public access.

(D) "Case file" means the compendium of case documents in a judicial action or proceeding.

(E) "File" means to deposit a document with a clerk of court, upon the occurrence of which the clerk time or date stamps and dockets the document.

(F) "Submit" means to deliver a document to the custody of a court for consideration by the court.

(G)(1) "Administrative document" means a document and information in a document created, received, or maintained by a court that serves to record the administrative, fiscal, personnel, or management functions, policies, decisions, procedures, operations, organization, or other activities of the court, subject to the exclusions in division (G)(2) of this rule.

(2) The term "administrative document" does not include the following:

(a) A document or information in a document exempt from disclosure under state, federal, or the common law, or as set forth in the Rules for the Government of the Bar;

(b) Personal identifiers, as defined in division (H) of this rule;

(c) A document or information in a document describing the type or level of security in a court facility, including a court security plan and a court security review conducted by a local court, the local court's designee, or the Supreme Court;

(d) An administrative or technical security record-keeping document or information;

(e) Test questions, scoring keys, and licensing, certification, or court-employment examination documents before the examination is administered or if the same examination is to be administered again;

(f) Computer programs, computer codes, computer filing systems, and other software owned by a court or entrusted to it;

(g) Information on or obtained from the Ohio Courts Network, except that the information shall be available at the originating source if not otherwise exempt from public access;

(h) Data feeds by and between courts when using the Ohio Courts Network.

(H) "Personal identifiers" means social security numbers, except for the last four digits; financial account numbers, including but not limited to debit card, charge card, and credit card numbers; employer and employee identification numbers; and a juvenile's name in an abuse, neglect, or dependency case, except for the juvenile's initials or a generic abbreviation such as "CV" for "child victim."

(I) "Public access" means both direct access and remote access.

(J) "Direct access" means the ability of any person to inspect and obtain a copy of a court record at all reasonable times during regular business hours at the place where the record is made available.

(K) "Remote access" means the ability of any person to electronically search, inspect, and copy a court record at a location other than the place where the record is made available.

(L) "Bulk distribution" means the distribution of a compilation of information from more than one court record.

(M)(1) "New compilation" means a collection of information obtained through the selection, aggregation, or reformulation of information from more than one court record.

(2) The term "new compilation" does not include a collection of information produced by a computer system that is already programmed to provide the requested output.

Sup. R. 45. Court Records – Public Access.

(A) Presumption of public access

Court records are presumed open to public access.

(B) Direct access

(1) A court or clerk of court shall make a court record available by direct access, promptly acknowledge any person's request for direct access, and respond to the request within a reasonable amount of time.

(2) Except for a request for bulk distribution pursuant to Sup. R. 46, a court or clerk of court shall permit a requestor to have a court record duplicated upon paper, upon the same medium upon which the court or clerk keeps it, or upon any other medium the court or clerk determines it can be reasonably duplicated as an integral part of its normal operations.

(3) A court or clerk of court shall mail, transmit, or deliver copies of a requested court record to the requestor within a reasonable time from the request, provided the court or clerk may adopt a policy allowing it to limit the number of court records it will mail, transmit, or deliver per month, unless the requestor certifies in writing that the requestor does not intend to use or forward the records, or the information contained in them, for commercial purposes. For purposes of this division, "commercial" shall be narrowly construed and does not include news reporting, the gathering of information to assist citizens in the understanding of court activities, or nonprofit educational research.

(4) A court or clerk of court may charge its actual costs incurred in responding to a request for direct access to a court record. The court or clerk may require a deposit of the estimated actual costs.

(C) Remote access

(1) A court or clerk of court may offer remote access to a court record. If a court or clerk offers remote access to a court record and the record is also available by direct access, the version of the record available through remote access shall be identical to the version of the record available by direct access, provided the court or clerk may exclude an exhibit or attachment that is part of the record if the court or clerk includes notice that the exhibit or attachment exists and is available by direct access.

(2) Nothing in division (C)(1) of this rule shall be interpreted as requiring a court or clerk of court offering remote access to a case document in a case file to offer remote access to other case documents in that case file.

(3) Nothing in division (C)(1) of this rule shall be interpreted as prohibiting a court or clerk of court from making available on a website any court record that exists only in electronic form, including an on-line journal or register of actions.

(D) Omission of personal identifiers prior to submission or filing

(1) When submitting a case document to a court or filing a case document with a clerk of court, a party to a judicial action or proceeding shall omit personal identifiers from the document.

(2) When personal identifiers are omitted from a case document submitted to a court or filed with a clerk of court pursuant to division (D)(1) of this rule, the party shall submit or file that information on a separate form. The court or clerk may provide a standard form for parties to use. Redacted or omitted personal identifiers shall be provided to the court or clerk upon request or a party to the judicial action or proceeding upon motion.

(3) The responsibility for omitting personal identifiers from a case document submitted to a court or filed with a clerk of court pursuant to division (D)(1) of this rule shall rest solely with the party. The court or clerk is not required to review the case document to confirm that the party has omitted personal identifiers, and shall not refuse to accept or file the document on that basis.

(E) Restricting public access to a case document

(1) Any party to a judicial action or proceeding or other person who is the subject of information in a case document may, by written motion to the court, request that the court restrict public access to the information or, if necessary, the entire document. Additionally, the court may restrict public access to the information in the case document or, if necessary, the entire document upon its own order. The court shall give notice of the motion or order to all parties in the case. The court may schedule a hearing on the motion.

(2) A court shall restrict public access to information in a case document or, if necessary, the entire document, if it finds by clear and convincing evidence that the presumption of allowing public access is outweighed by a higher interest after considering each of the following:

(a) Whether public policy is served by restricting public access;

(b) Whether any state, federal, or common law exempts the document or information from public access;

(c) Whether factors that support restriction of public access exist, including risk of injury to persons, individual privacy rights and interests, proprietary business information, public safety, and fairness of the adjudicatory process.

(3) When restricting public access to a case document or information in a case document pursuant to this division, the court shall use the least restrictive means available, including but not limited to the following:

(a) Redacting the information rather than limiting public access to the entire document;

(b) Restricting remote access to either the document or the information while maintaining its direct access;

(c) Restricting public access to either the document or the information for a specific period of time;

(d) Using a generic title or description for the document or the information in a case management system or register of actions;

(e) Using initials or other identifier for the parties' proper names.

(4) If a court orders the redaction of information in a case document pursuant to this division, a redacted version of the document shall be filed in the case file along with a copy of the court's order. If a court orders that the entire case document be restricted from public access, a copy of the court's order shall be filed in the case file. A journal entry shall reflect the court's order. Case documents ordered restricted from public access or information in documents ordered redacted shall not be available for public access and shall be maintained separately in the case file.

(F) Obtaining access to a case document that has been granted restricted public access

(1) Any person, by written motion to the court, may request access to a case document or information in a case document that has been granted restricted public access pursuant to division (E) of this rule. The court shall give notice of the motion to all parties in the case and, where possible, to the non-party person who requested that public access be restricted. The court may schedule a hearing on the motion.

(2) A court may permit public access to a case document or information in a case document if it finds by clear and convincing evidence that the presumption of allowing public access is no longer outweighed by a higher interest. When making this determination, the court shall consider whether the original reason for the restriction of public access to the case document or information in the case document pursuant to division (E) of this rule no longer exists or is no longer applicable and whether any new circumstances, as set forth in that division, have arisen which would require the restriction of public access.

Sup. R. 47. Court Records – Application, Remedies, and Liability.

(A) Application

(1) The provisions of Sup. R. 44 through 47 requiring redaction or omission of information in case documents or restricting public access to case documents shall apply only to case documents in actions commenced on or after the effective date of this rule. Access to case documents in actions commenced prior to the effective date of Sup. R. 44 through 47 shall be governed by federal and state law.

(2) The provisions of Sup. R. 44 through 47 requiring omission of information in administrative documents or restricting public access to administrative documents shall apply to all documents regardless of when created.

(B) Denial of public access - remedy

A person aggrieved by the failure of a court or clerk of court to comply with the requirements of Sup. R. 44 through 47 may pursue an action in mandamus pursuant to Chapter 2731. of the Revised Code.

(C) Liability and immunity

Sup. R. 44 through 47 do not affect any immunity or defense to which a court, court agency, clerk of court, or their employees may be entitled under section 9.86 or Chapter 2744. of the Revised Code.

(D) Review

Sup. R. 44 through 47 shall be subject to periodic review by the Commission on the Rules of Superintendence.