

**IN THE SUPREME COURT OF OHIO**

**STATE, *ex rel.* THE CINCINNATI  
ENQUIRER, a Division of Gannett  
Satellite Information Network, Inc.  
312 Elm Street  
Cincinnati, OH 45202**

Petitioner,

v.

**HONORABLE ROBERT H. LYONS  
Butler County  
Area I Court  
118 High St.  
Oxford, OH 45056**

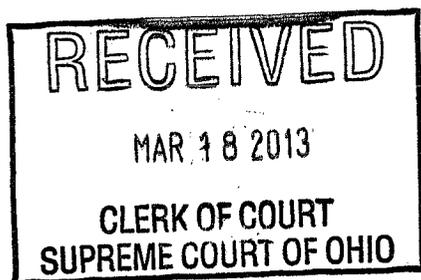
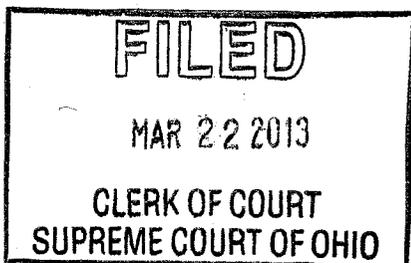
Respondent,

Case No. 12-1924

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**MERIT BRIEF OF RESPONDENT**

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**STATEMENT OF FACTS:** This case involves a John Doe defendant who plead guilty to a minor misdemeanor, disorderly conduct, in the court room of Respondent Judge Robert H. Lyons. Respondent does not dispute that Petitioner finds the underlying facts of the defendant's conduct to be newsworthy for whatever its reasons may be. Respondent testified in his deposition that it was his understanding that the defense counsel and prosecutor had a plea agreement in which the defendant would plead to the minor misdemeanor and the parties would agree to seal the record. (Respondent's deposition pages 11, 12 and 21). The evidence also shows that the filing of Petitioner's current mandamus action lead Respondent to realize that Respondent had erroneously used an entry citing the wrong revised code section to seal the defendant's record in the underlying action.

The form that Respondent used to seal the underlying minor misdemeanor case referred to R.C. 2953.52. Certainly the Respondent now concedes, R.C. 2953.52 is not applicable to a case in which a defendant has been convicted, applying instead to the sealing of records in which a person "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..." As stated above, the error was discovered as a result of an examination of Petitioner's Original Complaint in Mandamus. (Respondent's deposition pages 12 and 13).

In response to his discovery of the entry citing the incorrect revised code section, and acting upon the belief that sealing the record had been part of the original plea agreement, Respondent called a hearing at which the John Doe defendant was allowed to withdraw his plea. (Respondent's deposition pages 15 and 16). At that hearing or at a subsequent hearing the same afternoon, the prosecutor's office, announced that it did not have intentions of further pursuing the prosecution of the case. (Respondent's deposition pages 17 and 24) Of course, the record

contains no indication of the evidence or the relative merits of the State's case, nor any discussion of the legal or constitutional issues that may have surrounded the case. Thus, no inferences can be drawn as to the decision by the Prosecutor's office not to further pursue the matter.<sup>1</sup>

After the prosecutor's office declined to prosecute the case, effectively a nolle of the charges, the John Doe defendant again moved to have his record sealed. (Respondent's deposition pages 19 and 20). In the absence of a conviction, the Respondent again sealed the record, this time correctly and in accordance with O.R.C. 2953.52.

## **ARGUMENT**

Respondent will limit argument to the issues raised in **Petitioner's Proposition of Law No. III(B)1 and III(B)2** as those issues should be dispositive of the case.

**ISSUES:** In Petitioner's proposition of law number IIIB, Petitioner asserts two arguments in its quest for a Writ of Mandamus. Petitioner's first asserts that the minor misdemeanor criminal file belonging to this specific John Doe defendant should be unsealed because the defendant's plea reversal was allegedly in contravention of Ohio Rule of Crim. Procedure 32.1. Petitioner's second assertion is that the hearing following the reversal of defendant's plea, again failed to follow the requirements to be properly sealed pursuant to O.R.C. 2953.52.

**Petitioner's First Assertion in Proposition of Law III(B)(1):** Petitioner asserts that the unnamed defendant's file can not be correctly sealed pursuant to O.R.C. 2953.52 because,

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<sup>1</sup> In Petitioner's brief, there is a statement that the original charges against John Doe were "brought by Butler Country Prosecuting Attorney in connection with the flier". Although of marginal significance in this case, there is no evidence in the record that the original charges were actually "brought by" the prosecuting attorney. Charges can be brought before the court in various ways and it is not necessarily the case that the prosecuting attorney had actually decided to prosecute John Doe at the time he chose to submit his plea of guilty to a minor misdemeanor. This factual discrepancy could become a consideration should the court ponder the reasons for the prosecuting attorney's subsequent decision not to further pursue the case after John Doe's plea withdrawal.

Petitioner asserts, the plea could not properly be withdrawn pursuant to Ohio Rule of Crim.

Procedure 32.1, which states:

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.

Petitioner's assertion is based on the fact that the unnamed defendant had already paid his fines in this minor misdemeanor case thus rendering this a post sentence plea withdrawal. The Petitioner then correctly asserts that a plea reversal can not occur at this stage unless there was a showing of "manifest injustice". Petitioner then incorrectly asserts that there was no manifest injustice.

In making this assertion, the Petitioner newspaper, seeks to insert itself into judicial and prosecutorial functions that determined the outcome of the underlying criminal case. Even if Respondent illegally allowed the reversal of defendant's plea, which Respondent does not concede, to allow a newspaper to insert itself into the manner of conduct of a criminal case would be exceedingly dangerous and unprecedented. This is an ominous meddling in judicial and prosecutorial functions which must not be tolerated.

Furthermore, the newspaper's attempt to insert itself into the outcome of the underlying criminal case is without standing. *Federal Home Loan Mtge. Corp. v. Schwartzwald*, 134 Ohio St.3d 13, 2012-Ohio-5017. (Ohio 2012).

We recognized that standing is a "jurisdictional requirement" in *State ex rel Dallman v. Franklin Cty. Court of Common Pleas*, 35 Ohio St.2d 176, 179, 298 N.E.2d 515 (1973), and we stated: "It is an elementary concept of law that a party lacks standing to invoke the jurisdiction of the court unless he has, in an individual or representative capacity, some real interest in the subject matter of the action." (Emphasis added.)

Petitioner obviously has no “interest in the subject matter” of the original criminal case. That case was between the defendant and the State of Ohio and Petitioner’s complaints as to whether defendant should have been allowed to withdraw his plea, intrude into a process for which it has no standing and from which, its interference should be strictly rejected.

Petitioner’s assertion also overlooks the fact that in his deposition, Respondent articulated an exceedingly appropriate basis for allowing the plea withdrawal. At least according to Respondent’s belief at the time, the unsealing of the record would have violated the terms of the original plea agreement, (Respondent’s deposition pages 15 and 16), which would have certainly been a “manifest injustice”

Furthermore, the record of the hearing for withdrawal of the plea shows clearly that Respondent allowed the withdrawal of the plea because of change of circumstances with respect to the plea. In the hearing on defendant’s motion to withdraw his plea, Respondent noted that “Criminal Rule 32.1 permits the Court to ... allow defendant to withdraw a guilty plea after sentence has been imposed in order to correct manifest injustice.” (Hearing on withdrawal of plea, Page 3, lines 12 through 17.) The court further noted that;

“Defendant submits that manifest injustice has occurred in this case. In support the defendant asserts in part the following: defendant had been informed by the Court that the matter has been unsealed by court order. That is accurate. Defendant upon information believes the facts surrounding the case had been changed, that being the unsealing of the record.” *Id.*, page 3, line 23 through page 4, line 8.

Thereafter, the court ruled that “upon motion of the defendant for good cause shown, the Court hereby grants defendant’s motion to withdraw guilty plea pursuant to Ohio Criminal Rule 32.1 in order to correct manifest injustice.” *Id.*, page 6, lines 7 through 12.

“[W]hen a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise

must be fulfilled.” *Santobello v. New York*, 404 U.S. 257, 92 S. Ct. 495, 30 L. Ed. 2d 427, 1971 U.S. LEXIS 1 (U.S. 1971). The original plea agreement may well have been faulty. That does not alter the fact that there was a plea agreement, upon which the John Doe defendant placed reliance. If defendant could no longer rely on the terms of the plea agreement, and the terms of the agreement could no longer be met, failure to allow withdrawal of the plea would surely constitute a manifest injustice.

Petitioner asserts that “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.” Petitioner again fails to recognize that The Enquirer was not a party to the case. There was a defendant who had rights in this case that had to be considered. Once the Respondent Judge realized that the defendant’s underlying plea agreement was being undermined, it was far more important to deal with that issue than to alter the process to cater to a newspaper looking for a story. The respondent did exactly that in exercising his judicial discretion to allow the defendant to reverse his plea.

To allow the withdrawal of a plea under these circumstances is a matter of judicial discretion for the trial court and shall be reversed only upon a showing of abuse of discretion.

*State v. Scarnati*, 2002-Ohio-711 (11th) Eleventh District.

A Crim.R. 32.1 motion is addressed to the sound discretion of a trial court. *State v. Xie* (1992), 62 Ohio St.3d 521, paragraph two of the syllabus. Thus, the good faith, credibility, and weight of a defendant’s assertions in support of his motion are to be resolved by a trial court. *State v. Gibbs* (June 9, 2000), Trumbull App. No. 98-T-0190, unreported, 2000 Ohio App. LEXIS 2526, at 6, citing *State v. Stumpf* (1987), 32 Ohio St.3d 95, 104. Our review is limited to a determination of whether the trial court abused its discretion. *State v. Barnett* (1991), 73 Ohio App.3d 244, 250. Abuse of discretion connotes more than an error of law or judgment; rather, it implies that the trial court’s attitude is unreasonable, arbitrary, or unconscionable. *State v. Adams* (1980), 62 Ohio St.2d 151, 157.

Plea withdrawals before sentencing should be freely granted. After sentencing, the withdrawal should be granted when failure to do so would constitute a manifest injustice. Only an abuse of discretion could overturn such a decision. "Absent an abuse of discretion on the part of the trial court in making the ruling, its decision must be affirmed. For [a court] to find an abuse of discretion ... [it] must find more than an error of judgment. [The court] must find that the trial court's ruling was "unreasonable, arbitrary or unconscionable". *State v. Xie*, 62 Ohio St. 3d 521, 584 N.E.2d 715, 1992 Ohio LEXIS 204 (Ohio 1992).<sup>2</sup> It would indeed be difficult to find that the Respondent's actions in allowing the withdrawal of the plea, were an abuse of discretion.

The Petitioner newspaper is simply without standing to challenge the outcome of the criminal case. They were not a party. They have no knowledge of the evidence, or lack thereof in the underlying criminal case. They also have no knowledge of the legal or constitutional issues that may have been involved in a successful prosecution of the underlying case and even if they did, they are seeking to interfere in something that is simply not within their province. Consequently, Respondent strongly urges this court to hold the Petitioner's assertion in section III(B)1 of Petitioner's Merit Brief, to be without merit.

**Petitioner's Second Assertion in No. III(B)(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. Even if Respondent acted properly in allowing the reversal of the plea, Petitioner further asserts that "Respondent failed to comply with the requirements of R.C. 2953.52 in

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<sup>2</sup> Even if it appeared that the Respondent Judge improperly granted the defendant's motion to withdraw his plea, only the State, acting through the prosecutor's office would have standing to object. *Federal Home Loan Mtge. Corp. v. Schwartzwald*, 134 Ohio St.3d 13, 2012-Ohio-5017 (Ohio 2012). The prosecutor's office had no objection to the withdrawal of the plea. (Respondent's deposition pages 15 and 16). Again, there is no indication in the record of the relative merits of the underlying criminal case, so no inferences can be drawn as to why the State may have chosen not to proceed with the case.

sealing the record of dismissal, and therefore, the second sealing order is void.” However, the record of the hearing clearly belies that argument.

After Respondent withdrew his plea the prosecutor declined to further pursue the case, a decision which rested entirely with the State and was not up to the Respondent. The Petitioner Enquirer is not privy to the evidence of the case or to any legal or constitutional issues that may have been a part of the decision not to pursue the case and can therefore draw no conclusions from the decision not to further pursue the case.

Once the decision was made by the prosecutor, to nolle the charges with prejudice to refilling (hearing on withdrawal of plea, page 7, line 10 through page 8, line 7), Respondent began to address the defendant’s “motion for application to seal the record of dismissal and a requested hearing”. *Id* at page 8, lines 9 through 12. The prosecutor indicated that she had reviewed the motion and that she would not be requesting a continuance in this case. *Id* at page 8, lines 14 through page 9, line 3. Petitioners memorandum before this court has expressed its displeasure with that decision and has correctly noted that “Numerous appellate districts... have had the opportunity to address this issue [of the necessity of a hearing] 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. Citing *State v. Haney*, 10th Dist. No. 99AP-159, 1999 Ohio App. LEXIS 5524, at \*\*11-12.” That is all true, but the fact is, the court did conduct a hearing and the transcript of the hearing has been submitted to this court as evidence together with the affidavit of Respondent, Judge Lyons. That hearing proceeded immediately after the hearing to withdraw the plea.

What the Petitioner is really complaining about is that the Petitioner, Cincinnati Enquirer didn't get notice of the hearing. That is the crux of the matter. Simply stated, there is no requirement to set a hearing at some time in the future in order to notify the press. If any such statute, rule or cases existed, Petitioner would no doubt have cited such law.

Instead, Petitioner cited case law that sets forth the real reason to "set a date for a hearing". As taken from page 5 of Petitioner's memorandum: "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". That may all be true if either of the parties actually wished to submit briefs and evidentiary materials, but neither side did. Defendant was ready to proceed and the prosecutor stated on the record that she had reviewed the materials and had no objection to proceeding. (Hearing in State of Ohio vs. John Doe at page 8, line 14). The Petitioner, Cincinnati Enquirer seems to be asserting the absurd proposition that the hearing had to be set for a future date so the newspaper could be notified. Once again, the newspaper had no standing to assert any sort of notice or hearing requirements in this case nor to object to the procedural aspects of the case. It is not a party. *Federal Home Loan Mtge. Corp. v. Schwartzwald*, 134 Ohio St.3d 13, 2012-Ohio-5017. (Ohio 2012).

The remainder of the record in State of Ohio vs. John Doe, clearly shows that Respondent tracked the requirements of R.C. 2953.52 and Petitioner does not allege otherwise.

## **CONCLUSION**

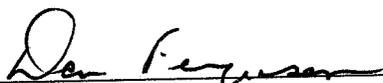
Petitioner's mandamus action commenced with the assertion that the Respondent, Judge Lyons had failed to follow proper statutory guidelines in granting the defendant's request to seal

his record. Respondent acknowledged the error. Respondent then proceeded to unseal the file. This, he could not do without violating the terms of the original plea agreement. Consequently, Respondent granted defendant's motion to withdraw his plea. After the state chose not to further pursue the case, a matter which was solely within the purview of the prosecutor's office, Respondent Lyons granted defendant's motion to seal the file. It was correctly and properly sealed pursuant to R.C. 2953.52.

WHEREFORE, Respondent renews its request that this court deem the present case to be moot and dismiss the case without further ado.

Respectfully submitted,

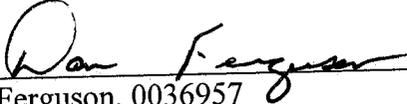
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## CERTIFICATE OF SERVICE

This is to certify that on March 15, 2013, a copy of the foregoing was served by Regular U.S. Mail upon the following:  
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Honorable Robert H. Lyons

Rule 32.1. Withdrawal of Guilty Plea.

**Ohio Rules**

**OHIO RULES OF CRIMINAL PROCEDURE**

*As amended through July 1, 2012*

**Rule 32.1. Withdrawal of Guilty Plea**

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.

**History.** Effective: July 1, 1973; amended effective July 1, 1998.

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

**Ohio Statutes**

**Title 29. CRIMES - PROCEDURE**

**Chapter 2953. APPEALS; OTHER POSTCONVICTION REMEDIES**

*Includes all legislation filed with the Secretary of State's Office through 3/7/2013*

**§ 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.

**Cite as R.C. § 2953.52**

**History.** Amended by 129th General Assembly File No.99, SB 268, §1, eff. 8/6/2012.

Effective Date: 10-11-2002