

ORIGINAL

In the
Supreme Court of Ohio

STATE, *ex rel.* THE CINCINNATI
ENQUIRER, a Division of Gannett
Satellite Information Network Inc.,

Petitioner,

vs.

HONORABLE ROBERT H. LYONS
Butler County, Area I Court,

Respondent.

Case No. 12-1924

Original Action in Mandamus

REPLY BRIEF OF PETITIONER THE CINCINNATI ENQUIRER

MICHAEL T. GMOSE
Prosecuting Attorney

DAN L. FERGUSON* (0036957)
**Counsel of Record*
315 High Street, 11th Floor
Hamilton, Ohio 45011
Phone: (513) 887-3943
Fax: (513) 887-3748
fergusondl@butlercountyohio.org

Attorney for Respondent
Honorable Robert H. Lyons

JOHN C. GREINER* (0005551)
**Counsel of Record*

GRAYDON HEAD & RITCHEY LLP
1900 Fifth Third Center
511 Walnut Street
Cincinnati, Ohio 45202-3157
Phone: (513) 629-2734
Fax: (513) 651-3836
jgreiner@graydon.com

Counsel for Petitioner
The Cincinnati Enquirer

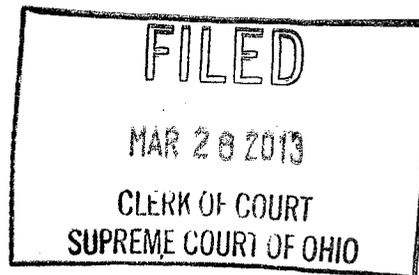
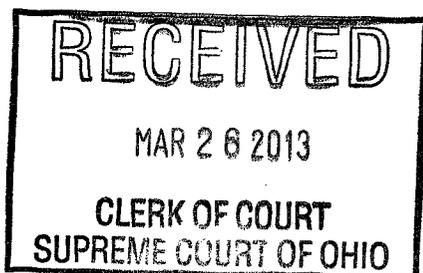


TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	ii
I. INTRODUCTION.....	1
II. ARGUMENT.....	1
 <u>PROPOSITION OF LAW NO. III.</u>	
AN UNLAWFUL ORDER SEALING A “COURT RECORD” CANNOT BE CURED BY SUBSEQUENT UNLAWFUL MANEUVERS INTENDED TO DENY THE PUBLIC ITS RIGHT OF ACCESS.....	
	1
B. Respondent’s subsequent efforts to seal John Doe’s record should not be given their intended effect by this Court	1
1. <u>Respondent’s acceptance of John Doe’s plea withdrawal was unlawful</u>	1
2. <u>Respondent failed to comply with R.C. 2953.52</u>	4
III. CONCLUSION	4
CERTIFICATE OF SERVICE	5

TABLE OF AUTHORITIES

<u>Cases:</u>	<u>Page</u>
<i>Coe v. Erb</i> , 59 Ohio St. 259, 52 N.E. 640.....	3
<i>Federal Home Loan Mtge. Corp. v. Schwartzwald</i> , 134 Ohio St.3d 13, 2012—Ohio—5017.....	1
<i>State ex rel. Leadingham v. Schisler</i> , 4th Dist. No. 02CA2827, 2003—Ohio—7293.....	2, 3

Constitutional Provisions; Statutes; Rules:

R.C. 2953.52.....	4
Criminal Rule 32.1.....	3

I. INTRODUCTION

In his merit brief, Respondent chose to respond only to sections (B)1 and (B)2 of The Enquirer's Third Proposition of Law. In so doing, Respondent tacitly admits that the record sought is a "court record" subject to the applicable Rules of Superintendence, and that his initial sealing order was unlawful. This reply brief, therefore, will address only Proposition of Law No.

III.

II. ARGUMENT

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.

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

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

In his reply brief, Respondent makes two arguments, neither of which has merit. He first argues that The Enquirer lacks "standing" to contest Lyons' assertion that his conspiracy with the prosecutor and defense counsel to keep the underlying proceedings shielded from public review is a complete defense here. He next argues that the provision in R.C. 2953.52 does not mean what it plainly says – that the court must set a date for a hearing on an application to seal records. Respondent offers no meaningful support for either argument, and in at least one instance, the supporting citation undermines his position.

Respondent's "standing" argument misses the very nature of the concept of "standing." As described in the *Schwartzwald* decision, "standing" examines whether a party has "some real interest in the subject matter of the action." *Federal Home Loan Mtge. Corp. v. Schwartzwald*, 134 Ohio St.3d 13, 2012–Ohio–5017. In this mandamus action, which is expressly provided for

in the Ohio Rules of Superintendence, The Enquirer has a real interest in the subject matter of the action – specifically, the record of the proceedings in the underlying litigation which Respondent conducted. This court implicitly, if not explicitly, acknowledged this fact when it rejected Respondent’s suggestion of mootness.

Respondent attempts an interesting maneuver here – he engineers a back room deal with the prosecutor and defense counsel to keep the record of a public proceeding sealed and proudly asserts that deal as his primary defense in this proceeding. He then asserts that The Enquirer cannot even object to the farce because it lacks standing. In his brief, Respondent accuses The Enquirer of “seek[ing] to assert itself into judicial and prosecutorial functions.” That is false. The Enquirer brought this action to protect the public’s right to observe fully a criminal proceeding. Any effort to “assert itself” into “judicial and prosecutorial functions” resulted from the Respondent’s misconduct.

Respondent moreover completely ignores case law that establishes the right to collaterally attack an expungement order. The Court of Appeals for the Fourth Appellate District addressed the standing of a third-party to collaterally attack an expungement order on the ground that the order violated his pre-existing right of public access in *State ex rel. Leadingham v. Schisler* (“*Leadingham*”), 4th Dist. No. 02CA2827, 2003–Ohio–7293.

Leadingham involved a mandamus action brought by a member of the public challenging the denial of his request for expunged convictions that he alleged were unlawfully expunged. Addressing the question of whether *Leadingham* could collaterally attack the expungement orders to preserve its pre-existing right of public access, the court held that “a stranger to a judgment of expungement, who seeks access to the expunged records as unlawfully sealed public records, may collaterally attack the expungement order for lack of jurisdiction to preserve his or

her (and the public's) pre-existing right of access to public records." *Id.* At ¶ 27. The *Leadingham* court based its holding on this Court's opinion in the 1898 case *Coe v. Erb*, 59 Ohio St. 259, 52 N.E. 640, which held that "strangers to the judgment, not being entitled to impeach it directly, and who, if the judgment were given full faith and effect, would be prejudiced in some pre-existing right, are placed on a different footing." *Leadingham*, 2003—Ohio—7293, ¶ 22 (quoting *Coe*, 59 Ohio St. at 268) (internal quotations omitted).

Aside from the meritless standing argument, Respondent cites to no support for his contention that he properly applied the "manifest injustice" standard here. Respondent contends that it would be manifestly unjust to deny the defendant in the underlying case the opportunity to withdraw his guilty plea, because he entered the plea in reliance on an agreement between the prosecutor and defense counsel that the record of the conviction would be sealed. But the prosecutor had no authority to enter such an agreement. And to suggest that it would be manifestly unjust to disregard a blatantly illegal agreement turns the concept of justice on its head. The scenario is no different from one in which a defendant pleads guilty in reliance on the belief that a prosecutor's sentencing recommendation constitutes a guarantee. Just as a defendant cannot withdraw a guilty plea when the sentence doesn't go his way, a defendant cannot withdraw his plea when the expungement process fails to meet his expectations.

In permitting the defendant to withdraw his plea here, Respondent did not "abuse his discretion" – because he had none. Criminal Rule 32.1 is mandatory. But even if this Court applies the abuse of discretion standard, it is clear that Respondent most certainly did violate that standard. And because he did so in order to deny the public its right to observe the criminal process, The Enquirer is entitled to challenge his action in this proceeding.

2. Respondent failed to comply with R.C. 2953.52.

Respondent's second argument – that the court is not required to set a date for a hearing on an application to seal the record of a proceeding – is belied by the very language of the statute. It does not say the court “shall conduct” a hearing. It very plainly says it shall set a date for a hearing. In this case, as part of the backroom deal to seal the records here, Respondent purposely failed to set a date for the hearing so that the public would have no opportunity to seek an order – even a temporary order – stopping him from proceeding. Given that this case was pending at the time Respondent engineered the scheme, it is very much like evidence spoliation. Respondent put critical material out of reach while on notice of a legal proceeding affecting that information.

And Respondent displays an utter disregard for the law when he effectively contends that the prosecutor waived the notice of the hearing: “the prosecutor stated on the record that she had reviewed the materials and has no objection to proceeding.” Respondent Brief at p. 9. The requirement to set a date is set forth in mandatory terms in the statute. The prosecutor has no authority to waive that requirement. In short, Respondent did not follow the mandatory statutory procedure for sealing the record of a criminal proceeding. The fact that the prosecutor acquiesced is irrelevant. The fact that the Respondent ignored the statute to frustrate the public's right of access is not irrelevant.

III. 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,

Of Counsel:

GRAYDON HEAD & RITCHEY LLP
1900 Fifth Third Center
511 Walnut Street
Cincinnati, OH 45202-3157
Phone: (513) 621-6464
Fax: (513) 651-3836

John C. Greiner / Dawn W. Ford
John C. Greiner (0005551)
Counsel for The Cincinnati Enquirer
GRAYDON HEAD & RITCHEY LLP
1900 Fifth Third Center
511 Walnut Street
Cincinnati, OH 45202-3157
Phone: (513) 629-2734
Fax: (513) 651-3836
E-mail: jgreiner@graydon.com

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing *Reply Brief of Petitioner The Cincinnati Enquirer* was served by regular U.S. Mail, postage prepaid, this 25th day of March, 2013, upon the following:

Michael T. Gmoser, Esq.
Dan L. Ferguson, Esq.
Prosecuting Attorney
315 High Street, 11th Floor
Hamilton, Ohio 45011

John C. Greiner / Dawn W. Ford
John C. Greiner (0005551)