

ORIGINAL

IN THE SUPREME COURT OF OHIO

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

Relator,

vs.

HONORABLE ROBERT H. LYONS,

Respondent.

: Case No. 13-0300
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: ORIGINAL ACTION IN MANDAMUS AND
: PROHIBITION
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MERIT BRIEF OF RESPONDENT IN OPPOSITION TO COMPLAINT FOR
WRIT OF MANDAMUS AND PROHIBITION

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Respondent, Honorable Robert H. Lyons, submits this Memorandum in Opposition to the Complaint for Writ of Mandamus and Prohibition.

I. STATEMENT OF FACTS

Judge Robert H. Lyons has served as a judge of the Butler County Area I Court for fourteen years. (Dep. of Honorable Robert H. Lyons, January 15, 2013, attached as Exhibit A to Relator's Complaint.) When Judge Lyons took the bench, it had been the practice of the Butler County Area Court (which has three part-time judges) to provide a packet of information to defendants who pled guilty to minor misdemeanors. (Lyons Aff. ¶ 2.) The packet contained a draft order to seal the record that was filled out by the offender.

At some point during Judge Lyons's tenure, an employee of the Clerk's office re-typed the form. (Lyons Aff. ¶ 2.) During that process, a mistake was made in the draft order used to seal records of minor misdemeanor convictions. R.C. 2353.32 is the statute that governs sealing the record of such a conviction. But the draft order incorrectly cited R.C. 2353.52 instead of R.C. 2353.32.

On November 14, 2012, the Relator, the Cincinnati Enquirer, filed a mandamus action against Judge Lyons to compel him to produce court records related to the conviction of a Miami University student who had pled guilty to a charge of disorderly conduct, a minor misdemeanor. After the student pled guilty, Judge Lyons issued an order to seal the record of conviction, using the standard draft order that incorrectly cited R.C. 2353.52. Relator alleged that the records were improperly sealed because they cited the wrong statute. That action in mandamus is still pending before this Court in case number 2012-1924. In his deposition taken in that case, Judge Lyons stated that the same standard order used to seal the record of the student's conviction had been

used to seal other minor misdemeanor conviction records. (Dep. of Honorable Robert H. Lyons, January 15, 2013, attached as Exhibit A to Relator's Complaint.)

On January 24, 2013, Cincinnati Enquirer reporter Sheila McLaughlin sent a public records request to Judge Lyons, requesting to "review and/or copy all records of criminal proceedings sealed pursuant to O.R.C. 2953.52 following a conviction for the last five (5) years." (Affidavit of Sheila McLaughlin, attached as Exhibit D to Relator's Complaint.) Judge Lyons denied this request in its entirety pursuant to R.C. 149.43(A)(1)(v) and R.C. 2953.32. (Judge Lyons's letter to Sheila McLaughlin, January 28, 2013, attached as Exhibit B to Relator's Complaint.) In addition, Judge Lyons's denial cited this Court's decision in *State ex rel. Cincinnati Enquirer v. Winkler*, 101 Ohio St.3d 382, 2004-Ohio-1581, for the proposition that, once court records are sealed under R.C. 2953.52, they cease to be public records.

After Ms. McLaughlin received the letter denying her request, Relator's attorney, John Greiner, sent a letter to Butler County Prosecutor Michael Gmoser, requesting production of redacted copies of orders issued by Judge Lyons in the last five years that purported to seal records of conviction under R.C. 2953.52. (Exhibit B attached to Relator's Complaint.) Mr. Gmoser denied that request on February 4. (Exhibit C attached to Relator's Complaint.) Relator filed the instant action for mandamus and prohibition on February 15, 2013.

For the reasons argued below, Respondent Honorable Robert Lyons respectfully asks this Court to deny Relator's requests for a writ compelling him to produce the requested court records and a writ prohibiting him from enforcing the sealing orders at issue in this case.

II. ARGUMENT OF LAW

To be entitled to a writ of mandamus to compel compliance with R.C. 149.43, the relator must establish (1) a clear legal right to the relief prayed for, (2) that the respondent has a clear legal duty to perform the requested act, and (3) that relator has no plain and adequate remedy at law. *State ex rel. Cincinnati Enquirer v. Streicher*, 1st Dist. No. C-100820, 2011-Ohio-4498, ¶ 6. The relator has the burden of establishing entitlement to the requested extraordinary relief by clear and convincing evidence. *State ex rel. Zidonis v. Columbus State Cmty. College*, 133 Ohio St.3d 122, 2012-Ohio-4228, 976 N.E.2d 861, ¶ 19.

Relator's right of access to the requested court records is alternatively governed by R.C. 149.43 and Sup.R. 44 through 47, depending upon the commencement date of the actions to which the records correspond: Rules 44 through 47 of the Rules of Superintendence apply exclusively to actions (and affiliated court case documents) commenced on or after July 1, 2009—the effective date of those rules. Sup.R. 47(A)(1); *State ex rel. Striker v. Smith*, 129 Ohio St.3d 168, 2011-Ohio-2878, ¶ 21 fn. 2. Access to documents in cases commenced before that date are governed by federal and state law—that is, R.C. 149.43. Sup.R. 47(A)(1). Therefore, within the five-year scope of records Relator seeks, R.C. 149.43 governs access to records for actions commenced on January 24, 2008 to June 30, 2009, and the Rules of Superintendence govern access to records for actions commenced on July 1, 2009 and after. Regardless of whether the Public Records Act or the Rules of Superintendence govern particular records within Relator's request, Relator does not have a clear legal right to the lawfully sealed conviction records.

- A. There is no clear right of access under R.C. 149.43 because neither the conviction records nor the orders to seal those records are “public records.”**

The Public Records Act defines “public record” as “records kept by any public office” However, records “the release of which is prohibited by state or federal law” are not “public records.” R.C. 149.43(A)(1)(v). R.C. 2953.32(D) clearly establishes that inspection of sealed records may be made only by a very limited group of persons and only for specific purposes enumerated in the statute. The individuals entitled to access sealed conviction records include law enforcement officers, prosecutors, parole or probation officers, or the Bureau of Criminal Investigation. *Id.* Furthermore, inspection by “an authorized employee of the attorney general or a court” is permitted only “for purposes of determining a person’s classification pursuant to Chapter 2950 of the Revised Code”—*i.e.*, to determine a person’s status as a sexual offender. Therefore, not only is a private entity such as The Enquirer not entitled to an inspection of a sealed conviction record, but even Judge Lyons himself is precluded from inspecting the records other than for the limited purpose of determining a defendant’s status under Chapter 2950.

The Revised Code not only restricts public access to sealed criminal records, but also prohibits dissemination of sealed records. R.C. 2953.35 provides that “any person who, in violation of section 2953.32 of the Revised Code, uses, disseminates, or otherwise makes available any index prepared pursuant to division (F) of section 2953.32 of the Revised Code is guilty of a misdemeanor of the fourth degree.” *See also State ex rel. Cincinnati Enquirer v. Winkler*, 101 Ohio St.3d 382, 2004-Ohio-1581, 805 N.E.2d 1094, ¶ 6 (the release of sealed court records is a fourth-degree misdemeanor and is thus prohibited by state law). Thus, release of records sealed pursuant to 2953.32 is clearly “prohibited by state law” within the meaning of R.C. 149.43(A)(1)(v).

1. The requested records are exempt from public access under state law.

The records of criminal proceedings requested by Relator are exempt from public access, having been sealed under the Ohio expungement statutes. Relator argues that the requested records are not exempt from public access, via operation of the sealing statutes, because they were unlawfully sealed. However, as set forth below, the records in question were lawfully sealed pursuant to statutory authority, and are not subject to collateral attack on grounds of voidness.

i. Judge Lyons had statutory authority to issue the requested sealing orders.

The orders to seal records of minor misdemeanors were not unlawful because Judge Lyons had statutory authority under R.C. 2953.32 to seal the records of minor misdemeanants. Minor misdemeanants may apply to have their criminal records sealed immediately upon the disposition of their case because the time limitations provided for in R.C. 2953.32(A)(1) apply only to felonies (three years) and misdemeanors (one year). Put another way, while there are prerequisite waiting periods for more serious offenses, there is no prerequisite waiting period for minor misdemeanors. As explained in R.C. 2953.31(A), “a conviction for a minor misdemeanor . . . is not a conviction.” Therefore, the one-year waiting period required before a misdemeanant becomes eligible to apply for sealing does not apply to minor misdemeanors—a different class of offenses—and the lack of a waiting period means that minor misdemeanants can immediately apply for sealing. Consequently, a court can lawfully proceed with the immediate sealing of those records.

Relator suggests that the argument that minor misdemeanors are not convictions necessitates a finding that minor misdemeanants are not “eligible offenders.” However, reading the statute so that minor misdemeanors are not “convictions” does not require a finding that minor misdemeanants cannot apply to have their records sealed under the statute. Such a reading

is untenable. The General Assembly could not have intended to make the records of felons eligible for sealing, but make the records of minor misdemeanants ineligible: Minor misdemeanors are the class of offense that most strongly invoke the public policy rationales behind a sealing statute in the first place.

Presumably, the purpose of a waiting period before sealing the conviction of more serious offenses is to ensure the defendant does not commit another similarly serious offense within a short period of time—one year in the case of ordinary misdemeanors and three years in the case of felonies. The potential harm to the public in immediately sealing a minor misdemeanor—which carries no possibility of jail and maximum fine of \$150—is substantially less than for more serious offenses. Therefore, the clear consequence of the Revised Code’s distinction between ordinary and minor misdemeanors in R.C. 2953.31 is *not* that minor misdemeanants are ineligible offenders who should be precluded from the possibility of sealed records; rather, the only meaning that the General Assembly could have intended was that minor misdemeanors are distinct from ordinary misdemeanors and, as a result, the one-year waiting period for ordinary misdemeanors is unnecessary.

ii. A clerical error does not render an order void *ab initio* and does not divest the court of subject-matter jurisdiction.

The Enquirer argues essentially that Judge Lyons lacked statutory authority to seal the records because the standard order he issued in these cases cited to the incorrect Revised Code section. However, a clerical error in a court’s order does not destroy the court’s authority to issue that order in the first place. A clerical mistake is “a mistake or omission, mechanical in nature and apparent on the record, which does not involve a legal decision or judgment.” *State ex rel. Cruzado v. Zaleski*, 111 Ohio St. 3d 353, 2006-Ohio-5795, 856 N.E.2d 263, ¶ 19. A clerical error does not automatically render a judgment entry void. *See, e.g., In re M.L.*, 2005-Ohio-2001, ¶ 9

(judgment entry reflecting incorrect case number was “not a void order, but instead, an order containing a clerical error”).

A clerical error does not divest the court of subject-matter jurisdiction. There are two distinct forms of jurisdiction: subject-matter jurisdiction and jurisdiction over the particular case. *In re J.J.*, 111 Ohio St.3d 205, 2006-Ohio-5484, 855 N.E.2d 851, ¶ 10. “It is only when the trial court lacks subject matter jurisdiction that its judgment is void; lack of jurisdiction over the particular case merely renders the judgment voidable.” *Pratts v. Hurley*, 102 Ohio St.3d 81, 806 N.E.2d 992, 2004-Ohio-1980, ¶ 12. A court’s failure to follow the procedural requirements for proper exercise of subject-matter jurisdiction “does not divest the court of its subject-matter jurisdiction.” *Id.* at ¶ 34. A judgment is void for lack of subject-matter jurisdiction only if the case “does not fall within a class of cases over which the trial court has subject matter jurisdiction.” *State v. Wilfong*, 2001 Ohio App. LEXIS 1195, *9 (2d Dist., Mar. 16, 2001).

Where a court possesses subject-matter jurisdiction, procedural irregularities “affect the court’s jurisdiction over the particular case and render the judgment voidable, not void.” *In re J.J.*, 2006-Ohio-5484 at ¶ 15. For example, in *In re J.J.*, a magistrate transferred a child custody matter to a visiting judge despite lacking the authority to do so under Sup.R. 4(B) and Juv.R. 40. *Id.* at ¶ 16. Noting that the magistrate lacked authority to transfer the case, this Court explained that the error “does not affect the subject-matter jurisdiction of the juvenile court over neglect and custody hearings.” *Id.* This Court continued, explaining that “the magistrate’s order, although erroneous, did not divest the juvenile court of jurisdiction.” *Id.* Thus, the procedural error rendered the judgment *voidable*, for lack of jurisdiction over the particular case, rather than *void* for lack of subject-matter jurisdiction. *Id.* at ¶ 15–16.

Many Ohio appellate courts have recognized this distinction, and have held that errors more serious than a mere typographical error in a judgment—such as orders granting expungement to ineligible offenders—do not render expungement orders void *ab initio*. See, e.g., *State v. Wilfong*, 2001 Ohio App. LEXIS 1195, *11 (2d. Dist., Mar. 16, 2001) (“Where jurisdiction has once attached, mere errors or irregularities in the proceedings, however grave, although they may render the judgment erroneous and subject to be set aside in a proper proceeding for that purpose, will not render the judgment void, . . . and *cannot be collaterally attacked*”) (emphasis added); *State v. Smith*, 10th Dist. No. 06AP-1059, 2007-Ohio-2873, ¶ 15 (expungement order improperly granted to an offender who was not a “first offender” within the meaning of R.C. 2953.32 was not void *ab initio* and was only voidable by means of direct appeal or by Civ.R. 60(B) motion); *City of Mayfield Heights v. N.K.*, 8th Dist. No. 93166, 2010-Ohio-909, ¶ 29 (same). Thus, it would be incongruous to hold that a typographical error on an order to seal the record renders a judgment void *ab initio*, despite the fact that other courts have upheld improperly granted expungement orders against collateral attack where the offender was ineligible for expungement in the first place—a far more serious error in the exercise of judgment.

Relator cites *State v. Lovelace*, 2012-Ohio-3797, 975 N.E.2d 567 (1st Dist.), which held that an expungement order granted to an ineligible offender is void for lack of jurisdiction because such an order is a “prohibited act” rather than a procedural irregularity or an error in judgment. However, *Lovelace*’s holding does not address *clerical errors*. Inadvertently citing to the wrong statutory authority for an expungement order, where proper statutory authority actually exists and where the clear intent of the order is apparent, is fundamentally different from issuing an order contrary to any statutory authority at all. Thus, *Lovelace* does not apply in a

situation where a court's statutory authority to issue an expungement order would be unquestioned but for a clerical error on the face of the order.

The orders to seal the records were not void *ab initio* simply because they cited to the incorrect Revised Code provision. Judge Lyons concedes that R.C. 2953.52—the code provision cited on the forms he used to issue the sealing orders—does not grant authority to seal a record of a person who has pled guilty to a minor misdemeanor. No one would think it does.¹ However, R.C. 2953.32 *does* confer that authority. Thus, Judge Lyons acted pursuant to statutory authority, and merely cited to the incorrect authority when issuing the order. This clerical error is a procedural error, which does not act to divest Judge Lyons of his subject-matter authority generally to issue orders to seal records of convictions under R.C. 2953.32. The Enquirer does not challenge either Judge Lyons's *general* subject-matter jurisdiction to seal minor misdemeanor conviction records, or the Butler County Area Court's subject-matter jurisdiction over criminal cases, including motions for expungement. The Enquirer instead challenges Judge Lyons's jurisdiction over particular cases whose records were sealed by orders that cited to a wrong code provision. This error, affecting jurisdiction over a particular case, did not divest Judge Lyons's subject-matter jurisdiction, and renders the orders voidable only upon direct appeal or a Civ.R. 60(B) motion, but not void *ab initio*.

2. An order containing a clerical error does not suddenly become void if it is not later corrected by a *nunc pro tunc* entry.

Relator argues that the sealing orders in this case are void because they contain clerical errors that were not corrected by *nunc pro tunc* entries, which would have replaced the incorrect statutory citation with the correct one. But Crim.R. 36 states, “Clerical mistakes in judgments, orders or other parts of the record . . . *may* be corrected at any time.” (emphasis added). By

¹ The title of the statute—“Sealing of records after not guilty finding, dismissal of proceedings, or no bill by grand jury”—very clearly does not apply to sealing the records of those who have been convicted of a crime.

permitting the use of entries *nunc pro tunc* to correct clerical errors, Crim.R. 36 does not *require* their use. *See also State v. Greulich*, 61 Ohio App.3d 22, 24, 572 N.E.2d 132 (9th Dist. 1988) (“A *nunc pro tunc* order *may be issued* by a trial court, as an exercise of its inherent power, to make its record speak the truth.”) (emphasis added). Thus, the issuance of an order *nunc pro tunc* is discretionary, not mandatory. *See Pepper v. Uniroyal Goodrich Tire Co. Pension Plan*, 1990 Ohio App. LEXIS 4685, 9th Dist. Case No. CV 89-2-0601 (Oct. 24, 1990) (trial court did not abuse its discretion in not granting a motion *nunc pro tunc*).

If a clerical error does not render an order void *ab initio*, and if there is no statutory duty to correct such an error through a *nunc pro tunc* entry, then it follows that Judge Lyons’s sealing entries remain lawful despite the fact that they have not been corrected *nunc pro tunc*. Because Judge Lyons would have to unseal hundreds of sealed records to determine which records need to be corrected through *nunc pro tunc* entries, and because he is not permitted by statute to unseal the records, his discretionary issuance of *nunc pro tunc* entries to correct the orders would cause him to violate state law. Therefore, it does not matter that the sealing orders have not been corrected by *nunc pro tunc* entries—they remain valid sealing orders that Judge Lyons does not have the authority to unseal in response to Relator’s request.

3. Because the clerical errors on the sealing orders in this case do not render those orders void, Judge Lyons and the Butler County Area Court Clerk cannot unseal the records *sua sponte* for the sole purpose of complying with Relator’s request.

Relator argues, essentially, that the filing of a public records request seeking sealed criminal records automatically requires the custodian of those records to simply disregard the sealing order in order to comply with the request or to determine which records are within the scope of the request. This argument is not supported by the plain language of RC. 2953.35(D), which makes it a fourth degree misdemeanor for “*any person*” to access sealed criminal records,

with the exception of those limited classes of persons who are granted access by statute. R.C. 2953.35(D) (emphasis added). Neither Judge Lyons nor any of the Butler County Area Court personnel are within the classes of public officials granted access to sealed criminal records. R.C. 2953.32 *et seq.* do not provide an exception that would allow court personnel to violate an otherwise valid sealing order in the context of a request for sealed court records.

Relator argues, in reliance on *State of Ohio ex rel. The Cincinnati Enquirer v. Sage*, 12th Dist. Case No. CA2012-06-122 (June 3, 2013), that a sealing order should only be considered as evidence that the release of a record is prohibited by state or federal law but should have no effect in actually prohibiting the access. *Sage* does not stand for such a proposition. To quote directly from *Sage*, in a mandamus proceeding under R.C. 149.43, “a closure or sealing order *may be* evidence that the record is one the release of which is prohibited by state or federal law pursuant to R.C. 149.43(A)(1)(v)” *Id.* at ¶ 43 (emphasis added). *Sage* does not hold that an order sealing the records is to be disregarded when a citizen seeks to compel disclosure of those records by a writ of mandamus. Such an interpretation would render meaningless the protections granted to offenders through R.C. 2953.32 if their sealed records could be subject public access automatically upon the filing of a writ of mandamus.

The General Assembly could easily have provided an exception to the strict nondisclosure provisions of R.C. 2953.32 to allow judges and clerks of court to circumvent sealing orders in order to determine whether those sealed records were responsive to a public records request. It chose not to do so, however, and instead made it a fourth degree misdemeanor to violate a sealing order. The release of lawfully sealed criminal records is unambiguously prohibited by state law, and neither Judge Lyons nor the Butler County Area Court have a privilege to circumvent the sealing orders in this case to respond to Relator’s request.

4. Relator lacks standing to bring a collateral attack against the sealing orders.

Citing to the Fourth District's opinion in *State ex rel. Leadingham v. Schisler*, 2003-Ohio-7293, Relator argues that, even if the orders are voidable (and thus, subject only to attack on direct appeal or through a Rule 60(B) motion), it may nonetheless collaterally attack the sealing orders on grounds that they violate its pre-existing right of public access.

Collateral attacks are “disfavored and . . . will succeed only in very limited situations.” *Ohio Pyro, Inc., v. Ohio Dep't of Commerce*, 115 Ohio St.3d 375, 2007-Ohio-5024, 875 N.E.2d 550, ¶ 22. As this Court explained in *Ohio Pyro*, there are only two recognized circumstances in which the rationale for the disfavoring of collateral attacks does not apply: when the court issuing the judgment lacked jurisdiction, or when the order was the product of fraud. *Id.* at ¶ 23. The collateral-attack doctrine “contains elements of the same considerations that come into play when considering whether a particular judgment is void or voidable.” *Id.* at ¶ 25.

Therefore, for the same reasons that the requested sealing orders are voidable, rather than void, on the basis of the clerical error citing to the incorrect statute, the validity of the orders is not subject to collateral attack. As set forth above, Judge Lyons had subject-matter jurisdiction, conferred by R.C. 2953.32, to issue an order to seal the record of a minor misdemeanor conviction, and that jurisdiction was not eliminated by the clerical error citing to the wrong statute.

Nor is there standing to vindicate Relator's “pre-existing right of access.” In *State ex rel. Cincinnati Enquirer v. Winkler*, 101 Ohio St.3d 382, 2004-Ohio-1581, 805 N.E.2d 1094, which affirmed the constitutionality of R.C. 2953.52, this Court rejected the notion that the right of public access to criminal proceedings is absolute. *Id.* at ¶ 9. It explained that “no one has a right to any particular degree of openness or secrecy, *except as provided by law*,” and found that it

was the proper role of the General Assembly to balance competing public and private rights through the Ohio sealing and expungement statutes. *Id.* at ¶ 9 (emphasis added). Therefore, there is no “natural” right to access court records that exists independently of the Public Records Act. Because the Public Records Act creates the right to access in the first place, but then limits access by referencing statutes such as R.C. 2953.32 and 2953.52, the General Assembly has carefully defined the scope and limits of the right of public access and has expressed an intent not to expand the right of public access at the expense of statutes that predated the Public Records Act and limited that access. Relator does not have a right of access that exists outside of the Public Records Act and thus cannot access the requested records except as provided by that law. Since R.C. 149.43 says there is no entitlement to access sealed court records, there is no “right” that can be vindicated through a collateral attack on the sealing orders.

B. Relator has no right of access to court records governed by Sup.R. 44–47 because those rules require Judge Lyons to restrict access.

Sup.R. 45(E)(2) provides: “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: * * * (b) whether any state, federal, or common law exempts the document or information from public access.” (emphasis added). As argued above, the entirety of Relator’s request is exempt from public access under R.C. 149.43. Upon making that determination, Judge Lyons was required by the Rules of Superintendence to restrict public access. Furthermore, regardless of whether state law restricts access, Sup.R. 45(E)(1) provides that “the court may restrict public access to the information in the case document or, if necessary, the entire document upon its own order.” Therefore, because the records had been sealed by Judge Lyons’s orders, he acted within his authority under Sup.R. 45 to restrict public access.

Judge Lyons has not failed to use the least restrictive means possible in denying The Enquirer's access to records because it is impossible to provide redacted versions of the conviction records requested. Sup.R. 45(E)(3) requires the court to use the least restrictive means available when limiting public access to a case document, including by redacting the information rather than excluding public access to the entire document. This rule presumes, however, that there is *some* right of public access that would be infringed upon if the entire document were kept from the public eye. No part of a sealed record of conviction is available to anyone, except for narrow categories of law enforcement personnel, and even then only for limited purposes. R.C. 2953.32. In other words, releasing part of the conviction records in this case, even with some information redacted, would still violate R.C. 2953.32, because the statute provides for nothing less than the sealing of "*all* official records pertaining to the case" (emphasis added). Because there is no public right of access to any part of a sealed criminal record, restricting access to the entire document is the only means of complying with the Rule, and there is no less restrictive means of doing so.

Nor can the sealing orders be produced in redacted form. As stated above, the orders requested by Relator are contained within sealed packets, and thus cannot be accessed or produced without unsealing the packets themselves. Because the orders are sealed within the packets, it is impossible to know which records were sealed with orders citing to the wrong statute. Furthermore, not all records of minor misdemeanors that have been sealed over the last five years were sealed using the order with the wrong statute. For example, Butler County attorney Wayne Staton, who handles hundreds of misdemeanor expungement cases each year, uses his own standard order which he submits to the court. Those orders cite to the correct statute, R.C. 2953.32. For Judge Lyons to comply with The Enquirer's request, he would have to

unseal every single case sealed in the last five years and then examine every single order to determine if the order cited the proper statute. As previously explained, the sealing statute does not provide a means for a judge to unseal a sealed record *sua sponte*. Unsealing every single record sealed in the last five years would also necessarily require the unsealing of hundreds of records sealed pursuant to an order that cited the proper statute—thus infringing upon the rights of offenders whose entitlement to sealed records is not at issue in this action.

C. Because Relator has no clear legal right to the requested records under either R.C. 149.43 or the Rules of Superintendence, Judge Lyons has no corresponding legal duty to produce the records.

In order to produce the records requested by The Enquirer, Judge Lyons would have to *sua sponte* unseal hundreds of records to determine which ones were sealed pursuant to the wrong Revised Code section. Nothing in the Revised Code or Rules of Superintendence grant a judge the authority to unseal a sealed conviction record other than by issuing an order after the offender applies to the court to have the record unsealed pursuant to R.C. 2953.32(D)(3). A trial court has no authority to *sua sponte* vacate a voidable judgment; instead, vacation of a voidable judgment must be done by motion. *Deutsche Bank Trust Co. v. Pearlman*, 162 Ohio App.3d 164, 2005-Ohio-3545, 832 N.E.2d 1253, ¶ 15 (9th Dist.); *Cf. Patton v. Diemer*, 35 Ohio St.3d 68, 518, N.E.2d 941 (1988) (holding that courts have inherent power to vacate *void* judgments, which power is not derived from Civ. R. 60(B)).

D. Because Relator has no clear legal right to the requested records under either R.C. 149.43 or the Rules of Superintendence, Judge Lyons also cannot produce the requested sealing orders themselves.

In addition to being unable to produce the underlying records, Judge Lyons cannot lawfully produce the requested orders themselves. Those orders, as “official records pertaining to the case,” R.C. 2953.32(C)(2), are sealed within the case files themselves. (Affidavit of Debbie

Bolser, ¶ 3.) Therefore, it would be impossible for anyone at the Butler County Area Court to review and produce the orders without first unsealing a sealed packet. That would violate R.C. 2953.32(D), as neither Judge Lyons nor any of the clerks or other employees at the Butler County Area Court are within the list of individuals permitted to inspect a sealed record. Releasing the records sealed pursuant to statute would also subject Judge Lyons or court employees to criminal penalties under R.C. 2953.35.

E. Relief in mandamus and prohibition are not remedies available to Relator under Sup.R. 47 and R.C. 149.43.

Sup.R. 47(B) provides that an action in mandamus is a remedy available to a person aggrieved by the failure of a court or clerk of court to comply with the requirements of Sup.R. 44 through 47.” Sup.R. 45(E)(2)(b) requires the court to restrict public access to case documents exempted from public access by state law. R.C. 2953.32 prohibits the release or disclosure of sealed records. Therefore, by restricting public access to the sealed records of conviction, Judge Lyons has complied with Sup.R. 45, and Relator is not entitled to a writ of mandamus on grounds of noncompliance.

R.C. 149.43(C)(1) provides a remedy in mandamus to a person aggrieved “by the failure of a public office . . . to promptly prepare a public record” and to make it available for inspection. Because R.C. 2953.32 prohibits the release or disclosure of sealed records, the sealed records of conviction at issue in this case are not “public records” under R.C. 149.43(A)(1)(v). Therefore, Judge Lyons has not failed to make a public record available, and Relator is not entitled to a writ of mandamus.

Finally, relator is not entitled to a writ prohibiting Judge Lyons from enforcing his sealing orders. Those orders were lawfully issued with proper subject-matter jurisdiction over the criminal cases and over the application for sealing the record. Judge Lyons also possessed the

requisite statutory authority to seal the record of eligible offenders under R.C. 2953.32. The orders are therefore lawful, and Judge Lyons must be permitted to enforce them.

F. Relator is not entitled to attorney fees.

In a mandamus action brought under R.C. 149.43, the court may choose to reduce or to not award attorney fees if it finds both that (1) “based on the ordinary application of statutory law and case law as it existed at the time of the [allegedly noncompliant conduct], a well-informed public office or person responsible for the requested public records reasonably would believe that the conduct . . . did not constitute a failure to comply . . .” and that (2) the person responsible for the requested records “reasonably would believe that the conduct . . . would serve the public policy that underlies the authority that is asserted as permitting that conduct or threatened conduct.” R.C. 149.43(C)(1)(a-b).

For those records sought pursuant to Ohio Rules of Superintendence 44-47, there is no provision for attorney fees. Rather, these documents are only pursued under Chapter 2731 in mandamus, and it is well-established in Ohio that attorney fees are not recoverable as part of the costs of litigation in the absence of statutory authorization; unlike R.C. 149.43, which contains a provision for the recovery of fees, the Rules of Superintendence do not. *See, e.g., State ex rel. Chapnick v. E. Cleveland City Sch. Dist. Bd. Of Educ.*, 93 Ohio St.3d 449, 452, 2001-Ohio-1585, 755 N.E.2d 883 (citing *State ex rel. Murphy v. Indus. Comm.* 61 Ohio St.2d 312, 313, 1980 Ohio LEXIS 661, 401 N.E.2d 923).

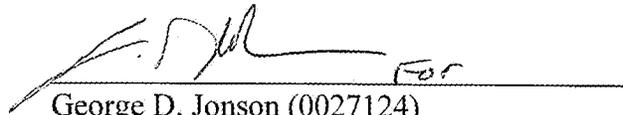
In this case, it is entirely reasonable for a well-informed judge in Judge Lyons’s position to restrict access to lawfully sealed court records. A plain reading of the Public Records Act in conjunction with the sealing statutes would reasonably lead a public official to conclude that a sealed criminal record, disclosure of which is prohibited by law and punishable as a fourth

degree misdemeanor, is not a “public record” subject to disclosure. A reasonable public official in Judge Lyons’s position could also reasonably conclude that the public policy supporting the existence of R.C. 2953.32 in the first place—the protection of the privacy of first-time offenders—would be undermined if sealed criminal records could be indiscriminately disclosed to the public through a simple public records request. By recognizing that a sealing statute would be a nullity if sealed records were somehow also “public records,” Judge Lyons acted reasonably in denying access to the records, and thus attorney fees are not an appropriate remedy in this case.

III. CONCLUSION

For the foregoing reasons, Judge Robert Lyons respectfully requests that this Court DENY Relator’s complaint for a writ of mandamus and prohibition.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "G. D. Jonson", is written over a horizontal line. To the right of the signature, the word "For" is written in a smaller, cursive script.

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CERTIFICATE OF SERVICE

I served a copy of the foregoing by First-Class U.S. Mail, postage prepaid, upon the following on this 26th day of June, 2013:

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