

IN THE SUPREME COURT OF OHIO  
2013

STATE OF OHIO,

Case Nos. 2012-1985  
2013-0004

Plaintiff-Appellee,

On Appeal from the  
Franklin County Court  
of Appeals, Tenth  
Appellate District

-vs-

JAMES RADCLIFF,

Court of Appeals  
Case No. 11AP-652

Defendant-Appellant.

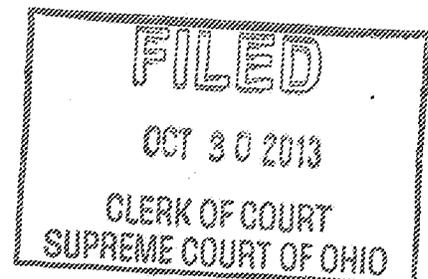
**MOTION OF PLAINTIFF-APPELLEE FOR BRIEFING AND ORAL  
ARGUMENT**

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## MEMORANDUM IN SUPPORT

This Court held this case for decision in *State v. Boykin*, 2012-0808 and 2012-1216. 02/20/2013, *Case Announcements*, 2013-Ohio-553. On October 22, 2013, this Court issued its decision in *Boykin*. *State v. Boykin*, Slip Opinion No. 2013-Ohio-4582. But because the decision in *Boykin* does not answer the question presented by this case, the State respectfully requests that this Court order that this case proceed to briefing and oral argument.

Prior to this Court's decision in *Boykin*, the lower courts were divided three ways over what effect a gubernatorial pardon has over a trial court's authority under *Pepper Pike v. Doe*, 66 Ohio St.2d 374, 421 N.E.2d 1303 (1981), to seal the records of a defendant who is otherwise statutorily ineligible for a sealing of records. (A sealing of records is colloquially referred to as "expungement." *State v. Pariag*, Slip Opinion No. 2013-Ohio-4010, ¶ 11.)

The First District in *State v. Cope*, 111 Ohio App.3d 309, 676 N.E.2d 141 (1st Dist.1996), held that a pardon entitles the recipient to a judicial expungement under *Pepper Pike*. The Ninth District in *State v. Boykin*, 9th Dist. Nos. 25752, 25845, 2012-Ohio-1381, held that a pardon does not entitle the recipient to a judicial expungement under *Pepper Pike*, but a trial court nonetheless has discretion to grant a judicial expungement. The Tenth District in *State v. Radcliff*, 978 N.E.2d 1275, 2012-Ohio-4372 (10th Dist.), held that, because "a pardon neither erases the conviction nor renders the pardon recipient innocent as if the crime were never committed," and because judicial expungement under *Pepper Pike* is available only where the applicant "has not been convicted," a defendant "cannot invoke the court's inherent jurisdiction to seal his records." *Id.* at ¶ 51.

Thus, the three-way split was as follows: (1) automatic judicial expungement (*Cope*), (2) discretionary judicial expungement (*Boykin*), and (3) no judicial expungement (*Radcliff*).

This Court's decision in *Boykin* only partially resolved the split. This Court held that that "[a] gubernatorial pardon does not automatically entitle the recipient to have the record of the pardoned conviction sealed." *Boykin* at syllabus. In other words, this Court rejected the First District's "automatic judicial expungement" approach. This Court, however, expressly declined to address the "discretionary judicial expungement" and "no judicial expungement" approaches. *Id.* at ¶ 10 (noting that the "sole issue" in *Boykin* was "whether a pardon automatically entitles the recipient to have his or her record of conviction of the pardoned offense sealed"); *see, also, id.* at ¶ 17 ("the narrow issue before us is whether a pardon requires a court to seal the record of the pardoned offenses.").

In short, the split between the Ninth and Tenth Districts is still alive and in need of resolution from this Court. Indeed, although the Tenth District certified its decision in *Radcliff* as in conflict with *Cope*, the certified question more aptly describes the conflict between *Radcliff* and the Ninth District's decision in *Boykin*:

May a trial court exercise jurisdiction to seal the record of a pardoned conviction where the petitioner has other offenses on his record?

This Court's decision in *Boykin* did not answer the question certified by the Tenth District. Although *Boykin* held that a pardon does not "automatically entitle" a defendant to an expungement, the question still remains whether—to use the words of the Tenth District's certified question—a trial court "may \* \* \* exercise discretion to seal the record

of a pardoned conviction where the petition has other offenses on his record?” (Emphasis added.)

Beyond just the unresolved conflict between the Ninth and Tenth Districts, this case presents important questions of great general interest. This Court should reaffirm its holding in *Boykin* that a pardon does not invalidate the conviction. *Boykin* at ¶¶ 22- 27. This Court should also hold that trial courts have no discretion under *Pepper Pike* to grant a judicial expungement of a pardoned conviction. To start, because a pardon does not erase the fact of conviction, a judicial expungement is not available after a pardon because *Pepper Pike* does not apply at all when there is a conviction. *Pepper Pike* at syllabus (limiting judicial expungement in criminal cases to “where the charges are dismissed with prejudice prior to trial by the party initiating the proceedings”); c.f., *Schussheim v. Schussheim*, Slip Opinion No. 2013-Ohio-4529 (extending *Pepper Pike* to cases where a civil protection order is dissolved at complainant’s request and complainant submits affidavit agreeing with expungement).

Moreover, a pardon does not present the “unusual and exceptional circumstances” where the privacy interest of the defendant outweighs the “government’s legitimate need to maintain records of criminal proceedings.” *Pepper Pike* at paragraph two the syllabus. Indeed, in rejecting the “automatic judicial expungement” approach, this Court in *Boykin* described the government’s various legitimate interests in maintaining records of pardoned convictions. *Boykin* at ¶¶ 29-35. These interests equally militate against the Ninth District’s “discretionary judicial expungement” approach.

Accordingly, the State respectfully requests that this Court order that this case proceed to full briefing and oral argument.

Respectfully submitted,

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### CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was hand-delivered this day,  
October 30<sup>th</sup>, 2013, to JOHN W. KEELING, 373 South High Street-12th Fl., Columbus,  
Ohio 43215; Counsel for Defendant-Appellant.



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