ORIGINAL

IN THE SUPREME COURT OF OHIO

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| State of Ohio, | : | Case Nos. 2012-1985 and 2013-0004 |
| Appellee, | : | On Appeal from the Franklin County Court of Appeals, Tenth Appellate District |
| v. | : | |
| James Radcliff, | : | |
| Appellant. | : | Court of Appeals Case No. 11AP-652 |

# MERIT BRIEF OF APPELLANT JAMES RADCLIFF


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## STATEMENT OF FACTS

The issue herein is whether the courts have the inherent power to seal the records of a very old conviction after the defendant received a pardon from the governor. The appellant lived a less than exemplary life from 1973 to 1981 when he had several felony convictions. Undersigned counsel actually represented the appellant in 1981 on his last felony conviction, which was for breaking and entering, the subject matter of the instant case. According to the judgment entry in the record, he entered a guilty plea and received a prison term of 1½ to 5 years to be served concurrently with a prison term imposed by Delaware County.

Since then, the appellant has done well. He served a short time in prison and turned his life around. He married a woman with four children whom he supported and cared for. They had another child together. He worked and took care of the family and became active in a church. His wife became disabled and he took care of her and the children. He was an exemplary employee. He obtained a job as a custodian for the Dublin School system. When he applied for the job, he noted on the application form, where it asked for his record, that he would discuss it. He managed to convince his employer that he had turned his life around and he was given a chance at employment. He worked as a custodian for twenty-one years. He won awards for perfect attendance and rose from custodian to shift supervisor. The Dublin Custodial Operations Manager described him as a great employee with a great attitude and demeanor who was a pleasure to work with.

This job ended when the local newspaper published an article noting the criminal records of some of the school employees. He was terminated after twenty-one years of employment because of his record. He experienced the embarrassment in the community and in his church that could be expected as a result of his past being revealed in such a public manner. However,

he persevered and took a minimum-wage job washing dishes at Bob Evans and also held down part-time jobs as a custodian at a physician's office and at a church and continued to help his youngest daughter and two-year-old grandchild who resided with him.

As a result of this ordeal, the appellant, on his own behalf, filed an application for a pardon and attached letters in support. He received a pardon for his criminal offenses, including the instant offense for breaking and entering, on January 7, 2011. He thereafter learned that the pardon did not resolve his dilemma and that he needed to take additional steps to have his record sealed. He then, pro se, sought to have his record of conviction sealed in this case. The state maintained that the appellee was not eligible for the statutory sealing of his record because of his multiple convictions. The trial court, nevertheless, ordered the record to be sealed based upon the fact that the defendant had received a pardon for this offense, relying upon the only controlling case law on point at the time, *State v. Cope,* 111 Ohio App.3d 309, 676 N.E.2d 141 (1996), which held that "a trial court may exercise its jurisdiction to seal the record of a conviction which has been erased by a pardon, regardless of whether the petitioner has other offenses on his record" and further noted that, "[a] pardon without expungement is not a pardon." [Id. 111 Ohio App.3d at 312].

The state appealed this ruling and argued that the trial court lacked authority to seal the records of a pardoned conviction in lieu of any express statutory authority to do so. Undersigned counsel was appointed to file an amicus brief on behalf of the pro se applicant and it was argued in response that trial courts have the inherent authority to seal records in the interest of justice and that the granting of a pardon by the governor created a situation where the interests of justice are generally served by an order to seal the records of the underlying conviction.

After the amicus brief was filed, the Summit County Court of Appeals rendered a decision in *State & Akron v. Boykin,* 9th Dist. Nos. 25752 & 25845, 2012-Ohio-1381, WL 1072305 (affirmed, ___ Ohio St.3d ___, 2013-Ohio-4582, ___ N.E.2d ___,) holding that courts are not required to seal records following a pardon even though they have the inherent power to do so. Id. at ¶ 7-8. The Franklin County Court of Appeals then issued a decision in this matter, citing to the appellate decision in *Boykin, supra.* While noting that the appellate court in *Boykin* had determined that trial courts have the authority to grant judicial expungement in situations where an executive pardon is at issue, the Franklin County Court of Appeals held that this was not the case and ruled that the courts had no inherent power to seal the records in a case where a pardon had been granted. [Id. ¶ 22, ¶ 51]

This Court accepted *State v. Boykin, supra,* for review and as being in conflict with *State v. Cope ,supra.* The issue on conflict was whether a pardon conclusively entitles the recipient to have her pardoned convictions sealed. This Court similarly accepted the instant case but stayed briefing pending the Court's resolution of *State v. Boykin.* This Court resolved *State v. Boykin,* ___ Ohio St.3d ___, 2013-Ohio-4582, ___ N.E.2d ___, and held in the syllabus that "A gubernatorial pardon does not automatically entitle the recipient to have the record of the pardoned conviction sealed" but noted, at ¶ 34, that, "[a]lthough the sealing of a criminal record may complement a pardon, it is not an automatic right that flows from a pardon."

This Court, after its decision above, lifted the briefing stay in this case to resolve the issue of whether a court has the inherent authority to seal records of a pardoned conviction.

## ARGUMENT

Proposition of Law

A trial court has the inherent authority to seal the records of a conviction, which has been erased by a pardon from the governor, in order to give effect to an important constitutional provision.

Question on Certified Conflict

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

Courts Have Inherent Powers to Seal Records Following a Pardon

The Franklin County Court of Appeals made a broad and unprecedented proclamation in its ruling below when it held that a trial court has no inherent authority to seal the records of a pardoned conviction in the absence of any express statutory authorization to do so. Inherent powers are essential to the proper functioning of courts and generally courts should be reluctant to abdicate such powers so critical to the ability of the courts to do justice. The ruling by the appellate court herein was wrong and is contradicted by decisions and rules promulgated by this Court. It is against a history and tradition of courts exercising power over its own records to ensure that justice is done.

Inherent powers of the courts are exercised across a broad spectrum of judicial functions. "[C]ourts may employ their inherent powers 'to fashion any remedy necessary for the proper administration of justice'" and courts have the "inherent power to prevent a miscarriage of justice or manifest injustice. Felix F. Stumpf, , *Inherent Powers of the Court,* at 1-2, The National Judicial College (2008). It is widely recognized that although the public has a right and interest in the openness of the judicial process that courts still have the inherent power to control public access to court records. Courts may deny access to court records to preserve the right of

the parties to a fair trial, to protect privacy interests of litigants or third parties, to protect trade secrets, in the interests of national or state security, to protect confidential informants, to safeguard an ongoing investigation, and for any number of reasons compelled by the interests of justice after a proper balancing of the competing interests. The courts can do all these things without the need of express statutory authorization.

The names and addresses of jurors have been kept secret, even from the defendant, at the government's request. General search warrants are sometimes ordered sealed in order to protect confidential informants or an ongoing investigation even though these are public records under the law and otherwise would be open to inspection.[1] See, *State v. Lawson,* 11th Dist. No. 2001-L-071, 2002-Ohio-5605, WL 31356635, ¶ 23 (right of defendant to examine affidavit in support of search warrant may be denied if government demonstrates a compelling interest to keep it under seal)

In *In re T.R.,* 52 Ohio St.3d 6, 556 N.E.2d 439 (1990), this Court held that a trial court could restrict public and media access to juvenile court proceedings, determining if a child was abused, neglected, or dependent, or determining child custody, if it finds that there exists a reasonable and substantial basis for believing that public access could harm the child or endanger the fairness of the adjudication process. This requires the weighing of the public's right to access and First Amendment considerations versus the privacy interests of the parties and of the interests of the child.

Even criminal court proceedings and records can be closed or sealed based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. *Press–Enterprise Co. v. Superior Court,* 464 U.S. 501, 510, 104 S.Ct. 819, 824, 78 L.Ed.2d 629,

[1] While statutory authority exists to seal interception warrants under R.C.2933.56(B), there does not appear to be any statutory authority to seal general warrants or their affidavits. These are apparently done under the inherent power of the courts.

(1984); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607–608, 102 S.Ct. 2613, 2620–2621, 73 L.Ed.2d 248, (1982).

This Court has expressly recognized that courts have the inherent power to seal or restrict public access to their records when the interests of justice so require, both in previous cases and when it promulgated Sup.R. 45(E), which authorizes courts to restrict public access to records if it finds that "allowing public access is outweighed by a higher interest***." The Rule provides in part:

> **(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.

This Court has also held in previous decisions that courts have the inherent power to seal records. In *Pepper Pike v. Doe,* 66 Ohio St.2d 374, 421 N.E.2d 1303 (1981), the Court held that judges had the inherent authority to seal records in a criminal case when the charge had been

dismissed. The statute allowing for the sealing of convictions, R.C. 2953.32, was enacted January 1, 1974. However, the defendant in *Pepper Pike* had been charged with assault in 1978 by her ex-husband's wife. This charge was dismissed and the defendant then filed a motion to seal the records of the case. The municipal court denied the motion, asserting that it had no authority to do this. At the time, R.C. 2953.52, the statute allowing for the sealing of records following dismissals or not guilty findings, did not exist. It was not enacted until 1984.

This Court noted that convicted first offenders could seek to have their records sealed under R.C. 2953.32 but that there was no statutory authority for expunging or sealing records of criminal cases that were dismissed. This Court noted that "even absent statutory authorization" trial courts had been known to expunge criminal records out of "a concern for preservation of privacy interest" and that some courts had done so under the "concern for due process rights." Id. at 376. In a unanimous decision, this Court held that the criminal charge and dismissal with prejudice were "exceptional circumstances as to make appropriate the exercise of the trial court's jurisdiction to expunge and seal all records in the case." The Court further noted that the basis for such expungement, in our view, is the constitutional right to privacy. Id. at 377.

More recently, this Court dealt with this issue in *Schussheim v. Schussheim,* 137 Ohio St.3d 133, 2013-Ohio-4529, 998 N.E.2d 446, when it had to determine whether a court has the inherent authority to seal records relating to a dissolved civil protection order. This Court held:

> {¶ 3} In *Pepper Pike v. Doe,* 66 Ohio St.2d 374, 421 N.E.2d 1303 (1981), we recognized that courts have inherent authority to grant the judicial remedy of expungement and sealing of records in "unusual and exceptional circumstances." This case is another where unusual and exceptional circumstances exist because the complainant who originally filed for the CPO subsequently filed a motion to dissolve it, which the court granted, and thereafter provided an affidavit in support of the application to expunge and seal the records pertaining to it. Thus, in accordance with *Pepper Pike,* we hold that a trial court has the inherent authority to grant an application to expunge and seal a record pertaining to a dissolved CPO in an adult

> proceeding when unusual and exceptional circumstances exist. Accordingly, we reverse the judgment of the court of appeals and remand the cause to the trial court for further proceedings consistent with this opinion.
>
> * * *
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> {¶ 14} Similar to *Pepper Pike,* no statutory authorization exists for the court to expunge and seal records relating to a dissolved CPO in adult proceedings. In accordance with our recognition in *Pepper Pike* of a court's inherent power to expunge and seal criminal records absent statutory authority, we hold that a court has the inherent authority to order the expungement and sealing of records that relate to a dissolved CPO in "unusual and exceptional circumstances." In deciding whether to grant this remedy, the court must determine whether the "interest of the accused in his good name and right to be free from unwarranted punishment" outweighs the "legitimate need of government to maintain records." *Id.,* 66 Ohio St.2d at 377, 421 N.E.2d 1303. And "[w]here there is no compelling state interest or reason to retain the * * * records," the applicant is entitled to this remedy. *Id.*
>
> * * *
>
> **Conclusion**
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> {¶ 17} Courts have the inherent authority to expunge and seal records when a case involves unusual and exceptional circumstances and when the interests of the party seeking expungement outweigh the legitimate need of the government to maintain records. Such unusual and exceptional circumstances appear to exist in this case, as the complainant who petitioned the court for an ex parte CPO later moved to dissolve the CPO and submitted an affidavit that expungement was in the best interest of herself and her children. Accordingly, we reverse the judgment of the court of appeals and remand the cause to the trial court for further proceedings consistent with this opinion.

Thus the appellate court's holding in this case was wrong since this Court has held in previous cases, and in its own Rules of Superintendence for the courts of Ohio, that courts have the inherent power to seal records when the interests of justice compel it. The instant case is similar to, but more compelling, than *Pepper Pike v. Doe,* and *Schussheim v. Schussheim, supra.* While there is no statutory procedure for sealing records following a pardon, a pardon is an exceptional circumstance that justifies a sealing of the records. This Court noted that the constitutional right to privacy could justify the sealing of records. This case involves the

constitutional right to privacy in addition to a constitutional provision expressly allowing for the power of the governor to pardon. If the courts cannot seal the records of pardoned cases, this constitutional provision relating to pardons will be profoundly impacted. Thus this case involves both privacy interests and constitutional concerns regarding the granting of pardons.

Courts have broad powers to regulate court matters to ensure that justice is done. As this Court has determined, this extends to the ability to regulate and control its own records, but, as in any case, competing interests must be weighed.

The Trial Court Properly Determined that the Interest of Justice Warranted the Sealing of the Records

The appellate court ruled that the interests of justice did not matter in this case because the trial court did not have the authority to seal the records of the pardoned offense. The appellate court reluctantly reversed the trial court's decision because it erroneously determined that it had no choice. The appellate court noted that it was hard to imagine a person more deserving of a fresh start, based upon the evidence in the record and his impressive turn-around than the defendant but the court erroneously concluded that it had no power to seal the record. Id. at ¶ 54.

Thus if a court has the authority to seal a record of a pardoned case, the trial court certainly did not abuse its discretion by doing so in this case. In *State v. Cope,* 111 Ohio App.3d 309, 676 N.E.2d 14, (1996), the court noted that a pardon without the sealing of the records was of little use. That is certainly true in this case. If the appellant cannot have his record sealed, his pardon is meaningless and, even more importantly, the power invested in the governor, by the Ohio Constitution, to grant pardons will be rendered meaningless in most of the instances where it is generally exercised.

The Pardon Power

The power to pardon is little used but is still considered to be very important in the justice system. Our nation, and almost every single state, as well as most countries, have some form of pardon where a person can be relieved from the consequences of a criminal conviction. The power to pardon is set forth in the Ohio Constitution, Article III, Section 11 (appendix). While a person can be pardoned to relieve the person of an unjust conviction or an overly harsh sentence, this is usually not the reason a pardon is granted in Ohio. Pardons of any form are relatively rare in comparison to the number of crimes committed. The vast majority of the pardons granted in this state are for cases similar to the one herein where the offender has completed his sentence and has spent a number of years living a crime-free life. In such situations, the motive and purpose for obtaining a pardon is to remove the stigma and embarrassment that attaches to having a very public record of the conviction. Thus a pardon without the sealing of the record is not of much value.

Records of a person's convictions can easily be accessed online through the clerk of court's website for any particular county and there are a number of commercial background-checking companies that offer their services for a fee. Reporters, employers, landlords, and others can easily access a person's record.

It is the existence and stigma of his record from over three decades ago that embarrassed the appellant, cost him his job of twenty-one years, hindered his efforts for new employment and for more gainful employment, and motivated him to seek a pardon. Our society has long recognized the importance of redemption and forgiveness for past offenses, which is why the power to pardon was placed in both the national and state constitutions. The power to pardon, properly exercised, is an act of justice and is supported by wise public policy. It extends the

possibility of redemption and encourages people to live law-abiding lives. It is a carrot that society places great value upon. The power to pardon is of constitutional significance and the courts must give due deference to the governor's exercise of this important constitutional power.

When the Ohio Constitution gives the governor the power to grant pardons, the courts should be willing to give due deference to the exercise of this constitutional power and to give the pardon meaning if the interests of justice so dictate. The appellate court's decision has eliminated the motive and purpose for the appellant, and most other applicants, to obtain a pardon. If the records cannot be sealed, what is the use of seeking such a pardon? This is not the law and should not be the law. The historical purpose of a pardon, or at least of the type granted herein, is to remove the stigma attached to the conviction.

The only way the appellant and others, who are not eligible for the statutory sealing of their records, can ever obtain relief from the burden of their criminal record is to seek a pardon. The Ohio Constitution provides for the remedy of a pardon but the appellate court has eviscerated a pardon as a viable remedy by claiming that the courts have no authority over their own records and cannot seal the record without express statutory authority.

The branches of the government were created to ensure a balance of power. Each branch serves as a check on the power of the others but each branch also depends upon the other branches to honor and recognize the proper exercise of its power. The Ohio Constitution has provided for the power of the governor to issue a pardon and the courts must act in comity with the executive branch by extending the recognition needed to honor this important power. Each branch of government depends upon the other branches of government to act in comity with one another. The legislature would be rendered ineffective if the executive branch did not attempt to

enforce their laws or if the judicial branch ignored them. Likewise the judicial branch would be powerless if the executive branch refused to honor or enforce court orders.

This Court addressed issues of comity and the separation of powers in *State v. Bodyke,* 126 Ohio St.3d 266, 2010-Ohio-2424, 933 N.E.2d 753. This Court noted, at ¶ 42, that the separation of powers doctrine is a "deliberate design to secure liberty by simultaneously fostering autonomy and comity, as well as **interdependence and independence, among the three branches.**" Citing to *Norwood v. Horney,* 110 Ohio St.3d 353, 2006-Ohio-3799, 853 N.E.2d 1115, ¶ 114. [Bold emphasis added] This Court further noted that "the doctrine also recognizes that our government is composed of equal branches that **must work collectively toward a common cause.** And in doing so, the Constitution permits each branch to have some influence over the other branches in the development of the law." [Id. at ¶ 48, Bold emphasis added]

At the same time that this Court recognized that the doctrine of comity required the branches to work together toward the common cause, it also recognized the need to be wary "of any usurpation of the powers conferred on the judiciary by constitutional mandate and any intrusion upon the courts' inherent powers * * *." *Norwood,* 110 Ohio St.3d 353, 2006-Ohio-3799, 853 N.E.2d 1115, at ¶ 115. We therefore must 'jealously guard the judicial power against encroachment from the other two branches of government and * * * conscientiously perform our constitutional duties and continue our most precious legacy.'" [Id. ¶ 46]

Thus this Court recognizes the doctrine of comity and of the need to cooperate with the other branches of the government for the common good. It also recognizes the importance of the inherent powers of the courts and of the need to jealously guard against the encroachment of the inherent powers of the court by the other branches. The trial court also recognized the need to

act in comity with the office of the governor and to give effect to the governor's pardon by sealing the appellant's record of conviction. It also recognized that the courts had the inherent power to seal the records of a conviction in order to do this. The appellate court, on the other hand, claimed that it could not seal the record because the legislature had complete control over the records of the court and that it could do nothing in this regard unless the legislature passed a law authorizing such actions. Thus the appellate court, instead of jealously guarding the courts' inherent power over its records, did just the opposite. It conceded total control over the records of the courts to the legislature. This was contrary to the holdings of this Court and is very bad precedent.

Courts must be willing to exercise and maintain their inherent powers to do justice. If they abdicate these powers, then there will be instances of injustice, just as was done in the instant case. The power of the courts over their records must be paramount. While deference can and should be given to legislative enactments, courts should never give up final control over their records even if this might result in a direct violation of statutory provisions such as public records laws enacted by the legislature or even with respect to the sealing of convictions. The courts must maintain the power to balance competing interests and to ultimately decide issues regarding their own records to ensure that justice is done in a given situation.

For instance, a person arrested for a felony, where the grand jury subsequently entered a no-bill in the case, must wait two years before applying for an order to seal the records according to R.C. 2953.52 (A)(2). This would mean that if a person was arrested for murder and a no-bill was returned by the grand jury, based upon facts indicating that the wrong man had been arrested, this poor person would not only have to undergo the indignity of being falsely accused and arrested for a murder he never committed but would also have to have a public record of this

for two years. Could not the court ameliorate this injustice by immediately sealing the record upon the application of both parties who wish to spare this innocent person from even more harm, embarrassment, and ridicule? The correct answer is yes. The court has the inherent power to seal the record in the interest of justice even though a statute expressly states such a person must wait two years. If the court has the inherent power to seal records in direct contravention of a statute, it certainly has the power to seal records when there is no statutory prohibition and it is being done to aid of the fulfillment of a constitutionally provided pardon power.

This Court and courts throughout the state have noted that the statutes providing for the sealing of records protect the privacy interests of those with a criminal record from having the information publically disseminated. This Court in *State ex rel. Cincinnati Enquirer v. Winkler,* 101 Ohio St.3d 382, 2004-Ohio-1581, 805 N.E.2d 1094, held that law allowing for the sealing of criminal records is an attempt to balance a "defendant's constitutional right to privacy" against the "public's right of access" to records. The Court noted that, "The defendant's right to privacy takes into account the public policy of providing a second chance to criminal defendants." *Id.* at ¶ 10.

Societies and religions throughout the world recognize the benefits and morality of second chances and redemption. This Court has noted that the sealing, or expungement statutes, are based upon the public policy of providing further opportunities for those convicted of a **crime. It is wise public policy to weigh the interests involved and to give deserving people a** chance to live life free from the stigma and disadvantages associated with a criminal record, particularly when the offenses are over thirty years old. The individual, government, and society all benefit when the individual can have enhanced employment opportunities, serve as better role models, and contribute more as productive citizens and parents.

In *State v. Auge,* 10th Dist. No. 01AP-1272, 2002-Ohio-3061, WL 1312668, the court dealt with an application to seal the record of conviction under R.C. 2953.32, and noted as follows:

> {¶ 23} Case law interpreting this statute makes it abundantly clear that it is *remedial* in nature, and "must be liberally construed" to promote the statute's purpose of allowing appropriate applicants to seal their records. *State ex rel. Gains v. Rossi* (1999), 86 Ohio St.3d 620, 716 N.E.2d 204. See, also, *State v. Hilbert* (2001), 145 Ohio App.3d 824, 764 N.E.2d 1064; *In the Matter of: M.B.* (2000), Franklin App. No. 99AP-922.

In *State v. M.D.,* 8th Dist. No. 92534, 2009-Ohio-5694, WL 3478517, the court noted:

> {¶ 9} "The expungement provisions are remedial in nature and 'must be liberally construed to promote their purposes.' " *Id.,* quoting *State ex rel. Gains v. Rossi,* 86 Ohio St.3d 620, 622, 716 N.E.2d 204, 1999-Ohio-213.

In *State v. M. D., supra,* the court noted at ¶ 8, that, "In enacting the expungement provisions, the legislature recognized that 'people make mistakes, but that afterwards they regret their conduct and are older, wiser, and sadder. The enactment and amendment of R.C. 2953.31 and 2953.32 is, in a way, a manifestation of the traditional Western civilization concepts of sin, punishment, atonement, and forgiveness." In *State v. Dzama,* 9th Dist. No. 25404, 2011-Ohio-2634, WL 2175472, ¶ 8, the court held:

> "[T]he remedial expungement provisions of R.C. 2953.32 and 2953.33 must be liberally construed to promote their purposes." *State ex rel. Gains v. Rossi* (1999), 86 Ohio St.3d 620, 622. The purpose of the statute, moreover, is to "provide remedial relief to qualified offenders in order to facilitate the prompt transition of these individuals into meaningful and productive roles." *Barker v. State* (1980), 62 Ohio St.2d 35, 41.

The constitutional provision providing for a pardon serves much the same purpose as the expungement statutes. It gives people like the appellant a new chance. It provides for a reward to those who spend decades earning atonement. The proper exercise of a pardon is an act of

justice expressly provided for in our Constitution. It is good public policy and it is justice in the truest sense to give people, such as the appellant, the opportunity to start over again after decades of living a virtuous and law-abiding life in order to re-earn our trust and forgiveness. The supreme law of Ohio provides for pardons and the courts should generally honor a pardon when it is granted by sealing the records. If courts have the inherent power to seal records in the interests of justice, then the interests of justice warrant the sealing of the records in this case.

It should be noted that the Ohio statutes do not expunge convictions even though that term is often used to describe the process. Ohio statutes call for a sealing of the records and this is a big difference. This means that the fact of the conviction would no longer be available for public dissemination but that the record would still exist for law enforcement purposes and certain employment considerations. Sealed records can be used in sentencing for another offense and in connection with certain applications for employment. See, R.C. 2953.32(D). The trial court below ordered the records to be sealed. This was a proper remedy based upon the fact that the appellant has received a pardon from the governor for the old case. Thus the trial court's ruling sealing the records was a just accommodation to the pardon granted by the governor.

## CONCLUSION

The decision below is fundamentally wrong in its holding that trial courts do not have the inherent power to seal their own records in the interests of justice. This is contrary to the decisions and rules promulgated by this Court holding that courts have the inherent power to seal records when justice requires. The decision below is also fundamentally flawed because it violates the separation of powers doctrine by holding that the legislature has the sole power to control the records of the courts. This Court in *State v. Boykin, supra,* noted that "the sealing of a criminal record may complement a pardon" but cautioned that "it is not an automatic right that

flows from a pardon." [Id. at ¶ 34] This court was unwilling to cede the inherent power of the courts to control its own records to the executive branch by creating an automatic obligation to seal records in pardoned cases. Likewise, the inherent power to control court records should not be ceded over to the legislature as the appellate court did herein.

This Court has already determined that courts have the inherent authority to seal their own records and it has also created an analytical process for doing so in Sup.R. 45(E). Under this rule, public access to court information can be restricted with a demonstration "by clear and convincing evidence that the presumption of allowing public access is outweighed by a higher interest" after considering "[w]hether public policy is served by restricting public access." Generally, the fact that a pardon was granted should be enough to demonstrate that the presumption of allowing public access is outweighed by a higher interest, namely all the interests served by the constitutional grant of a pardon. A pardon should create a presumption that the records should be sealed subject to a demonstration that the interest of public access to this information outweighs the interests that the pardon process is designed to foster.

The public no longer has an interest in knowing what kind of a person the appellant was from 1973 to 1981 and we do not need to keep poking him with sticks and punishing him for his old transgressions when he has completely atoned for his behavior and has re-earned our trust. He should be given a fresh start in life, which is what the pardon process is designed for. The trial court properly sealed the record to this end and the appellate court's ruling should be reversed.

Respectfully submitted,

Yeura R. Venters 0014879
Franklin County Public Defender

By John W. Keeling 0014860
Counsel of Record for Appellant

**CERTIFICATE OF SERVICE**

I certify that a copy of appellant's merit brief was served upon Seth L. Gilbert, Assistant Franklin County Prosecutor, 373 South High Street, 13th Floor, Columbus, Ohio 43215, by hand delivery on this Friday, January 31, 2014.

John W. Keeling 0014860
Counsel for Appellant

IN THE SUPREME COURT OF OHIO

| | | |
|---|---|---|
| State of Ohio, | : | Case Nos. 2012-1985 and 2013-0004 |
| Appellee, | : | On Appeal from the Franklin County Court of Appeals, Tenth Appellate District |
| v. | : | |
| James Radcliff, | : | |
| Appellant. | : | Court of Appeals Case No. 11AP-652 |

**APPENDIX**

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**IN THE SUPREME COURT OF OHIO**

12-1985

| | | |
|---|---|---|
| State of Ohio<br><br>Plaintiff-Appellee | : | On Appeal from the Franklin County Court of Appeals, Tenth Appellate District |
| vs | : | |
| J.A.R.<br><br>Defendant-Appellant | : | Court of Appeals Case No. 11AP-652 |

---

**NOTICE OF APPEAL**

---


YEURA R. VENTERS (0014879)
Franklin County Public Defender

And

JOHN W. KEELING (0014860) (Counsel of Record)
Counsel for Defendant-Appellant
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Columbus, Ohio 43215
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And

SETH L. GILBERT (0072929) (Counsel of Record)
Counsel for Plaintiff-Appellee
373 South High Street / 13th Floor
Columbus, Ohio 43215
614-525-3555



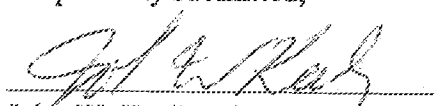
FILED
NOV 20 2012
CLERK OF COURT
SUPREME COURT OF OHIO

## NOTICE OF APPEAL OF DEFENDANT-APPELLANT

Defendant-Appellant J.A.R. gives notice of appeal to the Supreme Court of Ohio from the judgment of the Franklin County Court of Appeals, Tenth Appellate District, entered in Court of Appeals Case No. 11AP-652 on October 11, 2012.

This case is a case of public or great general interest and involves a substantial constitutional question.

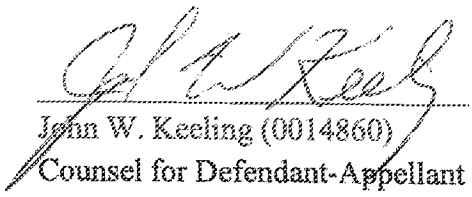
Respectfully submitted,



John W. Keeling (0014860)
Counsel of Record
373 South High Street / 12th Floor
Columbus, Ohio 43215
Phone: (614) 525-8783
Counsel for Defendant-Appellant

## CERTIFICATE OF SERVICE

I hereby certify that a copy of this notice of appeal was hand-delivered to the office of Seth L. Gilbert, Assistant Prosecuting Attorney, 373 South High St., 13th Floor, Columbus, Ohio 43215 on this the 26th day of November, 2012.



John W. Keeling (0014860)
Counsel for Defendant-Appellant

IN THE SUPREME COURT OF OHIO

| | | |
|---|---|---|
| State of Ohio, | : | Case No. 13-0004 |
| Appellee, | : | On Appeal from the Franklin County Court of Appeals, Tenth Appellate District |
| v. | : | |
| J.A.R., | : | Court of Appeals Case No. 11AP-652 |
| Appellant. | : | |

**NOTICE OF A CERTIFIED CONFLICT FILED BY J.A.R., APPELLANT**


Yeura R, Venters (0014879)
Franklin County Public Defender

and

John W. Keeling 0014860, Counsel of Record
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and

Seth Gilbert (0072929), Counsel of Record
Assistant Prosecuting Attorney
Counsel for Appellee



FILED
JAN 03 2013
CLERK OF COURT
SUPREME COURT OF OHIO

IN THE SUPREME COURT OF OHIO

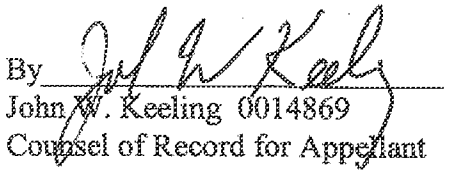
| | | |
|---|---|---|
| | | Case No. |
| State of Ohio, | : | |
| Appellee, | : | On Appeal from the Franklin County Court of Appeals, Tenth Appellate District |
| v. | : | |
| J.A.R., | : | Court of Appeals Case No. 11AP-652 |
| Appellant. | : | |

## NOTICE OF A CERTIFIED CONFLICT

Now comes appellant, pursuant to S.Ct.Prac.R. 4.1, to file the copy of the order of the Franklin County Court of Appeals, Tenth Appellate District, certifying a conflict pursuant to Article IV, Section 3(B)(4) of the Ohio Constitution. This matter should be consolidated with pending Case No. 12-1985, which is the same case currently pending a ruling on the claimed appeal of right or discretionary appeal. The Court may wish to stay briefing in this matter pending the resolution of the pending case of *State & Akron v. Boykin,* Case Nos. 2012-0808 & 2012-1216, which has a similar issue.

Respectfully submitted,

Yeura R. Venters
Franklin County Public Defender

By 
John W. Keeling 0014869
Counsel of Record for Appellant

## MEMORANDUM

Pursuant to S.Ct.Prac.R. 4.1, appellant hereby files the order from the Franklin County Court

of Appeals certifying that its decision herein is in conflict with that of another appellate district. Under S.Ct.Prac.R. 4.4(C), this Court must review the order of the court of appeals to determine whether a conflict exists along with the jurisdictional memoranda filed by the parties in Supreme Court Case N. 12-1985 to determine whether a conflict exists and whether to allow the discretionary appeal or the claimed appeal of right and to consolidate the cases if necessary.

The conflict is set forth in the attached December 4, 2012, entry certifying a conflict and in the attached memorandum decision on the motion to certify as follows:

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

The decision herein, in *State v. Radcliff,* 10th Dist. No. 11AP-652, 2012-Ohio-4732, attached, was found to be in conflict with the judgment of the court in State v. Cope, 111 Ohio App.3d 309, 676 N.E.2d 141 (1st Dist. 1996) (attached); discretionary appeal not allowed, 77 Ohio St.3d 1469, 673 N.E.2d 135, (1996).

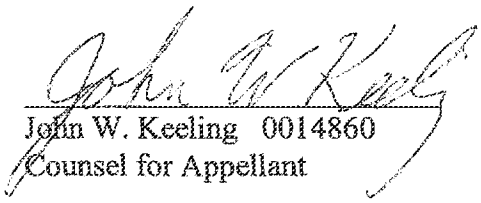
Respectfully submitted,

Yeura R. Venters
Franklin County Public Defender

By
John W. Keeling 0014869
Counsel for Appellant

## PROOF OF SERVICE

I certify that a copy of the foregoing was served upon Seth Gilbert, Assistant Franklin County Prosecutor, 373 South High Street, 13th Floor, Columbus, Ohio 43215, by hand delivery on the third day of January, 2013.



John W. Keeling 0014860
Counsel for Appellant

Franklin County Ohio Court of Appeals Clerk of Courts- 2012 Dec 05 4:47 PM-11AP000652

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

| | | |
|---|---|---|
| State of Ohio, | : | |
| Plaintiff-Appellant, | : | |
| v. | : | No. 11AP-652<br>(C.P.C. No. 11EP-183) |
| James A. Radcliff, | : | (REGULAR CALENDAR) |
| Defendant-Appellee. | : | |

JOURNAL ENTRY

For the reasons stated in the memorandum decision of this court rendered herein on December 4, 2012, it is ordered that defendant's October 18, 2012 motion to certify the judgment of this court as being in conflict with the judgment in *State v. Cope*, 111 Ohio App.3d 309 (1st Dist.1996) is sustained and, pursuant to Section 3(B)(4), Article IV, Ohio Constitution, the record of this case is certified to the Supreme Court of Ohio for review and final determination upon the following issue in conflict:

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

BRYANT, J., BROWN, P.J., & DORRIAN, J.

By /S/ JUDGE
Judge Peggy Bryant

Franklin County Ohio Court of Appeals Clerk of Courts- 2012 Dec 05 4:47 PM-11AP000652

Tenth Circuit Court of Appeals

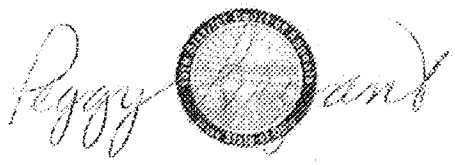
**Date:** 12-05-2012

**Case Title:** STATE OF OHIO -VS- JAMES A RADCLIFF

**Case Number:** 11AP000652

**Type:** JOURNAL ENTRY

So Ordered



/s/ Judge Bryant

Franklin County Ohio Court of Appeals Clerk of Courts- 2012 Oct 11 7:53 PM-11AP000652

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

| | | |
|---|---|---|
| State of Ohio, | : | |
| Plaintiff-Appellant, | : | |
| v. | : | No. 11AP-652<br>(C.P.C. No. 11EP-183) |
| James A. Radcliff, | : | (REGULAR CALENDAR) |
| Defendant-Appellee. | : | |

JUDGMENT ENTRY

For the reasons stated in the decision of this court rendered herein on October 11, 2012, it is the judgment and order of this court that the judgment of the Franklin County Court of Common Pleas is reversed and this case is remanded to that court in accordance with law and consistent with this decision. Costs assessed to defendant.

BRYANT, J., BROWN, P.J. & DORRIAN, J.

By /S/ JUDGE
Judge Peggy Bryant

Franklin County Ohio Court of Appeals Clerk of Courts- 2012 Oct 11 7:53 PM-11AP000652

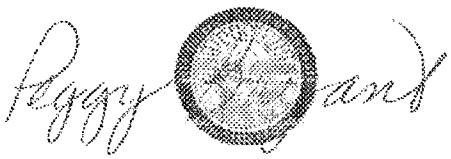
**Date:** 10-11-2012

**Case Title:** STATE OF OHIO -VS- JAMES A RADCLIFF

**Case Number:** 11AP000652

**Type:** JEJ - JUDGMENT ENTRY

So Ordered



/s/ Judge Bryant

Electronically signed on 2012-Oct-11 page 2 of 2

Franklin County Ohio Court of Appeals Clerk of Courts- 2012 Oct 11 12:58 PM-11AP000652

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

| | | |
|---|---|---|
| State of Ohio, | : | |
| Plaintiff-Appellant, | : | |
| v. | : | No. 11AP-652 (C.P.C. No. 11EP-183) |
| James A. Radcliff, | : | (REGULAR CALENDAR) |
| Defendant-Appellee. | : | |

D E C I S I O N

Rendered on October 11, 2012

*Ron O'Brien*, Prosecuting Attorney, and *Seth Gilbert*, for appellant.

*Yeura R. Venters*, Public Defender, and *John W. Keeling*, for *amicus curiae*, Franklin County Public Defender.

APPEAL from the Franklin County Court of Common Pleas.

BRYANT, J.

{¶1} Plaintiff-appellant, State of Ohio, appeals from a judgment of the Franklin County Court of Common Pleas granting the application of defendant-appellee, James A. Radcliff, to seal the record of his prior convictions. Because defendant does not satisfy the criteria for either judicial or statutory expungement, we reverse.

**I. Facts and Procedural History**

{¶2} On September 13, 2011, defendant filed an application requesting the trial court seal the record of his convictions for breaking and entering and passing bad checks in case No. 81CR-4506. The record indicates that between 1973 and 1981, in addition to the convictions in 81CR-4506, defendant was convicted of several crimes

throughout Ohio, including felonious assault, aiding escape, disorderly conduct, and complicity to commit theft.

{¶3} According to the letters from friends, co-workers, and family members submitted to support defendant's application to seal his record, defendant significantly reversed his behavior and became a productive, law-abiding member of society in the 30 years since defendant's youthful legal troubles. Defendant applied for a custodial position with Dublin City Schools, indicating on the application that he had a criminal background that he was willing to discuss with his prospective employer. Defendant successfully obtained the position and eventually became the lead custodian at Dublin Jerome High School. Defendant married and supported his disabled wife, their child, and his wife's four children from a previous marriage and also became an active member in his church. After 21 years of what appeared to be exemplary service with Dublin City Schools, defendant was fired from his job when a local newspaper published an article noting the criminal records of some school employees.

{¶4} On January 7, 2011, Governor Ted Strickland granted defendant "a full and absolute pardon" for defendant's various convictions, indicating defendant had "been rehabilitated and ha[d] assumed the responsibilities of citizenship." (R. 1-2.) Defendant then filed his application, indicating he was not seeking the order for any of the reasons listed in R.C. 2953.52 but rather because he possessed a pardon. The state objected to the application, noting defendant was ineligible to have his record sealed under either R.C. 2953.52 or 2953.31.

{¶5} The trial court held a hearing on defendant's application on July 7, 2011. The court found the circumstances of the case "a little bit * * * unusual" but concluded the pardon entitled defendant to "a full release." (Tr. 3, 5.) The court issued a judgment entry on July 20, 2011 sealing the record of defendant's conviction pursuant to R.C. 2953.32, noting defendant had no criminal actions pending against him, and concluding that sealing his record was consistent with the public interest.

**II. Assignments of Error**

**{¶6}** The state appeals, assigning two errors:

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**FIRST ASSIGNMENT OF ERROR**

THE TRIAL COURT ERRED WHEN IT FAILED TO DETERMINE WHETHER APPLICANT WAS A "FIRST OFFENDER" AS REQUIRED BY R.C. 2953.32.

**SECOND ASSIGNMENT OF ERROR**

THE TRIAL COURT ERRED IN EXERCISING ITS JURISDICTION WHEN IT GRANTED APPLICANT'S APPLICATION FOR EXPUNGEMENT AS APPLICANT WAS NOT A "FIRST OFFENDER" AS DEFINED BY R.C. 2953.31.

The state's assignments of error are interrelated and will be addressed together.

**III. Expungement: Statutory v. Judicial**

{¶7} " 'Expungement is a post-conviction relief proceeding which grants a limited number of convicted persons the privilege of having record of their first conviction sealed.' " *Koehler v. State*, 10th Dist. No. 07AP-913, 2008-Ohio-3472, ¶ 12, quoting *State v. Smith*, 3d Dist. No. 9-04-05, 2004-Ohio-6668, ¶ 9. Neither the United States nor Ohio Constitutions endows one convicted of a crime with a substantive right to have the record of a conviction expunged. *Koehler* at ¶ 14, quoting *State v. Gerber*, 8th Dist. No. 87351, 2006-Ohio-5328, ¶ 9. "Rather, ' "[e]xpungement is an act of grace created by the state" and so is a privilege, not a right.' " *Koehler*, quoting *State v. Simon*, 87 Ohio St.3d 531, 533 (2000), quoting *State v. Hamilton*, 75 Ohio St.3d 636, 639 (1996).

{¶8} R.C. 2953.52(A) permits any person who has been found not guilty by a jury, who is the defendant named in a dismissed indictment, or against whom the Grand Jury enters a no bill, to apply to the court for an order sealing the official records of the case. R.C. 2953.32(A)(1) permits a first offender to apply to the sentencing court for an order sealing the record of conviction. A first offender is "anyone who has been convicted of an offense in this state or any other jurisdiction and who previously or subsequently has not been convicted of the same or a different offense in this state or any other jurisdiction." R.C. 2953.31(A).

{¶9} Under either section, the court must determine if the prosecutor filed an objection to the application and, if so, consider the prosecutor's reasons for the

Franklin County Ohio Court of Appeals Clerk of Courts- 2012 Oct 11 12:58 PM-11AP000652

objection. R.C. 2953.32(B); R.C. 2953.52(B); *Koehler* at ¶ 13. The court also must weigh the applicant's interests in having the records sealed against the legitimate needs, if any, of the government to maintain the records. R.C. 2953.32(C)(1); R.C. 2953.52(B)(2)(d). If the applicant fails to satisfy any one of the statutory requirements, the court must deny the application. *Id.* at ¶ 13, citing *State v. Krantz*, 8th Dist. No. 82439, 2003-Ohio-4568, ¶ 23. None of the applicable statutes permits a defendant to seek expungement after obtaining a gubernatorial pardon, and defendant acknowledges he is not entitled to expungement under either statutory provision.

{¶10} Indeed, defendant sought to seal his records comprising case No. 81CR-4506 based on the pardon he received for those convictions, not the statutory provisions, and the trial court concluded the pardon defendant received, not the statutes, provided the court with authority to seal the record. Similarly, amicus curiae admits the trial court "had no authority to order the record of conviction sealed pursuant to the[] statutory provisions" but instead relied on the proposition that "trial court ha[d] the inherent power to order its records sealed in the interests of justice." (Amicus' brief, 3.)

{¶11} The seminal case defendant cites to support the trial court's decision is *Pepper Pike v. Doe*, 66 Ohio St.2d 374 (1981), stating a court may order a record of conviction sealed "where such unusual and exceptional circumstances make it appropriate to exercise jurisdiction over the matter." *Id.* at paragraph two of the syllabus. "When exercising this power, the court should use a balancing test which weighs the privacy interest of the defendant against the government's legitimate need to maintain records of criminal proceedings." *Id; see also State v. Davidson*, 10th Dist. No. 02AP-665, 2003-Ohio-1448, ¶ 15 (stating the enactment of R.C. 2953.31 et seq. did not abrogate the judicial remedy of expungement).

{¶12} In *Pepper Pike*, the charges against the defendant arose out of a domestic quarrel where the complaining witness used the court as "a vindictive tool to harass [the defendant]." *Id.* at 377. After the city dismissed the charges, the defendant filed a motion seeking to expunge the record of arrest. *Id.* at 375. At the time, the General Assembly had not enacted R.C. 2953.52, and the defendant had no statutory basis under which to seek expungement.

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Franklin County Ohio Court of Appeals Clerk of Courts- 2012 Oct 11 12:58 PM-11AP000652

{¶13} Finding the circumstances of the case "unusual and exceptional," the court determined the defendant was entitled to expungement based on her "constitutional right to privacy." *Id.* at 377, citing *Roe v. Wade*, 410 U.S. 113 (1973); *Wisconsin v. Constantineau*, 400 U.S. 433 (1971); *Griswold v. Connecticut*, 381 U.S. 479 (1965). The court warned, however, that the case before it was "the exceptional case, and should not be construed to be a carte blanche for every defendant acquitted of criminal charges in Ohio courts." *Pepper Pike* at 377 (observing that when courts exercise the judicial remedy of expungement they should "follow the guidelines set out in Ohio's criminal expungement statute").

{¶14} The "extra-statutory" authority to grant the expungement described in *Pepper Pike* derived "out of a concern for the preservation of the privacy interest," and courts have contrasted the facts and holding of *Pepper Pike* "with the case of adjudicated *offenders*, whose relief is prescribed by statute." (Emphasis sic.) *State v. Weber*, 19 Ohio App.3d 214, 216 (1st Dist.1983). Although *Pepper Pike* determined trial courts have jurisdiction to expunge the records of a criminal case "where the charges are dismissed with prejudice prior to trial by the party initiating the proceedings," it also observed that "[i]n Ohio, convicted first offenders may seek expungement and sealing of their criminal records under the authority of R.C. 2953.32." *Id.* at paragraph one of the syllabus; 376.

{¶15} Thus, "where a defendant has been convicted of an offense, expungement may be granted only as allowed by statute, and the court may not use the judicial (i.e., extra-statutory) expungement remedy used in *Pepper Pike*." *State v. Bailey*, 10th Dist. No. 02AP-406, 2002-Ohio-6740, ¶ 11. As a result, "[t]he only remedy for a convicted defendant is expungement through the statute." *Id.* at ¶ 12. *See also In re Barnes*, 10th Dist. No. 05AP-355, 2005-Ohio-6891, ¶ 14 (noting that because appellee had a previous conviction, "the judicial remedy of expungement [was] unavailable to appellee"); *Davidson* at ¶ 16 (determining that while "[e]xceptional circumstances demonstrating appellee's good character were indeed present under these facts, * * * because appellee was actually convicted of the charge she seeks to have expunged, she [could not] qualify for a judicial expungement"); *State v. Blank*, 10th Dist. No. 04AP-341, 2005-Ohio-2642, ¶ 11 (deciding that "because appellee was convicted of a crime and not just acquitted or

had his case dismissed, appellee cannot qualify for judicial expungement); *Weber* at 217 (concluding the holding of *Pepper Pike* was "clearly and obviously" directed toward "instances of defendants *acquitted of criminal charges*") (Emphasis sic.); *State v. Netter*, 64 Ohio App.3d 322, 325-26 (4th Dist.1989) (noting "a number of cases which have limited Pepper Pike to cases involving no conviction" and concluding that "[b]ecause appellee was convicted, his only remedy was statutory"); *State v. Kidd*, 11th Dist. No. 2004-P-0047, 2005-Ohio-2079, ¶ 12 (stating that "[i]n Ohio, appellate courts, including this one, have uniformly limited this remedy [of judicial expungement] to cases where the person seeking expung[e]ment was not convicted of an offense"); *State v. Fowler*, 12th Dist. No. CA2001-03-005 (Sept. 24, 2001) (concluding that "because appellant was convicted, his only remedy was statutory"); *State v. Chiaverini*, 6th Dist. No. L-00-1306 (Mar. 16, 2001) (stating that "although the judicial power to grant an expungement request still exists, * * * it is limited to cases where the accused has been acquitted or exonerated in some way and protection of the accused's privacy interest is paramount to prevent injustice").

{¶16} None of the above cited cases concerned a defendant convicted and subsequently pardoned by the governor, but the cases suggest trial courts retain inherent jurisdiction to expunge or seal criminal records only where the defendant has not been convicted of the underlying offense. The issue in this case then resolves to whether the governor's absolute pardon erased defendant's conviction and entitled defendant to invoke the court's inherent jurisdiction to judicially expunge his record in order to protect his constitutional right to privacy.

## IV. The Effect of a Pardon

### A. *Ohio's Pardon Jurisprudence*

{¶17} The Ohio Constitution grants the governor the "power, after conviction, to grant reprieves, commutations, and pardons, for all crimes and offenses, except treason and cases of impeachment, upon such conditions as the governor may think proper; subject, however, to such regulations, as to the manner of applying for commutations and pardons, as may be prescribed by law." Ohio Constitution, Article III, Section 11. Article III, Section 11 "was adopted as part of extensive revisions to the Constitution made in 1851." *State ex rel. Maurer v. Sheward*, 71 Ohio St.3d 513, 517 (1994). The only

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limits on the clemency power are those that Article III, Section 11 authorizes. *Id.* at 518. The General Assembly may not interfere with the discretion of the governor in exercising the clemency power, and the governor's exercise of discretion in using the clemency power is not subject to judicial review. *Id.*

{¶18} In 1883, the Supreme Court of Ohio explained that a pardon is," in effect, a reversal of the judgment, a verdict of acquittal, and a judgment of discharge thereon," creating a "complete estoppel of record against further punishment pursuant to such conviction." *Knapp v. Thomas*, 39 Ohio St. 377, 381 (1883). Relying on United States Supreme Court precedent, *Knapp* held that " 'a pardon reaches both the punishment prescribed for the offense and the guilt of the offender, * * * 'obliterates, in legal contemplation, the offense itself,' " and " 'so far blots out the offense, that afterwards it cannot be imputed to him to prevent the assertion of his legal rights.' " *Id.*, quoting *Ex Parte Garland*, 71 U.S. 333, 380 (1866); *Carlisle v. U.S.*, 83 U.S. 147, 151 (1872); *Knote v. U.S.*, 95 U.S. 149 (1877). *See also State ex rel. Atty. Gen. v. Peters*, 43 Ohio St. 629, 650 (1885) (stating that a full and absolute pardon "releases the offender from the entire punishment prescribed for his offense, and from all the disabilities consequent on his conviction").

{¶19} In *State ex rel. Atty. Gen. v. Hawkins*, 44 Ohio St. 98, 117 (1886), the court clarified its holding in *Knapp*, stating that "[w]hatever the theory of the law may be as to the effect of a pardon, it cannot work such moral changes as to warrant the assertion that a pardoned convict is just as reliable as one who has constantly maintained the character of a good citizen." In *Hawkins*, the defendant police commissioners defended their choice of police officers, some of whom were "gamblers; * * * ha[d] served terms in the workhouse, * * * ha[d] been keepers of houses of prostitution, and a number of whom ha[d] been discharged by said board for drunkenness;" they claimed at least some of the officers had been pardoned and "thereby restored to citizenship and entitled to the same confidence as if they had never been convicted." *Id.* at 98, 116-17. *Hawkins* called it "a perversion of language to give to the views expressed by Judge Okey in *Knapp v. Thomas*, 39 Ohio St. 377, such a construction. He never meant anything of the kind." *Id.* at 117.

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{¶20} In a later case that considered whether a probation department interfered with the governor's pardoning power, the court explained that "[a] full pardon purges away all guilt and leaves the recipient from a legal standpoint, in the same condition as if the crime had never been committed." *State ex rel. Gordon v. Zangerle*, 136 Ohio St. 371, 376 (1940), citing *Knapp* at 381. Thus, probation could not interfere with the governor's pardoning power, as an absolute pardon would "set[] the accused free from the custody of the law, * * * terminate[] existing probation and make[] anticipated probation impossible." *Id; see also State v. Morris*, 55 Ohio St.2d 101, 105 (1978), citing *Knapp* at 381 (holding that "a full pardon not only results in a remission of the punishment and the guilt, but also a remission of the crime itself").

{¶21} More recently, two Ohio appellate courts considered the effect a gubernatorial pardon on the recipient's ability to seek expungement of the pardoned offense. In *State v. Cope*, 111 Ohio App.3d 309 (1st Dist.1996), the court, observing trial courts have inherent powers to seal records pursuant to *Pepper Pike*, stated that while a factual distinction could be "drawn between a person who has charges dismissed with prejudice and a person who is convicted and receives a pardon, that distinction is immaterial, because the pardon places the recipient, from a legal standpoint, *in the same condition as if the crime had never been committed*." (Emphasis sic.) *Id.* at 311, citing *Gordon*. The court held that granting a pardon "is an 'exceptional and unusual' circumstance" entitling the trial court to seal the record of conviction, "regardless of whether the petitioner has other offenses on his record. 'A pardon without expungement is not a pardon.' " *Id.* at 312, quoting *Commonwealth v. C.S.*, 517 Pa. 89 (1987).

{¶22} By contrast, *State v. Boykin*, 9th Dist. No. 25752, 2012-Ohio-1381, concluded that, although trial courts have "authority to grant judicial expungement in situations in which an executive pardon is at issue," a pardon does not "conclusively entitle the recipient to have the record sealed." *Id.* at ¶ 7, 13. The court noted a careful reading of *Knapp* revealed that "a pardoned individual is 'a new man' insofar as the restoration of competency and the further imposition of punishment are concerned," but that the pardon "does not wipe away all traces of the criminal case." *Id.* at ¶ 10. Reviewing case law from various states and the federal courts, the court decided a "majority of courts that have considered the question" concluded a pardon does not

entitle the recipient to have their record of conviction sealed. *Id.* at ¶ 13. The *Boykin* court further found its holding correct because, "[i]n Ohio, the legislature has not provided for sealing records of a pardoned individual by statute" as "[s]ome other jurisdictions have." *Id.* at ¶ 14.

{¶23} Thus, the two Ohio appellate courts to recently consider the effect of a pardon on the recipient's ability to seek expungement have reached differing conclusions regarding the proper effect of a pardon. *Knapp* is at the root of the pardon jurisprudence in Ohio and based its understanding of the power to pardon on the United States Supreme Court holdings in *Garland*, *Knote*, and *Carlisle*.

B. *United States Supreme Court's Pardon Jurisprudence*

1. *Ex Parte Garland*

{¶24} In *Ex Parte Garland*, the U.S. Supreme Court explained that a pardon "blots out of existence the guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offence." *Id.* at 380. Garland was an Arkansas attorney admitted to practice before the United States Supreme Court prior to the civil war. *Id.* at 336. Following the war, Congress passed an act requiring any person seeking to practice before a court of the United States to take an oath affirming that he neither took up arms against the United States nor aided the Confederacy. *Id.* at 334-35. Because Garland represented Arkansas in the Confederate Congress, he could not take the oath. *Id.* at 336. Garland received a presidential pardon in 1865 for offenses he committed by taking part in the rebellion, presented the pardon to the court, and requested that he be admitted to practice without having to take the oath. *Id.* at 336-37.

{¶25} The court agreed with Garland's assertion that the act was unconstitutional, concluding the act was "of the nature of bills of pains and penalties" and thus "subject to the constitutional inhibition against the passage of bills of attainder." *Id.* at 377. The court also determined the act violated the constitutional prohibition against ex post facto laws, as it "impose[d] a punishment for some of the acts specified which were not punishable at the time they were committed, and for other of the acts it add[ed] a new punishment to that before prescribed." *Id.* at 377.

{¶26} After finding the act unconstitutional, the court stated its conclusion was "strengthened by a consideration of the effect of the pardon produced by the petitioner."

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*Id.* at 380. The court explained that "[a] pardon reaches both the punishment prescribed for the offence and the guilt of the offender," releasing the offender from punishment, "blot[ting] out of existence the guilt" and rendering the offender "as innocent as if he had never committed the offence." *Id.* at 380. When granted after conviction, the pardon "removes the penalties and disabilities, and restores him to all his civil rights; it makes him, as it were, a new man, and gives him a new credit and capacity." *Id.* at 380-81. The court acknowledged, however, that a pardon would not "restore offices forfeited, or property or interests vested in others in consequence of the conviction and judgment." *Id.* at 381. In the end, due to the pardon, the oath "could not be exacted, even if that act were not subject to any other objection than the one thus stated." *Id.*

{¶27} Modern case law has dismissed the "blotting out" language from *Garland* as dictum and rejected *Garland*'s expansive view of the power to pardon. *See In re Abrams*, 689 A.2d 6, 17 (D.C.App.1997) (noting that "[b]y the time Justice Field reached the issue of the pardon, the case had already been decided[,] * * * the statute was deemed invalid on other constitutional grounds"); *Bjerkan v. U.S.*, 529 F.2d 125, 128 (7th Cir.1975), fn.2 (noting "[a] pardon does not 'blot out guilt' nor does it restore the offender to a state of innocence in the eye of the law as was suggested in *Ex Parte Garland*"); *In re North*, 62 F.3d 1434, 1437 (D.C.Cir.1994) (concluding the Supreme Court "did not rest its judgment [in *Garland*] on the theory that the pardon blotted out Garland's guilt," and that "expansive view of the effect of a pardon turned out to be dictum"); *State v. Skinner*, 632 A.2d 82, 84 (Del.1993) (noting that "[w]hile the U.S. Supreme Court, in *Ex Parte Garland*, * * * stated that a full pardon 'releases the punishment and blots out the existence of guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offense,' that dictum has since been rejected"); *Hirschberg v. Commodity Futures Trading Comm.*, 414 F.3d 679, 682 (7th Cir.2005) (dismissing Hirschberg's reliance on *Garland*, noting that "modern caselaw emphasizes * * * that this historical language was dicta and is inconsistent with current law"); *U.S. v. Noonan*, 906 F.2d 952, 958 (3d Cir.1990) (noting the Supreme Court, by 1915, "made clear that it was not accepting the *Garland* dictum that a pardon 'blots out of existence the guilt' ").

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{¶28} "While the U.S. Supreme Court has never expressly overruled *Garland*, since that decision the Court has eroded its broad articulation of the power by narrowing its scope in *Angle v. Chicago, St. Paul, Minneapolis & Omaha Railway Co.*, 151 U.S. 1 * * * (1894), *Burdick v. United States*, 236 U.S. 79 * * * (1915), and *Carlesi v. New York*, 233 U.S. 51 * * * (1914)." *In re Sang Man Shin*, 125 Nev. 100, 105 (Nev.2009). "In *Angle*, the Court held that a third-party civil right of action to recover damages remains regardless of a pardon." *Id.*, citing *Angle* at 19. In *Carlesi*, the Supreme Court determined a court applying a habitual offender statute could consider "past offenses committed by the accused as a circumstance of aggravation, even although for such past offenses there had been a pardon granted." *Id.* at 59. *See Abrams* at 18 (stating "[t]he result in *Carlesi* cannot be reconciled with the notion that the presidential pardon 'blot[ted] out' of existence the conduct that led to Carlesi's federal conviction").

{¶29} In *Burdick*, the court similarly departed from *Garland*'s view, holding instead that a pardon "carries an imputation of guilt; acceptance a confession of it." *Id.* at 94. Burdick refused to answer questions before a Grand Jury regarding his sources for a newspaper article, and the state procured a presidential pardon for Burdick, hoping the pardon would induce Burdick to testify. *Id.* at 85. Burdick refused to accept the pardon and refused to answer the questions. *Id.* at 86. The court first determined a pardon may be "rejected by the person to whom it is tendered" and a court may not force the pardon on the unwilling recipient. *Id.* at 90. The court then explained why someone would reject a pardon, stating an individual may wish to "escape [the] confession of guilt implied in the acceptance of a pardon * * *, —preferring to be the victim of the law rather than its acknowledged transgressor." *Id.* at 90-91. *See also North* at 1437, citing *Burdick* at 91 (noting *Burdick*, "which recognized that the acceptance of a pardon implies a confession of guilt," implicitly rejected *Garland*'s dictum).

2. <u>*Carlisle v. U.S.* and *Knote v. U.S.*</u>

{¶30} The other two cases *Knapp* relied on, *Carlisle* and *Knote*, both concerned claims for reimbursement for property the United States government seized and sold during the Civil War. Although both cases rely on *Garland*'s interpretation of the

pardoning power, each case also qualifies the power, acknowledging that a pardon does not erase past conduct.

{¶31} In *Carlisle,* the claimants sought recovery under the Captured and Abandoned Property Act for cotton the United States Navy seized and sold during the Civil War. *Id.* at 148. Although the claimants aided the rebellion by selling saltpetre to the Confederate Army, rendering them unable to recover under the terms of the act, they presented the court with a presidential pardon which "obliterate[d] in legal contemplation the offence itself." *Id.* at 149, 151. The Supreme Court held that, while "the pardon and amnesty do not and cannot alter the actual fact that aid and comfort were given by the claimants, * * * they forever close the eyes of the court to the perception of that fact as an element in its judgment, no rights of third parties having intervened." *Id.* at 151.

{¶32} In *Knote,* the claimant sought reimbursement for his land confiscated and sold during the war, the proceeds of which were paid into the United States Treasury. *Id.* at 152. The claimant received a pardon for his participation in the rebellion, and the Supreme Court noted that, while a pardon "so far blots out the offence, that afterwards it cannot be imputed to him to prevent the assertion of his legal rights[,] * * * it does not make amends for the past." *Id.* at 153. Because the pardoned offense has been "established by judicial proceedings, that which has been done or suffered while they were in force is presumed to have been rightfully done and justly suffered, and no satisfaction for it can be required." *Id.* at 154. Because the rights to the property had vested in the buyer and the monies from the sale deposited into the United States Treasury, the court concluded the claimant was not entitled to reimbursement from the sale. *Id.*

{¶33} Given the facts of the cases on which it relied, *Knapp*'s foundation for holding that a pardon blots out the offense and operates as a verdict of acquittal is problematic. *Carlisle* and *Knote* both indicate that a pardon cannot erase past conduct, and recent case law dismisses *Garland*'s broad articulation of a pardon as dictum.

C. *Ancillary Authority on the Effect of a Pardon*

{¶34} By 1915, the debate over the proper interpretation and effect to be given a pardon had become so heated that Professor Williston wrote his seminal article: Samuel

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Williston, *Does a Pardon Blot Out Guilt?*, 28 Harv.L.Rev. 647 (1915). Williston noted the "often quoted" language from *Garland* and concluded that, "when it is said that in the eye of the law [pardoned convicts] are as innocent as if they had never committed an offence, the natural rejoinder is, then the eyesight of the law is very bad." *Id.* at 647-48. Williston analyzed English and United States case law and commentaries, concluding "[t]he true line of distinction seems to be this: The pardon removes all legal punishment for the offence," thus removing any legal disqualifications which may flow from the offense, but "if character is a necessary qualification and the commission of a crime would disqualify even though there had been no criminal prosecution for the crime, the fact that the criminal has been convicted and pardoned does not make him any more eligible." *Id.* at 653.

{¶35} Williston's comments about the effect of a pardon upon character have been followed widely in various contexts. Many courts have determined an attorney, suspended or disbarred after committing a crime, is not entitled to reinstatement upon receiving a pardon for the underlying conviction, since disbarment "is not a part of the punishment inflicted for the commission of the crime" but rather takes away the acquired right "because of misconduct." *Branch v. State*, 120 Fla. 666, 670 (1935). *See, e.g., State v. Snyder*, 136 Fla. 875 (1939) (noting the "very fact of embezzlement is cause for disbarment and a pardon does not blot out that fact"); *Grossgold v. Supreme Ct of Illinois*, 557 F.2d 122, 125-26 (7th Cir.1977); *In re Beck*, 264 Ind. 141, 146 (1976), quoting *In re Lavine*, 2 Cal.2d 324, 329 (1935); *Abrams* at 15, quoting *In re Harrington*, 134 Vt. 549, 555 (1976).

{¶36} Cases concerning other types of professional licenses similarly conclude that a pardon will not erase the historical fact of a conviction or render its recipient morally fit for admission to the profession. *See Stone v. Oklahoma Real Estate Comm.*, 369 P.2d 642, 646 (Okla.1962) (concluding, for purposes of considering Stone's fitness to become a real estate broker, the pardon did not remove the stigma of Stone's prior convictions, and "[i]n [the court's] opinion a pardon simply does not 'wipe the slate clean' "); *Sandlin v. Criminal Justice Standards & Training Comm.*, 531 So.2d 1344, 1345-46 (Fla.1988) (holding that although a "pardon removes all disabilities resulting from a crime[,] * * * [p]ersons seeking to practice certain professions or employments,

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* * * can be required to demonstrate their good moral character, even though they may have been fully pardoned for previous crimes").

{¶37} "Thus, while a pardon will foreclose punishment of the offense itself, it does not erase the fact that the offense occurred, and that fact may later be used to the pardonee's detriment." *Fletcher v. Graham*, 192 S.W.3d 350, 363 (Ky.2006). *See also Talarico v. Dunlap*, 177 Ill.2d 185, 190 (1997) (concluding that because a pardon does not "obliterate the fact of the commission of the crime and the conviction thereof[,] * * * Talarico's pardon did not negate the fact of his criminal conviction for purposes of collateral estoppel"); *North*, at 1438 (noting the pardon did "not blot out guilt or expunge the indictment," and "George's disability—the fact of his indictment—remain[ed], preventing the court from awarding him attorney's fees").

D. *The Effect of a Pardon on Expungement*

{¶38} Prior to the First District's ruling in *Cope*, two other courts had held a pardon entitled its recipient to record expunction. In *C.S.*, the court, noting a pardon "*blots out the very existence of * * * guilt*, " concluded "[t]here [was] no way that the state [could] retain the record of a former criminal who is 'as innocent as if he had never committed the offense.' " (Emphasis sic.) *Id.* at 92-93, quoting *Commonwealth v. Sutley*, 474 Pa. 256, 273-74 (1977). The court held that "[a] pardon without expungement is not a pardon." *Id.* at 93. *Cf. Skinner* at 86 (concluding *C.S.*'s holding, that a pardon without expungement is not a pardon, was "inexact because a pardon without expungement is clearly significant in that it restores civil rights that may have been lost").

{¶39} In *State v. Bergman*, 558 N.E.2d 1111 (Ind.App.1990), an Indiana appellate court concluded a gubernatorial pardon entitled its recipient to expungement. Although *Bergman* relied on *Garland* and *C.S.* to find the expungement proper, the court also noted that the pardon at issue specifically stated it was granted to enhance Bergman's career opportunities " 'and *to clear his name*.' " (Emphasis sic.) *Id.* at 1114. To carry out the executive mandate, "the court had no choice but to 'clear his name' by expunging the record of Bergman's conviction." *Id. Cf. Blake v. State*, 860 N.E.2d 625, 631 (Ind.App.2007) (noting "a majority of the case law from [Indiana's] sister states rejects the original principles drawn from *Ex parte Garland* and indicate[s] that a

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pardon does not entitle the pardonee to expunction of all criminal records," so that even though the trial court had to expunge the record of defendant's conviction pursuant to *Bergman*, it did not have to expunge the arrest records).

{¶40} The majority of courts to consider the issue hold that a pardon does not entitle its recipient to records expungement. *R.J.L. v. State*, 887 So.2d 1268, 1279 (Fla.2004) (deciding that of the "nine jurisdictions [to] have directly addressed whether a pardon entitles an individual to records expunction," the majority "held that a pardoned individual is not entitled to records expunction"). *R.J.L.* addressed whether a pardon "eliminate[d] [the defendant's] adjudication of guilt, so as to entitle him to a certificate of eligibility for records expunction" under the Florida expungement statute. *Id.* at 1271. The court observed that, although "a pardon has the effect of removing punishment and disabilities, and restoring civil rights[,] * * * the denial of records expunction does not constitute a punishment" and "eligibility for records expunction is not a civil right restored by the grant of a gubernatorial pardon." *Id.* at 1280. The court thus concluded that "[a] pardon does not eliminate the adjudication of guilt, creating a fiction that the crime never occurred." *Id.*

{¶41} In *Noonan*, the Third Circuit similarly addressed whether a pardon would directly or indirectly expunge a judicial branch record of a criminal conviction. The court explained that the pardoning power was "an executive prerogative of mercy, not of judicial record-keeping" and determined the notion that the president has the ability to tamper with judicial records flew "in the face of the separation of powers doctrine." *Id.* at 955-56. *See also* Ashley M. Steiner, *Remission of Guilt or Removal of Punishment? The Effects of a Presidential Pardon*, 46 Emory L.J. 959 (1997) (noting that, if the presidential pardoning power functions as a check on the judicial power to fix judgments, "acceptance of the view that a pardon obliterates guilt and the fact of conviction would usurp th[e] judicial power" to decide cases and impose punishments, thus "counteracting the balancing function of a pardon and resulting in a power in the executive that itself must be checked"); *Nixon v. U.S.*, 506 U.S. 224, 232 (1993), quoting Black's Law Dictionary 1113 (6th Ed.1990) (stating that "a pardon is in no sense an overturning of a judgment of conviction by some other tribunal" but "is '[a]n executive action that mitigates or sets aside *punishment* for a crime' "). (Emphasis sic.)

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{¶42} Reviewing varying authorities, *Noonan* determined a presidential pardon could not " 'create any factual fiction' that Noonan's conviction had not occurred" as would "justify expunction of his criminal court record." *Id.* at 960. *See also Bjerkan* at 126 (holding a pardon "cannot erase the basic fact of conviction, nor can it wipe away the social stigma that a conviction inflicts"); *State v. Blanchard*, 100 S.W.3d 226, 230-31 (Tenn.Crim.App.2002) (concluding the pardon did not render the defendant as though never convicted and noting "[n]umerous state courts have also recognized that a pardon does not eradicate the underlying conviction but rather releases the defendant from further punishment"); *Skinner* at 85 (stating that "[w]hile the pardon may have forgiven his conviction, it did not obliterate the public memory of the offense"); *People v. Thon*, 319 Ill.App.3d 855, 861 (2001) (concluding "petitioner's pardon did not erase his convictions" but "merely served to release petitioner from further punishment," so that petitioner was "an individual previously convicted of a criminal offense" and "ineligible for expungement"); *State v. Bachman*, 675 S.W.2d 41, 51-52 (Mo.App.1984) (deciding that while a "pardon gives new effect to the criminal conviction of a defendant, * * * a pardon does not grant authority to close or expunge criminal records"); *Commonwealth v. Vickey*, 381 Mass. 762, 769 (1980), quoting *Commissioner of Metropolitan Dist. Comm. v. Dir. of Civil Serv.*, 348 Mass. 184, 194 (1964) (stating that " 'even if a pardon may remit all penal consequences of a criminal conviction, it cannot obliterate the acts which constituted the crime' "); *Abrams* at 7 (determining that "although the presidential pardon set aside Abrams' convictions, as well as the consequences which the law attaches to those convictions, it could not and did not require the court to close its eyes to the fact that Abrams did what he did"); *U.S. v. Smith*, 841 F.2d 1127 (6th Cir.1988) (unpublished disposition), citing *U.S. v. Doe*, 556 F.2d 391, 392 (6th Cir.1977) (concluding the petitioner's reliance on *Garland* was misplaced, as "[a] presidential pardon restores the offender's civil rights, but, as this court has recognized, a presidential pardon does not require the expungement of a criminal conviction"); U.S. Dept. of Justice, Office of Legal Counsel, *Whether a Presidential Pardon Expunges Judicial and Executive Branch Records of a Crime* (Aug. 11, 2006), available at http://www.justice.gov/olc/memoranda-opinions.html (accessed September 27, 2012) (stating that while "a presidential pardon removes,

either conditionally or unconditionally, the punitive legal consequences that would otherwise flow from conviction for the pardoned offense," a pardon "does not erase the conviction as a historical fact or justify the fiction that the pardoned individual did not engage in criminal conduct").

{¶43} More recently, states have continued to conclude a pardon does not erase the underlying conviction or entitle the recipient to have his or her criminal record expunged. *See Harscher v. Commonwealth*, 327 S.W.3d 519, 522 (Ky.App.2010) (holding that "while a full pardon has the effect of removing all legal punishment for the offense and restoring one's civil rights, * * * [b]ecause a pardon does not erase the fact that the individual was convicted * * * a pardon does not entitle an individual to expungement of his criminal record"); *Sang Man Shin* at 101, 110 (concluding "the pardoning power does not bequeath innocence or erase the historical fact of the underlying criminal act and conviction," and, although "a pardon is an act of forgiveness that restores civil rights," nothing in the "Nevada Constitution * * * create[d] a civil right to expunge a criminal record"). Notably, no recent case has adopted the reasoning of *C.S.*, *Bergman*, or *Cope*, which concluded a pardon entitles its recipient to expungement.

E. *Ohio Statutes Addressing Pardons*

{¶44} In *People v. Glisson*, 69 Ill.2d 502, 506 (1978), the Supreme Court of Illinois concluded that the "effects of a pardon are not unlimited," as the legislature "explicitly provided in certain areas for rights and benefits to the pardonee beyond those afforded by the granting of the pardon." As an example, the court cited to an Illinois statute which "restored the right to hold public office to certain pardoned persons." *Id.*, citing Ill.Rev.Stat.1975, Chapter 46, par. 29-15.

{¶45} In Ohio, the General Assembly also enacted statutes delineating the rights and benefits restored to a pardonee. R.C. 2967.01(B) defines a pardon as "the remission of penalty by the governor in accordance with the power vested in the governor by the constitution." A pardon "relieves the person to whom it is granted of all disabilities arising out of the conviction or convictions from which it is granted." R.C. 2967.04(B).

{¶46} Although a pardon returns to a felon the right to be an elector or juror and to hold an office of honor, trust, or profit, a pardoned felon remains incompetent to

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circulate a petition. R.C. 2961.01(A), (B). Despite the civil rights returned to a pardoned felon, the pardon does "not release the person from the costs of a conviction in this state, unless so specified." R.C. 2961.01(A)(2). *Compare* Williston, 28 Harv. L. Rev. at 658 (stating that "[i]f one who has paid a fine on conviction of crime and is subsequently pardoned, is indeed an innocent man, or is to be so regarded by the law, he should have the fine which he has paid returned to him"). *See also* Evid.R. 609(C) (providing that "[e]vidence of a conviction is not admissible under this rule if (1) the conviction has been the subject of a pardon * * *, and that person has not been convicted of a subsequent crime which was punishable by death or imprisonment in excess of one year"); *Boykin* at ¶ 11, citing R.C. 2923.14(C) (noting that "[a] pardon does not automatically remove the recipient's disability with respect to carrying a concealed weapon").

{¶47} The Ohio Constitution and the Revised Code require a record of both the pardon and the corresponding conviction. The governor must "communicate to the general assembly, at every regular session, each case of * * * pardon granted, stating the name and crime of the convict, the sentence, its date, and the date of the * * * pardon, * * * with the Governor's reasons therefor." Ohio Constitution, Article III, Section 11. *See also* R.C. 107.10(E) (requiring the governor to keep a "pardon record" containing the date of each application for pardon, the name of the convict, the crime committed, in what county, the term of court where the convict was convicted, the sentence of the court, the action of the governor, the reason for that action, and the date of that action).

{¶48} Warrants of pardon must be issued in "triplicate, one to be given to the convict, one to be filed with the clerk of the court * * * in whose office the sentence is recorded, and one to be filed with the head of the institution in which the convict was confined, in case he was confined." R.C. 2967.06. The warrant of pardon must be "recorded by said clerk." *Id; see also* R.C. 2967.04(A) (obligating the clerk of court to "record the warrant [of pardon] * * * in the journal of the court, which record, or a duly certified transcript thereof, shall be evidence of such pardon or commutation, the conditions thereof, and the acceptance of the conditions").

{¶49} Lastly, R.C. 2953.52 provides that any person may seek to expunge records relating to a charge that resulted in a finding of not guilty, in a dismissed indictment, or

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a no bill; the General Assembly did not list a pardon as one such scenario. *See Blanchard* at 229 (noting that where the legislature specified a finding of not guilty, a dismissed indictment, a no bill, or reversal on appeal would entitle an individual to expungement, the court was "forced to conclude that the legislature's failure to mention the grant of an expungement" following a pardon, "while mentioning numerous other grounds, serve[d] to exclude the instant pardon as a basis for the remedy sought"); *Vickey* at 767 (noting that, where the statute permitted records to be sealed if the defendant was found not guilty, the case dismissed, nolle prosequi, or a no bill returned, the court could not agree "that the omission of the term 'pardon' from these sections," all of which were "premised on a presumption of innocence," created a statutory gap, and "the omission of pardon [was] not fortuitous").

{¶50} Other jurisdictions have enacted statutes entitling a pardon recipient to expunge the record underlying the pardoned conviction. See 20 Ill.Comp.Stat. 2630/5.2(e) (stating that "[w]henever a person who has been convicted of an offense is granted a pardon by the Governor which specifically authorizes expungement, he or she may * * * have a court order entered expunging the record of arrest"); Conn.Gen.Stat.Ann. § 54-142a(D)(1) (providing that whenever "any person who has been convicted of an offense in any court of this state has received an absolute pardon for such offense, such person * * * may * * * file a petition * * * for an order of erasure"); Tex.Code.Crim.Pro.Art. 55.01(a)(1)(B)(i) (providing that a person who has been arrested "is entitled to have all records and files relating to the arrest expunged if: * * * the person is tried * * * and is * * * convicted and subsequently * * * pardoned").

## V. Disposition

{¶51} In the final analysis, the state and federal law governing the effect of a pardon on a recipient's ability to seek expungement compels us to conclude that a pardon neither erases the conviction nor renders the pardon recipient innocent as if the crime were never committed. Recent case law dismissed *Garland*'s interpretation of a pardon as dicta and acknowledged the United State Supreme Court's implicitly overruling *Garland's* dicta in *Burdick*. Because a pardon cannot work a legal fiction and erase the fact of conviction, and *Bailey* and similar cases have limited *Pepper Pike*'s

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application to cases where the defendant has not been convicted, defendant cannot invoke the court's inherent jurisdiction to seal his records.

{¶52} Moreover, the General Assembly enacted laws specifically (1) requiring the governor to maintain a copy of both the pardon and the conviction, (2) requiring the clerk of court to maintain a copy of the warrant of pardon, which identifies the pardoned conviction, and (3) authorizing expungement of records when an individual is acquitted, found not guilty, or a no bill returned. Under (1) and (2), sealed records are of questionable value if the record of conviction, accessible through the internet, continues to reveal the underlying conviction. Under (3), if a pardon truly rendered the defendant innocent as if the crime were never committed, the General Assembly should have included pardons with the other innocence-based reasons for expungement contained in R.C. 2953.52. *See New Albany Park Condominium Assn. v. Lifestyle Communities, Ltd.*, 195 Ohio App.3d 459, 2011-Ohio-2806, ¶ 23 (10th Dist.), quoting *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 168 (2003), citing *U.S. v. Vonn*, 535 U.S. 55, 65 (2002); *Summerville v. Forest Park*, 128 Ohio St.3d 221, 2010-Ohio-6280, ¶ 35 (noting the expression " '*unius est exclusio alterius* does not apply to every statutory listing or grouping; it has force only when the items expressed are members of an "associated group or series," justifying the inference that items not mentioned were excluded by deliberate choice, not inadvertence' ").

{¶53} Our decision is a particularly difficult one to reach, knowing today's technologically based society makes the harm perpetrated through a public criminal record accessible to virtually everyone. As a result, the so-called "[c]ollateral consequences" of a conviction "take the form of employment disqualifications in the public and private sectors, prohibitions on federal educational subsidies, housing exclusions, public benefit ineligibility, and political punishment." Lahny R. Silvia, *Clean Slate: Expanding Expungements and Pardons for Non-Violent Federal Offenders*, 79 U.Cin.L.Rev. 155, 164 (2010). In terms of rehabilitation, "[p]ost-release employment appears to be a, if not the, determinative factor in post-release success," but employers are typically unwilling to hire an individual with a criminal conviction. *Id.* at 162, 168 (citing a 1987 study of the Federal Bureau of Prisons demonstrating "ex-offenders, who arranged for post-release employment, had a recidivism rate of 27.6% compared to

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53.9% of those who did not" and to additional "studies conducted over the past fifteen years" consistently showing "that on average 60% of employers indicate that they would 'probably not' or 'definitely not' consider hiring an individual with a criminal history").

{¶54} A convicted felon more deserving of a fresh start, based on the evidence in the record, is hard to imagine than defendant and his impressive turn-around. Based on the noted authority, however, defendant's pardon alone does not erase his conviction and entitle him to judicial expungement. The applicable statutes governing expungement similarly do not provide defendant with the relief desired. If that is to change, the General Assembly likely will be the entity to accomplish it. *See Miller v. Fairley*, 141 Ohio St. 327, 334 (1943), citing *State ex rel. Bishop v. Bd. of Edn. of Mt. Orab Village School Dist.*, 139 Ohio St. 427, 438 (1942) (noting that if a statute does "not give the relief desired, the remedy lies with the legislative branch of the state government"); *Skinner* at 86, fn. 7 (stating it could be "argued that a pardon to be complete should entitle the pardoned individual * * * to secure the removal of public records of his or her arrest," and the legislature "may wish to consider amending the expungement statute to permit a pardoned individual to seek expungement").

{¶55} Because defendant is ineligible to seek judicial expungement, and also ineligible for statutory expungement, we reluctantly sustain the state's assignments of error, reverse the judgment of the Franklin County Court of Common Pleas, and remand the matter to the trial court with instructions to deny the requested record sealing.

*Judgment reversed, case remanded.*

BROWN, P.J., and DORRIAN, J., concur.

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FILED
COMMON PLEAS COURT
FRANKLIN CO. OHIO

IN THE COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO
CRIMINAL DIVISION

2011 JUL 20 AM 11:11

CLERK OF COURTS

STATE OF OHIO,
Plaintiff,

SEALING CASE NO. 11EP-183

CRIMINAL CASE NO 81CR-4506

Vs. : JUDGE SERROTT

James A. Radcliff
Defendant,

**ENTRY SEALING RECORD OF CONVICTION PURSUANT TO R.C. 2953.32**

In accordance with Section 2953.32, Ohio Revised Code, the Court finds that there are no criminal proceedings pending against the applicant, **James A. Radcliff**, and that the sealing of the record of the applicant's CONVICTION, in Criminal Case number **81CR-4506** is consistent with the public interest.

It is therefore **ORDERED** that all official records pertaining to the applicant's conviction in Case number **81CR-4506**, be sealed and, except as provided in R.C. 2953.32(F), all index references be deleted. This order does not exempt from use records and work product in this case in any civil litigation arising out of, or related to, the facts in this case, and such records and work product will be available for inspection and use for such purposes if necessary.

With the exceptions noted above, it is **FURTHER ORDERED** that no officer or employee of the State, or political subdivision thereof, except as authorized by Division (D), (E) and (G) of Section 2953.32 of the Ohio Revised Code, shall release, disseminate, or make available for any purpose involving employment, bonding, licensing, or education to any person or to any department agency, or other instrumentality of the State, or any political subdivision thereof, any information or other data concerning the: arrest, complaint, indictment, dismissal, nolle, motion hearings, trial, adjudication or correctional supervision associated with Criminal Case **81CR-4506**.

For purposes of identification, the following information is provided for the arresting agency and any custodians of arrest and adjudication data:

APPLICANT'S FULL NAME: James A. Radcliff
ADDRESS: 105 Maplewood Dr.
CITY: Ashley STATE: OH ZIP 43003
SEX: Male RACE: White DATE OF BIRTH 02/21/1955 SSN [redacted]
CHARGE: B & E(F4); PCT(F4)
CONVICTED OF: B & E(F4)
DATE OF ARREST: 12/26/1981
ARRESTING AGENCY: CPD
MUNICIPAL COURT CASE NUMBER:
OHIO B.C.I. NUMBER: A775188
F.B.I.: 17088M8

JUDGE

RON O'BRIEN, Franklin County Prosecuter

THE STATE OF OHIO
Franklin County, ss

MARYELLEN O'SHAUGHNESSY, Clerk OF THE COURT OF COMMON PLEAS WITHIN AND FOR SAID COUNTY,

HEREBY CERTIFY THAT THE ABOVE AND FOREGOING IS A TRUE AND CORRECT COPY FROM THE ORIGINAL NOW ON FILE IN MY OFFICE
WITNESS MY HAND AND SEAL OF SAID COUNTY THIS 20 DAY OF JULY, 2011
MARYELLEN O'SHAUGHNESSY, Clerk
By Deputy

# Ohio Constitution, Article III, Section 11

The governor shall have power, after conviction, to grant reprieves, commutations, and pardons, for all crimes and offenses, except treason and cases of impeachment, upon such conditions as the governor may think proper; subject, however, to such regulations, as to the manner of applying for commutations and pardons, as may be prescribed by law. Upon conviction for treason, the governor may suspend the execution of the sentence, and report the case to the General Assembly, at its next meeting, when the General Assembly shall either pardon, commute the sentence, direct its execution, or grant a further reprieve. The governor shall communicate to the General Assembly, at every regular session, each case of reprieve, commutation, or pardon granted, stating the name and crime of the convict, the sentence, its date, and the date of the commutation, pardon, or reprieve, with the governor's reasons therefor.

**R.C. § 2953.32 [Effective Until 9/28/2012] Sealing of conviction record or bail forfeiture record.**

(A)(1) Except as provided in section 2953.61 of the Revised Code, a first 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.

(C)(1) The court shall do each of the following:
(a) Determine whether the applicant is a first offender or whether the forfeiture of bail was agreed to by the applicant and the prosecutor in the case. If the applicant applies as a first 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 a first offender; if the court does not make that determination, the court shall determine that the offender is a first offender.

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

(c) If the applicant is a first 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 a first 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 a first 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.

**R.C. § 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.