

ORIGINAL

IN THE SUPREME COURT OF OHIO  
2014

STATE OF OHIO,

Plaintiff-Appellee,

-vs-

JAMES RADCLIFF,

Defendant-Appellant.

Case Nos. 2012-1985

2013-0004

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

Court of Appeals

Case No. 11AP-652

**MERIT BRIEF OF PLAINTIFF-APPELLEE**

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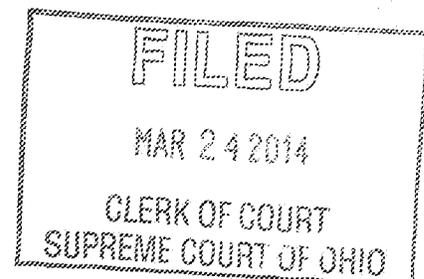
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## INTRODUCTION

Prior to this Court's decision in *State v. Boykin*, \_\_\_\_ Ohio St.3d \_\_\_\_, 2013-Ohio-4582, Ohio courts were split three ways on what effect a gubernatorial pardon had on a trial court's inherent power under *Pepper Pike v. Doe*, 66 Ohio St.2d 374 (1981), to seal records of a conviction when the applicant is otherwise statutorily ineligible to have the records sealed.<sup>1</sup> The First District had held that a pardon entitles the recipient to a judicial sealing of records. *State v. Cope*, 111 Ohio App.3d 309 (1st Dist.1996). The Ninth District had held that a pardon does not entitle the recipient to a judicial sealing of records, but nonetheless authorizes the trial court to exercise its discretion to seal the records. *State v. Boykin*, 9th Dist. Nos. 25752, 25845, 2012-Ohio-1381, ¶ 13. The Tenth District in the present case held that a pardon recipient "cannot invoke the court's inherent jurisdiction to seal his records." *State v. Radcliff*, 978 N.E.2d 1275, 2012-Ohio-4732, ¶ 51 (10th Dist.).

Accordingly, the three-way split was as follows: (1) automatic sealing of records (*Cope*), (2) discretionary sealing of records (*Boykin*), and (3) no sealing of records (*Radcliff*).

This Court partially resolved the split in *Boykin* by holding that "a gubernatorial pardon does not automatically entitle the recipient to have the record of the pardoned conviction sealed." *Boykin*, 2013-Ohio-4582, ¶ 36. In other words, this Court rejected the First District's "automatic sealing of records" approach in *Cope*. But the question still remains: Does a pardon even

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<sup>1</sup> A sealing of records is often referred to colloquially as an "expungement." *State v. Pariag*, 137 Ohio St.3d 81, 2013-Ohio-4010, ¶ 11. But a sealing of records and an expungement are distinct remedies. Whereas a sealing of records restricts access to the records, to "expunge" a record means "to destroy, delete, and erase a record as appropriate for the record's physical or electronic form or characteristic so that the record is permanently irretrievable." R.C. 2953.37(A)(1); R.C. 2953.38(A)(1). The expungement remedy was recently created for certain offenders convicted of improper handling of a firearm, R.C. 2953.37(B), and for certain human-trafficking victims, R.C. 2953.37(B). Nonetheless, in keeping with the long-used colloquialism, unless otherwise noted any use of the term "expungement" in this brief refers to a sealing of records.

*authorize* a trial court to seal the records of the underlying conviction when the pardon recipient is otherwise statutorily disqualified to have the records sealed?

The answer is no. To start, the time has come for this Court to hold that *Pepper Pike* no longer gives trial courts extra-statutory authority to seal records in criminal cases. The statutory criteria for sealing records exist for a reason. And these criteria would be meaningless if a trial court that is statutorily barred from sealing records could nonetheless do so under the guise of “inherent power.” The inherent power to seal records recognized in *Pepper Pike* was meant to fill a statutory gap—i.e., sealing records of dismissals. But the General Assembly filled that gap long ago when it enacted R.C. 2953.51 et seq. The sealing of records in criminal cases is now governed entirely by statute, so *Pepper Pike* has outlived its purpose in criminal cases.

Even if *Pepper Pike* does still give trial courts extra-statutory inherent power to seal records in criminal cases, the receipt of a pardon is not enough to satisfy *Pepper Pike*’s strict standards for invoking this authority. Under *Pepper Pike*, the inherent power to seal records in criminal cases exists only when there is no conviction—and even then, only when there are “unusual and exceptional” circumstances. But, as this Court made clear in *Boykin*, a pardon does not erase the fact of conviction. And unlike the false, vindictive, and later-dismissed assault complaint at issue in *Pepper Pike*, receiving a pardon comes nowhere near the type of “unusual and exceptional” circumstance that would justify an extra-statutory sealing of records.

A pardon recipient’s interest in sealing the records of the conviction is merely part of the equation. The government agencies also have a strong interest in maintaining the records. Sealing records of a conviction affects not just court documents maintained by the clerk, but all government agencies in possession of any record pertaining to the case. Another interest at stake—and perhaps the most important—is the public’s ability to access public records. As

reflected in the principles animating the Public Records Act, the public has an interest in accessing information not just about the applicant, but also about *government officials* involved in the criminal-justice system, including the governor.

Apparently eschewing *Pepper Pike*, Radcliff proposes a vague and flawed “justice”-based conception of inherent power to seal records of convictions, which should be rejected. Importantly, while Radcliff argues that separation-of-powers principles require giving trial courts extra-statutory inherent power to seal records of convictions, just the opposite is true. The General Assembly has carefully balanced the competing interests involved in sealing records in criminal cases, and it is not the role of courts to ignore the Legislative Branch’s judgments in this regard.

Even though he had already served his sentence, James Radcliff benefited from his pardon. In addition to the symbolic significance that a pardon from the governor entails, Radcliff was relieved of all legal disabilities arising out of the convictions for which he was pardoned. But for all its benefits, the pardon did not authorize the trial court to seal the records of Radcliff’s convictions. Whatever a trial court’s inherent power entails, it does not include sealing records of a conviction when the pertinent statutes prohibit it.

#### **STATEMENT OF THE CASE AND FACTS**

##### **I. THE TRIAL COURT SEALS THE RECORDS OF RADCLIFF’S CONVICTIONS, THEREBY RESTRICTING THE GOVERNMENT’S AND THE PUBLIC’S ACCESS TO THE RECORDS.**

In 1982, Radcliff was convicted in Franklin County Common Pleas Case Number 81CR-4506 of breaking and entering and possessing criminal tools. Governor Strickland pardoned Radcliff for these offenses, and Radcliff applied to have the records in 81CR-4506 sealed. R. 1. The application sought an “Order Sealing Record of Dismissal, Finding of Not Guilty or No Bill [R.C. 2953.52(A)].” In the section of the application requiring the applicant to “[i]ndicate

dismissal, finding of not guilty or no bill,” Radcliff wrote “Pardon.” Attached to the application was the Warrant of Pardon stating that Radcliff had been pardoned for the offenses in 81CR-4506 and several offenses from other counties.

The State objected to Radcliff’s application. R. 3. The State maintained that Radcliff was statutorily ineligible to have the records of his convictions in 81CR-4506 sealed because he was not a “first offender” as required by former R.C. 2953.32(A)(1). In addition to the several out-of-county convictions listed in the pardon, Radcliff has an unpardoned conviction for operating a motor vehicle while intoxicated, which by itself precluded “first offender” status. *State v. Sandlin*, 86 Ohio St.3d 165 (1999), syllabus.<sup>2</sup> The State further argued that the trial court had no inherent power under *Pepper Pike* to seal the records. On this point, the State maintained that *Pepper Pike* does not allow a trial court to seal records of a conviction and that a pardon does not erase the fact of conviction.

The trial court granted Radcliff’s application in an entry titled, “Entry Sealing Record of Conviction.” R. 7. An order sealing records of a conviction seals all “official records pertaining to the case.” R.C. 2953.32(C)(2). “[O]fficial records” is defined as “all records that are possessed by any public office or agency that relate to a criminal case.” R.C. 2953.51(D). This definition “must be read to include each and every record possessed by every public office or agency that is connected to or has a nexus with the criminal case.” *State v. S.R.*, 63 Ohio St.3d 590, 595 (1992). An order sealing records of a conviction also requires that “all index references to the case [be] deleted,” R.C. 2953.32(C)(2), except that a governmental agency “may maintain a manual or computerized index to the sealed records,” R.C. 2953.32(F).

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<sup>2</sup> Am.Sub.S.B. 337, effective September 28, 2012, replaced the “first offender” requirement with a more expansive “eligible offender” requirement. R.C. 2953.32(A)(1). But given his numerous prior convictions, Radcliff fails to qualify for a sealing of records even under the more lenient “eligible offender” standard.

Sealed records may be inspected only by certain persons for certain enumerated purposes. R.C. 2953.32(D), (E). While “investigatory work product” in the possession of a law-enforcement agency is not an “official record,” R.C. 2953.51(D), access to these materials is available only to those “directly employed by the law enforcement agency,” R.C. 2953.321(B)(2), or to another law enforcement agency investigating a “reasonably similar” offense, R.C. 2953.321(B)(3). Otherwise, a law-enforcement agency must treat investigatory work product “as if it did not exist and never had existed.” R.C. 2953.321(B)(2). A person seeking employment, license, or any other right or privilege may not be questioned regarding a sealed conviction “unless the question bears a direct and substantial relationship to the position for which the person is being considered.” R.C. 2953.33(B)(1).

## II. THE TENTH DISTRICT REVERSES, AND THIS COURT ACCEPTS REVIEW.

The State appealed the trial court’s order, and the Tenth District reversed. The Court began by noting that Radcliff was statutorily ineligible to have the records sealed. *Radcliff*, 2012-Ohio-4732, ¶ 9. The Court further held that *Pepper Pike* did not authorize the trial court to seal the records. “[T]he 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.” *Id.* at ¶ 16. After thoroughly surveying the relevant authorities, the Court concluded “that a pardon neither erases the conviction nor renders the pardon recipient innocent as if the crime were never committed.” *Id.* at ¶ 51. Because a pardon does not “erase the fact of conviction,” and because a judicial sealing of records under *Pepper Pike* is available only where the applicant “has not been convicted,” Radcliff “cannot invoke the court’s inherent jurisdiction to seal his records.” *Id.*

The Tenth District certified its decision as being in conflict with *Cope* on the following question: “May a trial court exercise jurisdiction to seal the record of a pardoned conviction

where the petitioner has other offenses on his record?” *State v. Radcliff*, 10th Dist. No. 11AP-652 (Dec. 4, 2012) (Memo. Dec.). (Although the Tenth District certified a conflict with *Cope*, the certified question more accurately describes the conflict between the decision in this case and the Ninth District’s decision in *Boykin*). This Court agreed that a conflict exists and also accepted Radcliff’s discretionary appeal. This Court consolidated the two cases and held them for decision in *Boykin*. 02/20/2013, *Case Announcements*, 2013-Ohio-553.

This Court decided *Boykin* in October 2013. Rejecting the argument that a pardon invalidates the underlying conviction, this Court held that a pardon “does not erase the past conduct. In other words, what’s done is done.” *Boykin*, 2013-Ohio-4582, ¶ 27. Absent a statutory provision entitling a pardon recipient to the sealing of a criminal record, “a gubernatorial pardon does not automatically entitle the recipient to have the records of the pardoned conviction sealed.” *Id.* at ¶ 36.

This Court then sua sponte ordered that this case no longer be held for *Boykin* and ordered full briefing. 11/03/2013, *Case Announcements*, 2013-Ohio-4993.

## ARGUMENT

**Proposition of Law:** Even if *Pepper Pike v. Doe*, 66 Ohio St.2d 374 (1981), still provides an extra-statutory source to seal records in criminal cases, the inherent authority to seal records under *Pepper Pike* is limited to cases in which there is no conviction. A pardon is not an acquittal or dismissal and does not erase the fact of conviction. The receipt of a pardon therefore does not authorize a trial court to seal records under *Pepper Pike*.

**Certified-Conflict Question:** May a trial court exercise jurisdiction to seal the record of a pardoned conviction where the petitioner has other offenses on his record?

Everyone agrees that the trial court had no statutory authority to seal the records of Radcliff’s convictions. *Radcliff*, 2012-Ohio-4732, ¶ 9. The statutory provision for sealing records of convictions was unavailable because Radcliff was not a “first offender.” R.C.

2953.32(A)(1); R.C. 2953.31(A). And because Radcliff was convicted, the statutory provision for sealing records of acquittals, dismissals, or no bills was also unavailable. R.C. 2953.52(A).

Nor did the trial court have extra-statutory inherent power to seal the records. *Pepper Pike* no longer gives trial courts extra-statutory inherent power to seal records in criminal cases, and even if it did, the receipt of a pardon does not satisfy the strict criteria under *Pepper Pike*.

And Radcliff's vague "justice"-based conception of inherent power to seal records of convictions is flawed and should be rejected. Allowing trial courts to seal records of a conviction when statutorily prohibited from doing so would threaten separation-of-powers principles, especially when there is a pardon.

**I. TRIAL COURTS NO LONGER HAVE EXTRA-STATUTORY INHERENT POWER UNDER PEPPER PIKE TO SEAL RECORDS IN CRIMINAL CASES.**

**A. This Court Has Repeatedly Insisted that an Application to Seal Records in a Criminal Case Must Satisfy the Statutory Criteria.**

Sealing criminal records "is an 'act of grace created by the state.'" *Boykin*, 2013-Ohio-4582, ¶ 11, quoting *State v. Hamilton*, 75 Ohio St.3d 636, 639 (1996); see, also, *Pariag*, 2013-Ohio-4010, ¶ 12. It is a "privilege, not a right." *Boykin*, 2013-Ohio-4582, ¶ 11, quoting *State v. Futrall*, 123 Ohio St.3d 498, 2009-Ohio-5590, ¶ 6. "Neither the United States Constitution nor the Ohio Constitution endows one convicted of a crime with a substantive right to have the record of a conviction expunged."). *Hamilton*, 75 Ohio St.3d at 639. "Moreover, the government possesses a substantial interest in ensuring that expungement is granted only to those who are eligible." *Id.* at 640.

For these reasons, this Court has repeatedly stated that sealing records in criminal cases "should be granted only when all requirements for eligibility are met." *Boykin*, 2013-Ohio-4582, ¶ 11; *Pariag*, 2013-Ohio-4010, ¶ 12; *Futrall*, 2009-Ohio-5590, ¶ 6; *State v. Simon*, 87 Ohio St.3d

531, 533 (2000); *Hamilton*, 75 Ohio St.3d at 640. In each of these cases, this Court refused to allow a sealing of records because the statutory criteria were not satisfied. See, also, *Sandlin*, 86 Ohio St.3d at 168 (statute barred sealing records); *State v. Yackley*, 43 Ohio St.3d 181, 182-183 (1989) (same). A trial court has no more authority to seal records when prohibited by statute than it does to deny sealing records for a reason not permitted by statute. *State v. Greene*, 61 Ohio St.3d 137, 140 (1991) (refusal to seal records was improper because “the prime reason for denying expungement was rooted in a misconception of the law”).

**B. *Pepper Pike* Was a Temporary Stopgap and No Longer Gives Trial Courts Extra-Statutory Inherent Power to Seal Records in Criminal Cases.**

In *Pepper Pike*, this Court recognized that trial courts have limited inherent power to seal records. In that case, the applicant was charged with assault, which was later dismissed with prejudice. *Pepper Pike*, 66 Ohio St.2d at 377. The charge was the product of a domestic quarrel in which the applicant’s ex-husband and his wife “used the courts as a vindictive tool to harass” the applicant. *Id.*

At the time, there was no statutory provision for sealing records of dismissals; only convictions were sealable by statute. This Court nonetheless held that “[t]he trial courts in Ohio have jurisdiction to order expungement and sealing of records in a criminal case where the charges are dismissed with prejudice prior to trial by the party initiating the proceedings.” *Id.* at paragraph one of the syllabus. The “basis” for this judicial remedy was the “constitutional right to privacy,” but “individuals who have never been convicted are not entitled to expungement of their arrest records as a matter of course.” *Id.* at 376-377. This remedy was available only in “unusual and exceptional circumstances.” *Id.* at 377. “[T]he trial court should use a balancing test, which weighs the interest of the accused in his good name and right to be free from unwarranted punishment against the legitimate need of government to maintain the records.” *Id.*

“Typically, the public interest in retaining records of criminal proceedings, and making them available for legitimate purposes, outweighs any privacy interest the defendant may assert.” *Id.*

Just a few years after *Pepper Pike*, the General Assembly “closed the gap in the expungement statutes illustrated by that case and enacted R.C. 2953.52.” *Boykin*, 2013-Ohio-4582, ¶ 16. Under that statutory provision, a person may apply to seal records of acquittals, dismissals, and no bills. R.C. 2953.52(A). Echoing the balancing test from *Pepper Pike*, the statute requires trial courts to “[w]eigh 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 the records.” R.C. 2953.52(B)(2)(d); see, also, *State ex rel. Cincinnati Enquirer v. Winkler*, 101 Ohio St.3d 382, 2004-Ohio-1581, ¶ 10 (equating R.C. 2953.52 with balancing test set forth in *Pepper Pike*); *Rieger v. Rieger*, 165 Ohio App.3d 454, 2006-Ohio-482, ¶ 47 (2nd Dist.) (“In 1984, the legislature provided a remedy for the problem the court faced in *Pepper Pike*.”).

Thus, the General Assembly has now provided a comprehensive statutory scheme for sealing records in criminal cases. Sealing records of convictions and bond forfeitures is governed by R.C. 2953.31 et seq.; sealing records of acquittals, dismissals, and no bills is governed by R.C. 2953.51 et seq.; and, for good measure, the actual expungement remedy for certain convictions is governed by R.C. 2953.37 et seq. Now that the General Assembly has “closed the gap” that *Pepper Pike* was intended to fill, *Pepper Pike* no longer provides extra-statutory inherent power to seal records in criminal cases. Anyone who would seek to invoke the judicial remedy created in *Pepper Pike* can now simply invoke R.C. 2953.52 instead.

Yet *Pepper Pike* continues to live. Applicants frequently use *Pepper Pike* as a sort of trump card to be played any time sealing records is prohibited by statute. See, e.g., *State v. Potts*, 11th Dist. No. 2011-T-0054, 2012-Ohio-741, ¶¶ 12-16; *Youngstown v. Garcia*, 7th Dist.

No. 05 MA 47, 2005-Ohio-7079, ¶¶ 15-22; *State v. Kidd*, 11th Dist. No. 2004-P-0047, 2005-Ohio-2079, ¶¶ 10-13; *State v. Bailey*, 10th Dist. No. 02AP-406, 2002-Ohio-6740, ¶¶ 7-12; *State v. Fowler*, 12th Dist. No. CA2001-03-005 (Sept. 24, 2001); *State v. Netter*, 64 Ohio App.3d 322, 323-326 (4th Dist.1989). In response to these arguments, courts typically assume that *Pepper Pike* still gives courts inherent power to seal records but distinguish *Pepper Pike* on the facts.

This Court should hold once and for all that *Pepper Pike* no longer provides extra-statutory inherent power to seal records in criminal cases. Relying on *Pepper Pike* to seal records in the *absence* of a statute is controversial enough. See *Schussheim v. Schussheim*, 137 Ohio St.3d 133, 2013-Ohio-4529 (4-3 decision holding that *Pepper Pike* allows trial courts to seal records of adult civil protection orders). After all, the absence of any statutory provision to seal certain records can just as easily reflect the General Assembly's judgment that those records should never be sealed. *Id.* at ¶ 20 ("If the legislature had wanted to afford adults the same sealing provision, it would have done so.") (O'Connor, C.J., dissenting); *id.* at ¶ 77 ("Because the legislature has not afforded him such a remedy, the trial court was powerless to do so.") (French, J., dissenting). But relying on *Pepper Pike* to seal records when *prohibited* by statute is beyond controversial; it is a direct affront to the General Assembly.

*Pepper Pike* does retain some relevance. Courts should continue to heed *Pepper Pike*'s admonishments in considering applications to seal records under R.C. 2953.52. That is to say, even under R.C. 2953.52, sealing records should not be granted "as a matter of course" and should be available only when the applicant's interest in sealing the records outweighs the "legitimate need of government to maintain the records." And in applying R.C. 2953.52(B)(2)(d), courts should continue to recognize that in typical cases the public's interest in maintaining records "outweighs any privacy interest the defendant may assert."

But *Pepper Pike* “did not construct a bottomless reservoir of judicial expungement power.” *Schussheim*, 2013-Ohio-4529, ¶ 76 (French, J., dissenting). Rather, *Pepper Pike* was “a narrow, short-lived, judge-made ‘fix’ to Ohio’s nascent criminal expungement statutes.” *Id.* at ¶ 63 (French, J., dissenting). This Court should discard *Pepper Pike* as a source of extra-statutory inherent power to seal records in criminal cases and make clear that sealing records in criminal cases is governed entirely by statute. For this reason alone, Radcliff’s application to seal records should have been denied because—even liberally construing the statute—he is not a “first offender” under former R.C. 2953.31(A).

**II. EVEN IF INHERENT POWER UNDER *PEPPER PIKE* DOES STILL EXIST IN CRIMINAL CASES, A PARDON IS NOT GROUNDS TO SEAL RECORDS.**

**A. *Pepper Pike* Applies in Criminal Cases Only When There Is No Conviction, and a Pardon Does Not Erase the Fact of Conviction.**

Even if *Pepper Pike* still provides extra-statutory inherent power to seal records in criminal cases, the receipt of a pardon does not satisfy *Pepper Pike*’s strict standards. First, *Pepper Pike* by its own terms applies only when “the charges are *dismissed with prejudice* prior to trial by the party initiating the proceedings.” *Pepper Pike*, 66 Ohio St.2d 374, paragraph one of the syllabus (emphasis added); see, also, *id.* at 376 (issue in case was “whether a defendant charged with but not convicted of a criminal offense has a right to a judicial remedy which orders expungement of her criminal record.”); *id.* at 377 (“The criminal charge and dismissal with prejudice were such unusual and exceptional circumstances as to make appropriate the exercise of the trial court’s jurisdiction to expunge and seal all records in the case.”).

That *Pepper Pike* does not apply to convictions is dispositive, because this Court held in *Boykin* that a pardon does not erase the fact of a conviction. *Boykin*, 2013-Ohio-4582, ¶¶ 20-27. “[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.” *Id.* at ¶ 20, quoting *State ex rel. Atty. Gen. v. Peters*, 43 Ohio St.3d 629, 650 (1885); see, also, R.C. 2967.01(B) (pardon is a “remission of penalty by the governor in accordance with the power vested in the governor by the constitution”); R.C. 2967.04(B) (pardon “relieves the person to whom it is granted of all disabilities arising out of the conviction or convictions from which it is granted”). While dicta from early cases suggested that a pardon invalidated the conviction, this Court set the record straight and held that “although a pardon grants the recipient relief from any ongoing punishment for the offense and prevents any future legal disability based on that offense, it does not erase the past conduct. In other words, what’s done is done.” *Boykin*, 2013-Ohio-4582, ¶ 27.

Thus, a pardon recipient is no less “convicted” than any other convict who seeks to seal records of a conviction. Just as lower courts have consistently held that trial courts have no extra-statutory inherent power *Pepper Pike* to seal records of conviction, *Radcliff*, 2012-Ohio-4732, ¶ 15 (collecting cases), the result should be no different when the applicant seeks to seal records of a pardoned conviction. A pardoned conviction is a conviction all the same.

**B. The Receipt of a Pardon Is Not an “Unusual and Exceptional” Circumstance That Would Outweigh the Need to Maintain the Records of the Conviction.**

Even if *Pepper Pike* was available to seal records of convictions, the receipt of a pardon, by itself, is not the type of “unusual and exceptional” circumstance that would justify sealing records. While the right to privacy was the basis of the judicial remedy created in *Pepper Pike* (but not the *source* of the remedy, *Schussheim*, 2013-Ohio-4529, ¶ 76 (French, J., dissenting)), this Court later stated that the right to privacy is not violated by information contained in public records, even when that information is actively disseminated to the public. *State v. Williams*, 88 Ohio St.3d 513, 525-526 (2000). To the extent privacy interests enter into the equation at all, it is only to “provid[e] a second chance to criminal defendants *who have been found not guilty.*”

*Winkler*, 2004-Ohio-1581, ¶ 10, citing *State v. D.H.W.*, 686 So.2d 1331, 1336 (Fla.1996) (emphasis added). (Radcliff quotes this passage from *Winkler* but omits the italicized phrase. Appellant’s Brief, 14.)

It is of course true that records of convictions are available online to “[r]eporters, employers, landlords, and others” and that the availability of these records may result in “stigma” and “embarrass[ment].” Appellant’s Brief, 10. But this is true of *all* convictions, whether or not there is a pardon. Unlike the applicant in *Pepper Pike*—who had no prior criminal record and was falsely and vindictively charged with a crime that was later dismissed with prejudice—a pardon recipient is not “as reliable as one who has constantly maintained the character of a good citizen.” *State ex rel. Atty. Gen. v. Hawkins*, 44 Ohio St. 98, 116-117 (1886). In short, a pardon recipient’s interest in sealing records of the conviction is no different in kind or degree than any other individual convicted of a crime.

On the other side of the *Pepper Pike* balancing test, a pardon does nothing to diminish the government’s legitimate and compelling need to maintain the records of the conviction. As *Pepper Pike* itself recognized, “[t]ypically, the public interest in retaining records of criminal proceedings, and making them available for legitimate purposes, outweighs any privacy interest the defendant may assert.” *Pepper Pike*, 66 Ohio St.2d at 377. This is no less true when there is a pardon. Whereas the government may have no compelling interest in maintaining records that arise from a “vindictive use of our courts,” *id.*, the need to maintain the records of lawfully-obtained convictions is undeniable.

Conviction records serve important internal governmental and law-enforcement purposes. But this is not all. An order sealing records restricts the *public’s* access to records that would otherwise be “public records” under Ohio’s Public Records Act. R.C. 149.43(A)(1). Indeed,

while Radcliff's main objective is to prevent potential employers, landlords, and other members of the public from accessing records of his convictions, it is the public's interest in the records that is perhaps most compelling.

And the public's interest in these records extends beyond just obtaining information about the pardon recipient. It also includes obtaining important information about our government. After all, the purpose of the Public Records Act "is to expose government activity to public scrutiny." *Winkler*, 2004-Ohio-1581, ¶ 5, citing *State ex rel. WHIO-TV-7 v. Lowe*, 77 Ohio St.3d 350, 355 (1997). The Public Records Act must be construed to "provide the broadest access to government records." *Winkler*, 2004-Ohio-1581, ¶ 5, citing *State ex rel. Nat'l Broadcasting Co. v. Cleveland*, 38 Ohio St.3d 79, 83 (1988). This is especially so when the records involve the criminal-justice system:

The right of public access, as examined in the context of a criminal proceeding, serves several lofty goals. First, a crime is a public wrong, and the interest of the community to observe the administration of justice in such an instance is compelling. Also, the general right of public access promotes respect for and an understanding of the legal system and thus enables the public to engage in an informed discussion of the governmental process.

*Winkler*, 2004-Ohio-1581, ¶ 9 (internal citations omitted).

A pardon only enhances the public's interest in the records of a conviction. Through the pardon power, the governor plays an important role in the criminal-justice system. Just as the decisions and actions of the prosecutor, judge, and other public officials should be available for public scrutiny, so too should the governor's pardoning decisions. Indeed, all three branches of government are required to keep pardon records. The governor is constitutionally required to "report the name of the offender, the offense, the sentence, and the reasons for the pardon to the General Assembly." *Boykin*, 2013-Ohio-4582, ¶ 32, citing Ohio Constitution, Article III,

Section 11. The governor is also statutorily required to keep a “pardon record” containing specific information about every pardon application. R.C. 107.10(E). And a copy of the warrant of pardon must be filed with the clerk of court where the sentence is recorded (copies must also be delivered to the pardon recipient and the prison warden if the recipient was confined). R.C. 2967.06; see, also, R.C. 2967.04(A). These pardon records would all qualify as “official records” under R.C. 2953.51(D), so an order sealing a pardon recipient’s records of conviction would restrict access to these records.

*Schussheim* does not support the view that a pardon authorizes a trial court to seal records of a conviction. Beyond the fact that *Schussheim* involved the absence of statutory authority to seal records and not the presence of a statute prohibiting sealing records—again, the line between no authorization and prohibition is often illusory—receiving a pardon is nothing like the circumstances at issue in *Schussheim*. In *Schussheim*, the complainant who filed the petition for the civil protection order later moved to dissolve it and averred that “expungement is in the best interest of herself and her children.” *Schussheim*, 2013-Ohio-4529, ¶ 15. These unique circumstances were, this Court held, “unusual and exceptional” so as to give the trial court the inherent power to seal the records. *Id.* at ¶ 17.

Thus, in both *Schussheim* and *Pepper Pike*, the conduct of the adverse party weighed heavily in favor of giving the trial court the inherent power to seal the records. In *Pepper Pike*, the adverse “party” (i.e. the complaining witnesses) “used the courts as a vindictive tool to harass” the applicant, and the charge was dismissed with prejudice as a result. In *Schussheim*, the adverse party agreed to dissolve the civil protection order and specifically requested that the records be sealed. But in the case of a pardon, the criminal proceedings against the recipient legitimately culminated with the recipient being convicted of a crime.

All in all, if *Pepper Pike* really does still give trial courts extra-statutory inherent power to seal records of a conviction, the granting of a pardon would come nowhere near to satisfying the strict criteria under *Pepper Pike*. The desire to avoid the embarrassment and stigma that comes from a conviction is one that is shared by *all* persons convicted of a crime, not just those who receive a pardon. And the need to maintain records when there is a pardon equals—if not exceeds—the need to maintain records pertaining to non-pardoned convictions.

**III. RADCLIFF’S VAGUE “JUSTICE”-BASED CONCEPTION OF INHERENT POWER TO SEAL RECORDS IS UNPERSUASIVE.**

Although *Pepper Pike* is the leading case addressing a trial court’s extra-statutory inherent power to seal records, Radcliff’s brief barely mentions *Pepper Pike*. Rather than try to fit the receipt of a pardon into the *Pepper Pike* framework, Radcliff argues that a trial court may seal records of a conviction under an entirely different conception of inherent power. Under Radcliff’s conception, a trial court has inherent power to seal records of a conviction “to ensure that justice is done.” Appellant’s Brief, 4. (Radcliff variously refers to this conception of inherent power with other “justice”-based formulations—i.e., “interest of justice,” “to do justice,” “miscarriage of justice,” etc.). Aside from its inherent vagueness, Radcliff’s “justice”-based conception of inherent power to seal records is unpersuasive.

**A. Radcliff Improperly Equates Sealing Records of a Conviction with Validly Restricting Access to Court Records.**

As support for his “justice”-based conception of inherent power to seal records, Radcliff tries to equate an order sealing records with other instances in which court records and proceedings are not available to the public, such as the names and addresses of jurors, general search warrants, and juvenile proceedings. But in each of these instances, the public’s lack of access is supported by statutory authority. For example, the names and addresses of jurors are

not “records” under R.C. 149.011(G) and thus “cannot be ‘public records’ subject to disclosure under R.C. 149.43.” *State ex rel. Beacon Journal Publ’g Co. v. Bond*, 98 Ohio St.3d 146, 2002-Ohio-7117, ¶ 13. Likewise, a general search warrant is not a “public record” if it is a “confidential law enforcement investigatory record,” R.C. 149.43(A)(1)(h), which in turn is defined as any law-enforcement record that contains “[i]nformation that would endanger the life or physical safety of law enforcement personnel, a crime victim, a witness, or a confidential information source,” R.C. 149.43(A)(1)(h); see, also, *State v. Lawson*, 11th Dist. No. 2001-L-071, 2002-Ohio-5605, ¶¶ 30-33. A juvenile court has statutory authority to close court proceedings. *In re T.R.*, 52 Ohio St.3d 6, 17 (1990), citing R.C. 2151.35(A).

Moreover, in each of these instances, it is only the *public’s* access that is restricted. In contrast, an order sealing records of a conviction under R.C. 2953.31 et seq. requires that all “official records pertaining to the case [be] sealed.” R.C. 2953.32(C)(2). “Official records” includes records that would not otherwise be “public records” under R.C. 149.43(A)(1). An order sealing records also requires that “all index references to the case [be] deleted.” R.C. 2953.32(C)(2), except that a governmental agency “may maintain a manual or computerized index to the sealed records,” R.C. 2953.32(F). While “investigatory work product” in the possession of a law enforcement agency is not an “official record,” R.C. 2953.51(D), access to these materials is also restricted, R.C. 2953.321(B)(2), (3). An order sealing records of a conviction restricts both the public’s and government’s access to the records.

Radcliff’s reliance on Sup.R. 45 is also misplaced. Under that rule, “[c]ourt records are presumed open to public access.” Sup.R. 45(A). However, a trial court may restrict public access to “information in a case document” or, if necessary, “the entire document.” Sup.R. 45(E). But an order sealing records of a conviction under R.C. 2953.31 et seq. restricts much

more than just the public's access to a "document." Plus, the plain terms of the rule would not support Radcliff's "justice"-based conception of inherent power. The desire to avoid the stigma and embarrassment that comes with having a conviction is not a "higher interest" that would justify invoking Sup.R. 45(E). Maintaining records of a duly-obtained conviction does not pose any risk of injury, implicate any legitimate privacy interests, threaten any proprietary information, or otherwise undermine the "fairness of the adjudicatory process." Sup.R. 45(E)(2)(c).

In short, sealing records of a conviction is a far different remedy than restricting access to court records. Those who wish to obtain the full range of benefits afforded by a sealing of records of a conviction under R.C. 2953.31 et seq. must satisfy the statutory criteria for obtaining those benefits. Whatever inherent power a trial court has over its own records would not include the extra-statutory inherent power to seal records of a conviction under R.C. 2953.31 et seq.

**B. The Motives in Seeking a Pardon Are Irrelevant.**

Radcliff further argues that a pardon would be "meaningless" if it did not also authorize a trial court to seal records. Appellant's Brief, 9-10. According to Radcliff, most pardons are granted after the recipient has completed the sentence, so "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." *Id.* at 10. Radcliff apparently believes that whether a pardon authorizes a trial court to seal records of the conviction should be controlled by the pardon recipient's motives for seeking the pardon.

But even if it is in fact true that most pardons are granted post-sentence (a point that Radcliff does not support with any evidence), it could be just as likely that the motive for seeking the pardon is to obtain a release "from all the disabilities consequent on [the] conviction."

*Boykin*, 2013-Ohio-4582, ¶ 20. A pardon recipient also could be motivated by a pardon's symbolic significance, knowing that anyone who bothers to look up the recipient's conviction record would also see that the governor has forgiven (but not forgotten) the recipient's crimes. *Jones v. State*, 141 Tex.Crim. 70, 73, 147 S.W.2d 508 (1941) ("the very essence of a pardon is forgiveness"; "it involves forgiveness and not forgetfulness"). In any event, the pardon recipient's motives are irrelevant. The effect of a pardon is governed by law—no more, no less.

**C. Giving Trial Courts Extra-Statutory Inherent Power to Seal Records in Criminal Cases Would Violate Separation-of-Powers Principles.**

Nor do separation-of-powers principles support Radcliff's "justice"-based conception of inherent powers. In fact, separation-of-powers principles weigh against—not in favor of—giving trial courts extra-statutory inherent power to seal records of convictions. Sealing records implicates multiple private and public interests, and "it is a proper role of the General Assembly to balance competing private and public rights." *Winkler*, 2004-Ohio-1581, ¶ 9, citing *State ex rel. Toledo Blade Co. v. Univ. of Toledo Found.*, 65 Ohio St.3d 258, 266 (1992). Sealing records affects not only the courts own records, but the ability of the public and other government officials to access records. *Schussheim*, 2013-Ohio-4529, ¶ 77 (sealing of records is a "legislatively defined remedy that encroaches on other branches of government and conceals historical fact from public view") (French, J., dissenting).

The General Assembly has carefully balanced these interests by providing a comprehensive statutory scheme for sealing records in criminal cases. Allowing a trial court to seal records of a conviction when statutorily prohibited from doing so would constitute an obvious encroachment on the General Assembly's authority. As one court has stated in asking whether a trial court has inherent power to seal records contrary to statutory authorization:

The obvious answer, if one subscribes to the doctrine of separation of powers, is no. To hold otherwise would permit an unfettered judiciary to absorb the policy making function of the legislative branch and would violate Article IV, section 18 of the Ohio Constitution, which states that judges shall “have and exercise such power and jurisdiction \* \* \* as may be directed by law .”

*Garcia*, 2005-Ohio-7079, ¶ 21; see, also, *Schussheim*, 2013-Ohio-4529, ¶ 29 (“A judicial remedy may not contravene the public policy expressed in duly enacted, constitutional legislation.”)

(O’Connor, C.J., dissenting).

Indeed, the threat to separation-of-powers is heightened when there is pardon. As noted above, all three branches are required to keep pardon records. It would be an odd notion of separation-of-powers that gave trial courts “inherent power” to restrict the General Assembly and the governor from accessing their own pardon records.

Moreover, there are no “comity” interests that would require giving trial courts extra-statutory inherent power to seal records of a conviction after a pardon. Appellant’s Brief, 12. The effect of a pardon is governed by law, and a sealing of records is not necessary to give the pardon its proper legal effect. While Radcliff suggests that the governor’s purpose in granting a post-sentence pardon is to allow the recipient to apply to seal the records of the conviction, this claim is speculative and irrelevant. But just as the recipient’s motives in seeking a pardon have no bearing on the effect of the pardon, neither do the governor’s motives. “Comity” does not mean that the different branches of government must give the other branches what they want.

\* \* \*

In the end, a pardon and a sealing of records offer distinct forms of relief and are governed by distinct sets of rules. A pardon is available for any offense. While a pardon releases the recipient from any remaining punishment and legal disabilities arising out of the conviction, it does not authorize a trial court to seal records of the conviction. A sealing of

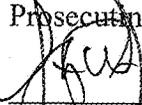
records, on the other hand, is an “additional avenue to restore rights and privileges” apart from a pardon. *State ex rel. Gains v. Rossi*, 86 Ohio St.3d 620, 623 (1999). While sealing records of a conviction is available only for certain offenses and does not affect the punishment, it does restrict the public’s and the government’s access to all official records of the case. Whether the receipt of a pardon should authorize a trial court to seal records of a conviction is a question for the General Assembly to decide, not the courts. Radcliff’s proposition of law should be rejected and the certified question should be answered in the negative.

**CONCLUSION**

For the foregoing reasons, the Tenth District’s judgment should be affirmed.<sup>3</sup>

Respectfully submitted,

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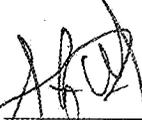


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**CERTIFICATE OF SERVICE**

This is to certify that a copy of the foregoing was hand delivered on this 24th day of March, 2014, to the office of John W. Keeling, 373 South High Street, 12th Floor, Columbus, Ohio 43215.



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<sup>3</sup> If this Court sua sponte contemplates a decision upon an issue not briefed, the State respectfully requests notice of that intention and requests an opportunity to brief the issue before this Court makes its decision. *State v. 1981 Dodge Ram Van*, 36 Ohio St.3d 168, 170 (1988).