



Report of the Rights Restoration/Record Sealing Ad Hoc Sub-Committee

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I. Background on Sub-Committee’s Creation, Work and Findings

In the midst of discussions of various sentencing reform topics, members of the Ohio Criminal Sentencing Commission decided that whether and how prior convictions are sealed and/or civil rights restored is a critical topic that merited study by a special committee. The **Rights Restoration/Record Sealing Ad Hoc Sub-Committee** was created and began its work by seeking to **(1)** collect data on current practices under Ohio’s existing statutes, and **(2)** identify and prioritize aspects of Ohio’s existing statutory scheme that most needed reform. The process of data collection and identification of priority reform issues suggested to members of the Sub-Committee that it might not be efficient or effective to consider only modifications to the existing statutory structure. Nevertheless, in an effort to provide a needed start to more ambitious reform suggestions and plans, a partial clarifying redraft of existing statutes was developed by members of the Sub-Committee (and is attached to this memorandum as Appendix A). The rest of this report provides an overview of the issues and concerns identified through the work of the Ad Hoc Sub-Committee to date.



A. Policy Justifications for Bold Reform Efforts

Ohio and other states have long provided various means for former offenders to seal or expunge criminal records, and in recent years states have created new mechanisms for offenders to obtain special certificates of merit or rehabilitation. But policy advocates and public officials all recognize a new urgency for strengthening and expanding such laws because: **(1)** expanded criminalization at the local, state and federal levels has dramatically increased the number of citizens saddled with criminal records, **(2)** expanded formal and informal application of collateral sanctions at the local, state and federal levels has dramatically increased the impact and consequences of having even a minor criminal record, **(3)** technological advances have made it far easier and more common for official and non-official entities to store criminal records and make them readily accessible to various parties, and **(4)** empirical research and anecdotal evidence suggests that the burdens of even minor criminal history can be detrimental to former offenders obtaining employment and other services that are proven to reduce the likelihood of recidivism.

National leaders have long discussed the importance of reform efforts focused on the “back-end” of the criminal justice system: calling America “the land of second chance,” President George W. Bush in his 2004 State of the Union Address spotlighted prisoner reentry and proposed a major “prisoner reentry initiative to expand job training and placement services, to provide transitional housing, and to help newly released prisoners get mentoring.” More recently, in November 2015, President Barack Obama issued an executive order announcing a series of steps to encourage reentry and rehabilitation of individuals who have recently been released from prison. *See Press Release, President Obama Announces New Actions to Promote Rehabilitation and Reintegration for the Formerly-Incarcerated* (Nov. 2, 2015). Among various initiatives, this new executive order called for the U.S. Departments of Labor and Justice to help develop and implement a National Clean Slate Clearinghouse (NCSC) to provide information and resources to reentry, legal services and advocacy organizations.

The NCSC, which is still in development, is tasked with **(a)** gathering on a national website state-by-state information on sealing, expungement, and other related legal services that lessen the negative impact of having a criminal record, and **(b)** developing tools and providing technical assistance to reentry service providers and legal aid organizations on how to use and expand access to sealing, expungement, and other legal services. Materials released in conjunction with the development of this new NCSC provided this explanation of the importance of sustained criminal justice reform work in this arena:



Each year, more than 630,000 individuals are released from state and federal prisons and almost 12 million cycle through local jails with close to 450,000 people in pretrial detention. Nationally, some 1 in 3 U.S. adults has an arrest record, often for relatively minor, non-violent offenses, sometimes decades in the past. The sometimes lifetime-impact of a criminal record will keep many people from obtaining employment, access to housing, higher education, student loans and other forms of credit, even after they've paid their debt to society, have turned their lives around, and are unlikely to reoffend. It is known that having a record of even a single arrest without a conviction can profoundly reduce a person's earning capacity. However, research shows that people who stay out of trouble for just a few years are no more likely to be arrested than the general population. Information and assistance regarding record mitigation, sealing, expungement, pardons, certificates of rehabilitation and the correcting of inaccurate juvenile and criminal records can play a critical role in giving people a second chance. Such actions can translate into reduced recidivism and increased chances for employment, housing, education and reintegration into the community.

Significantly, as detailed in a recent report from the Vera Institute of Justice, many states around the nation are recognizing and responding to these modern realities: from "2009 through 2014, forty-one states and the District of Columbia enacted 155 pieces of legislation to mitigate the burden of collateral consequences for people with certain criminal convictions." Ram Subramanian, Rebecka Moreno & Sophia Gebreselassie, *Relief in Sight? States Rethink the Collateral Consequences of Criminal Conviction, 2009-2014*, at 4 (Dec. 2014). While states nationwide, including Ohio and neighboring states, have been pursuing various legal reforms in this arena in recent years, many public officials and policy advocates continue to express concern that recent legislative activity is still too often too narrowly tailored with respect to which offenders and offenses are impacted by recent reforms.

With these realities and concerns in mind, the **Rights Restoration/Record Sealing Ad Hoc Sub-Committee** is committed to continuing to explore and draft reform proposals that would build and expand on recent reform efforts in order to now "flip the norm" with respect to criminal records in Ohio — i.e., to propose new laws and procedures that could provide, subject only to a few narrowly tailored exceptions, for presumptive or automatic sealing of nearly all criminal records after a certain period of law-abiding behavior. Various members of the Sub-Committee along with various members of the Sentencing Commission have expressed firm support for a bold and ambitious statutory and administrative reform in this arena. An institutional structure and the substantive outlines of bold and ambitious long-term reforms are outlined in **Part II** of this Report below (Reform Recommendations).



B. Practical Problems Justifying Short- and Long-Term Reform Proposals

In addition to identifying broad reasons for strengthening and expanding various means for former offenders to seal criminal records and/or have civil rights restored, members of **Rights Restoration/Record Sealing Ad Hoc Sub-Committee** have identified an array of practical problems with Ohio’s existing statutory scheme and its administration. These practical problems, which are briefly discussed in subsections below, can be roughly divided into four categories: **(1)** Code Confusion and Data Fog, **(2)** Substantive Eligibility for Statutory Relief, **(3)** Procedural Issues Related to Fair and Effective Statutory Relief, and **(4)** Relief after Executive Action and Other Remedies.

(1) Code Confusion and Data Fog

Since the mid-1970s, Ohio has had statutory sections providing for the sealing of records of a conviction. But until quite recently Ohio's sealing statutes applied only to “first offenders” and statutory provisions further limited what types of convictions were eligible for record sealing. Through recent statutory changes, though, Ohio has **(a)** expanded the nature of offenders and offenses eligible for record sealing, **(b)** provided distinctly for full expungement of a certain limited number of offenses, and **(c)** created mechanisms for ex-offenders to petition for a Certificate of Qualification for Employment (CQE).

The result of this recent legislative activity is an array of complicated and cumbersome statutory provisions now appearing in Ohio Revised Code §§ 2953.27—2953.61. Collectively, these statutes are difficult for even experienced lawyers and judges — let alone lay individuals potentially eager to utilize these provisions without the benefit of counsel — to fully understand and apply consistently. Indeed, the Ohio Supreme Court in recent cases has noted that some Ohio courts refer inaccurately to the record sealing process as “expungement,” even though now under Ohio statutes “expungement is a separate process from sealing a conviction record. Expungement results in deletion, making all case records ‘permanently irretrievable,’ R.C. 2953.37(A)(1), while sealing simply provides a shield from the public's gaze. R.C. 2953.32(D).” *State v. Aguirre*, 2014-Ohio-4603, ¶15, n.2. Problematically, the array of statutory provisions now covering record sealing and related mechanisms contribute to an unwieldy process fraught with confusion, inefficiency and frustration for all involved. These realities prompted members of the Sub-Committee to develop a clarifying redraft of existing statutes intended initially to seek an immediate remedy to this “Code Confusion.” This proposed redraft, with explanatory notes within, is attached to this memorandum as Appendix A.



Problems understanding and assessing existing statutory schemes extend beyond basic concerns of “code confusion.” At the outset of the Sub-Committee’s work, members sought to gather and analyze statewide and regional information on basic matters such how often applicable statutes were invoked and how they were being applied. Through various research efforts, the Sub-Committee sought basic data on how many individuals have applied to have their records sealed and/or expunged in recent years, as well as how these applications have been processed and how many have been granted.

Initial data provided by the Bureau of Criminal Investigation (BCI) reported annual total sealing orders of around 36,000 from 2013 to 2015. (To be precise, BCI reported 38,530 such orders in 2013; 36,083 in 2014, and 35,739 in calendar year 2015.) The following basic data was also secured for the years 2010 to 2014 from the Franklin County Municipal Court (FCMC), which jurisdictionally would handle only non-felony offenses:

Total FCMC sealing cases in 2014: 3,272 – total cases where a sealing was granted: 2,831 (87%)
Total FCMC sealing cases in 2013: 3,460 – total cases where a sealing was granted: 3,136 (91%)
Total FCMC sealing cases in 2012: 3,102 – total cases where a sealing was granted: 2,819 (91%)
Total FCMC sealing cases in 2011: 2,965 – total cases where a sealing was granted: 2,611 (88%)
Total FCMC sealing cases in 2010: 2,685 – total cases where a sealing was granted: 2,211 (82%)

Subsequently, with the aid of summer staff interns, a systematic effort was made to communicate directly with all relevant courts throughout the state to understand expungement and record sealing services provided, internal court procedures, and annual rates of applications. The data collection efforts of the research staff included reaching out via hundreds of emails and phones calls to Common Pleas and Municipal Court Clerks or Administrators. These inquiries revealed, perhaps unsurprisingly, that nearly every court seemed to catalog, process and retain records on these matters very differently, and that many courts count and handled both sealed and expunged records the same way.

Staff researchers reported that they confronted major research problems because there is no standardized system for record keeping. In addition, as a memo from the staff reported, many courts “differ both in application/hearing process itself, and how the records are retained (or not).” In their words, due to the “sporadic and inconsistent nature of the data [collected], the wide variety of sizes of courts, and the different systems in place, the (limited) amount of data collected is difficult, if not impossible, to compare against one another [and] no individual set of data is sufficiently large enough to draw conclusions” about the basic application or efficacy of the existing statutory mechanisms for expungement and record sealing.



Due to the data collection challenges encountered by the Sub-Committee, one recommendation from the Sub-Committee is for the Ohio Criminal Sentencing Commission and/or another body to consider instituting and promulgating standard data-recording and data-transmission processes for all courts statewide that receive and act on sealing and expungement applications. This recommendation is discussed more fully in Part II below.

(2) Substantive Eligibility for Statutory Relief

During conference calls and meetings, Sub-Committee members identified a number of concerns with the substantive eligibility provisions of the sealing and expungement statutes. Some concerns were focused on specific types of offenses or substantive limitations that seemed to problematically preclude eligibility for statutory relief. For example, some members suggested that, with the exclusion of offenses of violence and sexually oriented offenses, M4s and possibly M3s ought to be treated the same as MMs under the statute to reflect the reality that often that there is no inherent substantive difference between, say, an MM disorderly conduct conviction and an M4 disorderly. It was also noted that the new statute providing for expungement of offenses resulting from human trafficking only allows for sealing of loitering, soliciting, and prostitution convictions and does not provide for automatic sealing of dismissed offenses (this may be addressed in a pending set of bills, HB 286 and SB 284). Prior to 2012, only first-time offenders could apply to seal a single conviction – any past conviction barred the sealing of a subsequent one and OVI was specifically enumerated as a conviction that would bar sealing. Effective as of 2012, 129 SB 337 changed that by allowing offenders with a single past conviction (including one, and only one, OVI with no other convictions) to be eligible to seal a criminal record. That bill also addresses appellate court decisions that did not allow sealing of non-support because the victim of the crime is a minor (the current statute still prohibits sealing the record of a crime that victimizes a minor, but specifically excludes non-support from that prohibition).

In addition specific concerns with particular eligibility limitations, there was a collective broader concern about eligibility expressed not only by all the Sub-Committee members, but also by many other who spoke with the Sub-Committee. Stated simply, the concern was that, even despite recent statutory expansions, the existing limitations on who can have their records sealed or expunged are still too restrictive — primarily because existing rules and limits are focused upon the number or type of convictions rather than taking into account in any way the passage of significant time during which a former offender has been law-abiding. Many Sub-Committee



members believe that the statutes are still far too limiting in the number and type of offenses that an offender may seek to have sealed. (Somewhat relatedly, as discussed in the procedural section below, there was also a view that minor offenses might be wisely subject to automatic sealing and that there are still too many means for third-parties to access a sealed conviction). Sub-Committee members generally believe that Ohio's policy-makers need to rethink the current statutory structure that forever prohibits judicial sealing for most offenses — including any first or second-degree felony, any conviction involving a mandatory prison term, any first-degree misdemeanor or a felony conviction involving an offense of violence, or a conviction where the victim is under the age of eighteen — even if those offenses were committed decades earlier and the applicant has subsequently been a model citizen.

In short, members of the Sub-Committee urge review of the current, strictly bright-line, structure which allows for the sealing of the convictions of only certain offenses on a single timeline. In the view of the Sub-Committee, existing statutes should be replaced with a new statutory scheme which gives primary consideration instead given to a classification-specific timeline structure that also allows for increasing judicial discretion over time to seal distant offenses. Members believe the sealing statutes need to account for the passage of time in determining eligibility, rather than focusing solely upon either the number of convictions or the type of conviction. (For example, an individual who is convicted of 3 counts of theft when the person is 20 years old should be able to petition for a record sealing by the time that person is, say, 50 years old assuming a clean history since that time.) While the specifics of any proposal to broadly expand eligibility for sealing and expungement would need to be hammered out, members consistently expressed the view that having no mechanisms or accommodation for the passage of time was a fundamental flaw in the way the existing statutes are written. An institutional structure and the substantive outlines of bold and ambitious long-term reforms are outlined in **Part II** of this Report below (Reform Recommendations).

(3) Procedural Issues Related to Fair and Effective Statutory Relief

In addition to concerns with the substantive eligibility provisions of the sealing and expungement statutes, Sub-Committee members expressed concern about the procedures that can attend the sealing/expungement process. Some procedural problems stem from the code confusion concerns highlighted above: i.e., because it is difficult for many to understand fully who is eligible for relief, there are concerns about some wasteful applications being filed, and



some possibly meritorious applications not being filed, due to unwieldy statutory provisions. As just one “code confusion” example, some members noted it is difficult under the existing statutes to effectively differentiate between the payment of court costs and applicable fines in order to determine eligibility for statutory relief. Another example concerns the statutory disconnect between the requirements of the public records’ statute to provide an explanation, in writing, of the reason for non-disclosure of a record and the sealing statutes’ requirement that no reference to the sealed cases be made. The public records statute needs to make clear that “sealing” means records are no longer public records. Yet another example concerns confusing statutory provisions which appear to both prohibit all index references to a case and allow for indexing of a case. The Sub-Committee’s clarifying redraft of existing statutes is intended to seek an immediate remedy to many of these problems, and the proposed redraft, with explanatory notes within, is attached to this memorandum as Appendix A.

Critically, Sub-Committee members also expressed concerns about existing procedures that are not merely the result of “code confusion.” For example, it was noted that relevant prosecutors are not always getting notice concerning applications to seal or expunge convictions even though the statutes evince the General Assembly’s intent to ensure prosecutors have an opportunity to be involved in the process. Thus, formal or informal mechanisms are needed to enhance the process of notification and review by the appropriate prosecutor’s office of all petitions to seal/expunge (and the appropriate prosecutor’s office includes notice to the **county** prosecutor’s office of applications to seal amendments, bind-overs or dismissals of felony complaints filed in **municipal** courts). Also, members noted the need to address procedural issues related to “partial sealing” in situations in which one offense may be sealed by statute but another offense may not — for instance, a traffic offense (no sealing) and an accompanying drug possession charge: e.g., there perhaps ought to be a means to allow for the redaction of the official records possessed by law enforcement and prosecutors’ offices rather than an order to seal in order to address the dilemma of how agencies satisfy their requirement to both maintain the unsealed records and seal the sealed records out of the same arrest/stop.

Two of the most fundamental procedural concerns often raised by Sub-Committee members and others concerned **(1)** the basic burdens (and/or lack of awareness) surrounding the entire sealing/expungement process for former offenders, and **(2)** the difficulty of ensuring that records that a court orders to be sealed or expunged actually are shielded from review and access by third parties [note that there are several pending bills that aim to address this problem, albeit in a piecemeal approach: HB 172 and HB 427]. Sub-Committee members suggested various ideas for how these fundamental procedural concerns might be addressed through statutory



reforms. For example, it was suggested that some minor offenses might be subject to automatic sealing or expungement after a certain period of time. And it was suggested that kinds of liability for third-parties (or even government officials) who refuse to respect or implement sealing or expungement orders could help reduce possible access and use of such conviction by third-parties. In the course of these discussions, however, Sub-Committee members recognized that statutory proposals for automatic sealing and/or third-party liability could raise both normative and administrative issues that would impact a number of potential stakeholders. Some of these ideas and concerns are discussed further in **Part II.B.** of this Report below (Long-Term Reform Recommendations).

(4) Relief after Executive Action and Other Remedies.

In *State v. Boykin*, 138 Ohio St. 3d 97, 2013-Ohio-4582, the Ohio Supreme Court ruled that “a gubernatorial pardon does not automatically entitle the recipient to have the record of the pardoned conviction sealed.” Members of the General Assembly and others have, in the wake of this opinion, expressed interest in statutory reform to address the fact that there is currently no provision in the sealing statute for addressing the issue of pardons. The Chair of the Sub-Committee was contacted by a few persons who were involved in an informal working group working toward a possible draft legislative response to this problem. Though these efforts did not produce any tangible results, there seems to be continued wide-spread interest in some form of new legislation or amendments to existing statutes to facilitate the (perhaps automatic) sealing by court order of official records related to any and all convictions subject to a gubernatorial pardon.

In addition, another substantive matter briefly discussed by some members was the operation of the new statutory remedy allowing offenders to petition for a Certificate of Qualification for Employment (CQE). If issued, a CQE “lifts the automatic bar of a collateral sanction, and a decision-maker shall consider on a case-by-case basis whether it is appropriate to grant or deny the issuance or restoration of an occupational license or an employment opportunity.” Many have suggested that the CQE mechanism has potential to aid ex-offenders, but it is unclear whether and how this potential is now being realized and effectuated. Some have reported that the application process is burdensome and should be changed to remove the onus from the applicant to make a sophisticated statement about collateral consequences (in other words, it should be evident that a petitioner is hoping to gain employment and hoping that a CQE will help him do so; requiring a “legalese” explanation in an application creates an



unnecessary pitfall). It has also been reported that newly-created background check requirements can help to create a counterintuitive loop: the background checks reveal long-past criminal histories that jeopardize jobs and create the need for a CQE. The CQE is arguably the weakest tool in the rights restoration scheme; if the rest of the scheme were improved, it may not be necessary to implement the CQE at all.

II. Reform Recommendations

The main and fundamental recommendation emerging from the Sub-Committee’s work is that the existing record sealing/expungement statutory framework should be repealed and replaced with a simplified, intelligible and purposeful statute grounded in evidence based policy and decision making. Helpfully, a number of organizations have proposed “Model Statutes” which could provide a useful framework and template for a whole new statutory approach to record sealing and/or expungement. In substance, many of these models provide mechanisms for automatic sealing of certain minor offenses after a certain period; they also provides broad discretion to judges to seal a wide array of offenses (with different timelines based on the seriousness of the offense) if and whenever a former offender has “earned” a clean record through years of law abiding behavior and through positive contributions to his community. For example, one model statute proposes that any person convicted of a criminal offense may petition for sealing: **a)** for drug offenses arising out of drug addiction, upon completion of the sentence imposed and successful completion of a drug treatment program, **b)** for non-violent crimes, after 5 years have elapsed from the completion of sentence for a felony conviction; after 2 years have elapsed for a misdemeanor conviction, **c)** for violent crimes, after 10 or more years have elapsed from the completion of the sentence for a felony conviction; after 5 years have elapsed from the completion of the sentence for a misdemeanor conviction.

Many members of the Sub-Committee, as well as members of the Sentencing Commission and other interested Ohio stakeholders, have expressed firm support for a bold and ambitious statutory and administrative reform in this arena. Other than expressions of concern about the particulars, there seems to be broad support for reform efforts that would “flip the norm” with respect to criminal records in Ohio — i.e., to have Ohio embrace laws and procedures that could provide, subject only to a few narrowly tailored exceptions, for presumptive or automatic sealing of nearly all criminal records after a certain period of law-abiding behavior. At the same time, Sub-Committee members recognize and are quick to concede that soup-to-nuts reform of existing rights restoration statutes would be an ambitious project and one that implicates an array of substantive, procedural and practical issues that extended far beyond the basic concerns



of criminal sentencing and necessarily implicate the work and responsibilities of many state official and private third-parties.

In light of these realities, a working group of the Sub-Committee took the initiative to develop, as a first immediate step forward, a clarifying redraft of existing statutes intended initially to seek an immediate remedy to the “code confusion” that impacts negatively the operation of existing statutes. As noted before, this proposed redraft, with explanatory notes within, is attached to this memorandum as Appendix A.

In addition to recommending that the full Commission endorse this proposed redraft for publication and promulgation, the Sub-Committee recommends that the Ohio Criminal Sentencing Commission, or perhaps another separate body within the Ohio court system seek to institute and promulgate standard data-recording and data-transmission processes for all courts statewide that receive and act on sealing and expungement applications. As noted above, there is currently no statewide data on the operation of existing statutes and no entities committed to seeking to collect and assess how these statutes are functioning.

MORE ON CREATING A NEW ENTITY???



Appendix A: Summary of Statutory Rewrite drafted by Action Group

Record-Sealing & Expungement Chapter 2953 Proposed Reorganization

The draft does not address topics outside of 2953 such as (1) changing the Criminal Rules to address investigatory work product in a case with co-defendants, (2) changing public records law, (3) changing how pardons affect sealing, (4) changing how indigency is determined in civil cases, and (5) a ‘super seal’ specific to licensing boards. Subsequent work will also focus on executive branch functions like clemency and Certificate for Qualification for Employment (CQE) and a more long range approach to some of the national trends. In the meantime, we thought clarity of current provisions is an important goal.

Section I: Definitions

This section will contain all the definitions from the various sections, including expungement, some of which repeat (duplicative definitions have been removed). Importantly, the definition of “eligible offender” will be removed because it is really a set of eligibility criteria which belongs in Section II: Process.

- I. Definitions [§§ 2953.31, 2953.321 (A), 2953.35 (A), 2953.37 (A)(1)-(4), 2953.38 (A)(1)-(4)]

Section II: The Process for Sealing Convictions, Dismissals, No Bills, and Not Guilty Findings

This section will lay out records eligible for sealing and exceptions to eligibility. Importantly, convictions, dismissals, no bills, and not guilty findings will all be in this section, unlike the current Code organization which separates convictions from all other records but treats them similarly in terms of process. The current definition of “eligible offender” (2953.31) is placed at the beginning of 2953.32 to immediately establish what records are eligible for sealing – this creates some repetition that can be deleted later. Currently, exceptions are located at 2953.36, but by putting them at the beginning of 2953.32, the entire section is easier to comprehend. Lastly, the sealing of multiple charges is currently located at 2953.61, but really should be incorporated in the process of Section II.



- II. The Process of Sealing Convictions, Dismissals, No Bills & Not Guilty Findings [§§ 2953.32, 2953.34, 2953.36, 2953.51, 2953.52, 2953.61]
 - a. Records Eligible for Sealing
 - b. Exceptions to Conviction Sealing
 - c. Multiple Charges
 - d. Process by Petitioner
 - e. Objection by Prosecutor
 - f. Determination of Court
 - g. Costs, Fines, Fees

Section III: Indices and Other Access to Sealed Records

This section will lay out the impact of sealing a criminal record: who no longer has access to that record, who does have access to that record, and how information from the record can or cannot be used. This section also contains what rights and privileges are restored through record-sealing.

- III. Impact of Sealing and Access to Sealed Records [§§ 2953.53, 2953.321, 2953.33, 2953.35, 2953.54, 2953.55, 2953.56]
 - a. Prosecutors' Index
 - b. Other Access to Sealed Records
 - c. Restoration of Rights and Privileges

Section IV: Expungements

Because expungements have a different result than sealing a record and because eligibility for expungements is much more limited than for sealing a record, they are



in a section separate from record-sealing. Alternately, expungements could be incorporated into the other three sections, as relevant.

- IV. Expungements [§§ 2953.37, 2953.38, 2923.14]
 - a. For Certain Firearms Convictions & Relief for Firearm Disability
 - b. For Victims of Human Trafficking
 - c. Impact of Expungement

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