ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO	)	CASE NO. 2012-0808
Appellee,	)	On Appeal from the Court of Appeals, Ninth Appellate District,
vs.	)	Summit County, Ohio
MONTOYA L. BOYKIN	)	Court of Appeals Case No. 25752
Appellant.	)	
CITY OF AKRON	)	
Appellee,	)	On Appeal from the Court of Appeals, Ninth Appellate District,
vs.	)	Summit County, Ohio
MONTOYA L. BOYKIN	)	Court of Appeals Case No. 25845
Appellant.	)	

APPELLEE, CITY OF AKRON'S MOTION IN OPPOSITION TO APPELLANT MONTOYA L. BOYKIN'S MEMORANDUM IN SUPPORT OF JURISDICTION

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APPELLANT'S PROPOSITION OF LAW

PROPOSITION OF LAW: A PARDON CONCLUSIVELY ENTITLES THE RECIPIENT TO HAVE HER PARDON CONVICTIONS SEALED.

EXPLANATION OF WHY THIS CASE DOES NOT PRESENT A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND DOES NOT INVOLVE A SUBSTANTIAL CONSTITUTIONAL QUESTION.

This is not a case of public or great general interest, nor does it present a substantial constitutional question.

The Ninth District Court of Appeals held that despite the limitations of R.C. 2953.32, a trial court possesses the authority to grant a judicial expungement when an individual has received an executive pardon. The court further held that the General Assembly has not provided for the automatic sealing of records upon receipt of an executive pardon. The court properly deferred to the process enacted by the legislature. The appellate court relied upon this Court's holding in *Pepper Pike v. Doe*, 66 Ohio St.3d 374, (1981) that a trial court should not exercise its powers of judicial expungement as a matter of course, but "where such unusual and exceptional circumstances make it appropriate to exercise jurisdiction over the matter [.]."

The Ninth District Court's decision is in accord with both the legislative process and this Court's holding in *Pepper Pike, supra.* Accordingly, this case does not present this Court with a case of public or great general interest, nor does it present a substantial constitutional question.

STATEMENT OF THE CASE AND FACTS

Between 1987 and 2007, Appellant Montoya Boykin was convicted three separate times for misdemeanor theft and one time for Disorderly Conduct in the Akron Municipal Court and was convicted of theft and receiving stolen property in the Summit and Cuyahoga County Common Pleas Court respectively.

In 2007, the Appellant filed an application for pardon for three theft cases and one receiving stolen property case. Presumably by oversight, the Appellant did not include the 1987 theft case in her application to the governor. While the application was under review by the Ohio Parole Authority the Appellant pled to a minor misdemeanor Disorderly Conduct charge.

All six convictions were of record before the Ohio Parole Authority when it made this recommendation:

> Following careful consideration of available information and after due deliberation, the Ohio Parole Board, with eight (8) members participating, recommends to the Honorable Ted Strickland, Governor of the State of Ohio, by a vote of eight (8) to zero (0) that Clemency be granted to Montoya L Boykin.

The Governor's Warrant of Pardon signed November 23, 2009 states in pertinent part as follows:

> Montoya Boykin was convicted of three counts of the crime of Theft and one count of Receiving Stolen Property and was sentenced by the Cuyahoga County Common Pleas Court, Akron Municipal Court, and the Summit County Common Pleas Court.
> ... I do hereby direct that the conviction of Montoya Boykin for the crimes of Theft and Receiving Stolen Property be pardoned.

While the Parole Board's recommendation arguably could have included all of the Appellant's convictions in its recommendation, the Governor's Warrant did not and granted pardon for four convictions without specifying which of the convictions were included or excluded.

Appellant appealed the trial court's Order denying expungement and the Ninth District Court of Appeals affirmed the trial court's decision.

ARGUMENT

Appellee contends that the effect of a pardon very simply relieves the person from the penalties arising from the conviction. It does not, in and of itself, alter the fact that the defendant did commit the acts underlying the conviction nor does it carry with it an entitlement to a sealing of the records of the conviction.

The historical basis for an executive pardon comes from the power of English kings to mitigate harsh criminal sentences in the early years in that nation. In *U.S. v. Wilson,* (1833) 32 U.S. 150, Chief Justice Marshall acknowledged this origin and expressly adopted the English common law's "principles respecting the operation and effect of a pardon". *U.S. v. Wilson, id* at p. 160. C.J. Marshall concisely defined a pardon as follows:

> A pardon is an act of grace, proceeding from the power intrusted [sic] with the execution of the laws, which exempts the individual, on whom it is bestowed, from the punishment the law inflicts for a crime he has committed. It is the private, though official, act of the executive magistrate, delivered to the individual for whose benefit it is intended, and not communicated officially to the court. *U.S.* v. *Wilson, id* at p. 160-1.

After the United States Civil War, the U.S. Supreme Court had occasion to address the effect of a pardon granted to those who fought for the Confederacy and struck down a statutory requirement that attorneys swear an oath that they had never borne arms against the United States. *Exparte Garland* (1866) 71 U.S. 333. In *Garland,* the Court stated an expansive view of a pardon -

> .. .it releases the punishment and 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. *Exparte Garland, id* at p. 380.

This flowery portrayal of a pardon may have helped with reconciliation between the North and the South, but the description was dictum and not a statement of law in the case. This dictum

was rejected later by the Supreme Court in *Burdick* v. *United States* (1915) 236 U.S. 79. The Court reaffirmed Chief Justice Marshall's decision regarding the effect of a pardon when it determined that a pardon does no more than remit a defendant's punishment. The Third Circuit Court of Appeals in *U.S.* v. *Noonan* (1990, 3rd Cir.) 906 F.2d 952 summarized the history this way:

> By 1915, ... the [Supreme] Court made clear that it was not accepting the *Garland* dictum that a pardon "blots out of existence the guilt." In *Burdick* v. *United States,* 236 U.S. 79, (1915), the Court reaffirmed its reasoning in *United States* v. *Wilson,* 32 U.S. 150, (1833), and concluded that there is a "confession of guilt implied in the acceptance of a pardon." *Burdick,* 236 U.S. at 91. The Court explained that "[a pardon] carries an imputation of guilt; acceptance a confession of it." *Id.* at 94, 35 S.Ct. at 270. *U.S.* v. *Noonan,* id at p. 958.

The Third Circuit summarized the effect of an executive pardon.

> The pardon removes all legal punishment for the offense. Therefore if the mere conviction involves certain disqualifications which would not follow from the commission of the crime without conviction, the pardon removes such disqualifications. On the other hand, 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.
>
> Thus, the fact of conviction after a pardon cannot be taken into account in subsequent proceedings. However, the fact of the commission of the crime may be considered. Therefore, although the effects of the commission of the crime may be considered, the effects of the conviction are all but wiped out.
> *U.S. v. Noonan, id* at p. 958-9

The State of Ohio's provision for an executive pardon is found in Article III, Section 11 of the Ohio Constitution. The Constitution does not define the term nor set forth any particular effects of a pardon. Appellee argues that the meaning and effect of a pardon in Ohio follows that of the executive pardon as established in the United States Constitution as the concept and practice is derived from the same common law precedent from England.

The Ohio General Assembly's understanding of the effect of a pardon is consistent with the effect prescribed by *U.S. Wilson, supra* and *Burdick v. U.S., supra* as is evinced in O.R.C. § 2967.01:

> "Pardon" means the remission of penalty by the governor in accordance with the power vested in the governor by the constitution.
> O.R.C. § 2967.01

This statutory definition clearly and succinctly limits the effect of a pardon to "remission of penalty."

Pardon is also addressed by Ohio's legislature in the context of voting, serving as a juror and holding public office. In these regards the General Assembly expressly provides that a person who has received a pardon may vote, serve as a juror and hold public office. O.R.C. § 2961.06. Thus the General Assembly has consciously expanded the effect of a pardon, but has not elected to provide for a process for expunction of records following a pardon.

Regarding the sealing of records, the legislature has provided for sealing for first time offenders (O.R.C. § 2953.31, et seq.) and for persons who are acquitted or whose charges are dismissed (O.R.C.§ 2953.51 et seq.). There is no other legislative grant of authority for sealing records in criminal cases.

There is nothing in the Ohio Constitution or in the Ohio Revised Code that hints that a pardon provides for a re-write of history or the sealing of records of conviction.

The cases relied on by the Appellant to suggest that Ohio follows the proposition in *Ex parte Garland, supra* that an executive pardon negates the fact of conviction are not binding on this Court.

Appellant cites *State* v. *Cope* (1996), 111 Ohio App.3d 309, a decision from the First District that upheld the trial court sealing of a felony conviction based on the governor's warrant of pardon. The First District cites *State ex rel. Gordon* v. *Zangerle* (1940), 136 Ohio St. 371 as

"the definitive pronouncement by the Ohio Supreme Court" on the issue. *State* v. *Cope, id* at Fn. #4. However, the Supreme Court's comments on pardon in *Zangerle* were dicta and any statement regarding the effect of a pardon was gratuitous. In *Zangerle,* the petitioner sought an injunction to prevent the Cuyahoga County Treasurer from paying monies for the support of the Common Pleas Court Probation Department on a theory that the governor has exclusive authority to issue pardons. The Supreme Court held that the system of probation established in 1925 in Cuyahoga County was authorized by statute and not constitutionally infirm. The description of the governor's constitutional power to grant a pardon was tangentially relevant to the discussion, but the specific effects of a governor's pardon was not a question before the court.

The Appellant also relies on *Knapp v. Thomas* (1883) 39 Ohio St. 377 for support and *Knapp* is cited in the *Zangerle* decision in its description of a gubernatorial pardon. Again, the Supreme Court's comments on the effect of pardon are dicta. The issue in *Knapp* is the ability of the governor to revoke a pardon once granted in the context of a petition for a writ of habeas corpus. Governor Foster gave Mr. Knapp a pardon based on information that the prisoner was gravely ill and in imminent danger of death. Learning later that the diagnosis was fraudulently obtained, the Governor sent the prison warden an instrument under seal declaring the pardon null and void causing the warden to re-incarcerate Mr. Knapp without notice, trial or hearing. The Supreme Court found "a want of power in this court, under the present legislation to enter upon the proposed inquiry as to the validity of Knapp's pardon." *Knapp* v. *Thomas, id* at p. 394.

Note that the dictum in *Knapp* that a pardon obliterates the crime cites the dictum from *Ex. parte Garland, supra* which was negated in 1915 by *Burdick* v. *United States, supra.* Thus the conclusion stated in *State* v. *Cope* that the Ohio Supreme Court has definitively determined

that a pardon erases the crime itself relies on dictum citing dictum citing dictum -a house of cards that collapses after a review of the holdings in the cited Ohio and the United States Supreme cases.

Two years after Knapp, this Court decided *State ex rel Any. Gen. V. Peters* (1885), 43 Ohio St. 629, also cited by the Appellant. The *Peters* decision, similarly to *Zangerle,* determined that the State's creation of a system for parole is constitutional. The *Peters* opinion quotes the *U.S. v. Wilson, supra* definition of pardon as only canceling punishment. While it cites *Ex rel Garland, supra,* it does not repeat the dictum that a pardon erases the crime itself. Another case cited by Defendant is *St. ex rel Maurer v. Sheward* (1994, Sup. Ct.), 1994-Ohio-496, which revoked two pardons granted because the applicant failed to properly apply to the Adult Parole Board. *Sheward* quotes the definition from the *Peters* case and again omits the gratuitous language about the crime never having occurred. Regardless, the description of the effect of a pardon in both *Peters* and *Sheward* are dicta, as the effect of a pardon was not an issue in either case.

Several other states have considered the effect of pardons and have concluded that an executive pardon does not change history or encompass a sealing of records.

In 1899 the New York Court of Appeals determined that the effect of a pardon simply cancels any penalties imposed by the Court. *Roberts* v. *State* (1899, NY Ct of App), 14 E.H. Smith 217, 54 NE 678.

> We think the effect of a pardon is to relieve the offender of all unenforced penalties annexed to the conviction, but what the party convicted has already endured or paid, the pardon does not restore. When it takes effect, it puts an end to any further infliction of punishment, but has no operation upon the portion of the sentence already executed. A pardon proceeds not upon the theory of innocence, but implies guilt. If there was no guilt, theoretically at least, there would be no basis for pardon. It is granted not as a matter of right, but of grace. In the language of another: 'A party is acquitted on the ground of innocence; he is pardoned through favor. ... The pardon in this case shows upon its face that it was granted as an act of mercy, and not as one of justice. It

> was upon the representation that the appellant was a fit subject for mercy that it was obtained, and not upon the ground that the judgment was unjust or invalid. If the judgment was erroneous, the remedy was by appeal or by application to set it aside, and not by pardon.
> *Roberts* v. *State, id,* at p 221-2.

In 1942 the Supreme Court of the State of Washington also decided that a pardon of a person does not obliterate the history of the offense and held that a person's sentence for a conviction occurring afterwards must take into account the earlier conviction for purpose of sentencing in the new offense. *State* v. *Culp* (1942, Washington Supreme Court) 27 P.2d 257.

> The pardon in this case merely restored the defendant to his civil rights. If it had been granted before his term of imprisonment had been served, it would also have relieved the defendant of that. But it did not obliterate the record of his conviction or blot out the fact that he had been convicted.
> *State* v. *Culp, id* at p. 259.

In more recent times, six states have considered the specific issue of the effect of a pardon on sealing a conviction and determined that a governor's pardon does not include an entitlement to sealing of records.

In 1975 John Glisson asked an Illinois court to order that his fingerprint card, photographs and identifying records be returned to him and the court records sealed after receiving a governor's pardon for his conviction for contributing to the delinquency of a minor. *People v. Glisson* (1978, 111. Sup. Ct.), 372 N.E.2d 669. Illinois statutes provided for sealing records for persons who were not convicted following arrest. The Illinois Supreme Court held that Mr. Glisson was not entitled to a sealing order, as "the effects of a pardon are not unlimited". *People v. Glisson, id* at p. 670. That Court noted that the state's legislature had acted to restore some rights to the beneficiaries, but had not acted to authorize the expunction of records. The same is true in Ohio. O.R.C. § 2961.01 provides that a pardon restores a person's right to vote, serve as a jury and hold office, but no statute provides for sealing records.

In 1978, Mr. Robert Vickey was granted a full pardon by Massachusetts' governor for his conviction of making a false bomb report. *Commonwealth* v. *Vickey* (1980, Mass. Sup. Ct.), 412 N.E.2d 877. The Massachusetts Supreme Court determined that Mr. Vickey was not entitled to a sealing and affirmed the trial court's decision that "a pardon is not analogous to a dismissal" and so did not qualify for sealing under the state statute permitting sealing of dismissed cases. *Commonwealth v. Vickey, id* at p.879. Mr. Vickey further argued that the Massachusetts courts had "inherent or ancillary powers" to order a sealing in the absence of a legislative grant of authority. The Massachusetts Supreme Court declined to exercise such authority noting that while a pardon may remit all penal consequences of a criminal conviction, it cannot obliterate the acts which constituted the crime. The Court recognized the need of the state to have the information of conviction available for other purposes, where the conviction may affect matters such as licensing. The Court declined to exercise inherent judicial authority and concluded as follows:

> Rather, the statutory scheme of parole and pardon, as well as the legislative definition of rehabilitation which entitles a convicted person to have his record sealed, are spelled out by the Legislature in terms which require no judicial enlargement.
> *Commonwealth* v. *Vickey, id,* at p. 883.

In 2000, Jonathan Blanchard was pardoned for sale of cocaine in Tennessee after serving seven years in prison and completing his PhD in chemistry and earning a JD. *State* v. *Blanchard* (2002, Tenn. Sup. Ct.), 100 S.W.3d 226. Mr. Blanchard argued first that the court had discretion to seal, as there was no express prohibition. The Tennessee Supreme Court disagreed finding that "the legislature's exclusion of the trial court's discretion results in a finding that the court had no such discretion." *State* v. *Blanchard, id* at p. 229. Secondly, Mr. Blanchard argued that a pardon is the equivalent of a successful appeal through the judiciary. The Supreme Court again disagreed and held that a pardon is not the same as an acquittal and does not erase the guilt

but is a matter of a favor to the guilty, "granted not of right but of grace." *State* v. *Blanchard, id* at p. 229, [Citation omitted.]

Courts in Delaware, Florida and Missouri have also considered the question of sealing records based on a governor's pardon and are in accord with the position that a full pardon does not entail a sealing of the defendant's record. *State* v. *Skinner* (1993, Del. Sup Ct.), 632 A.2d 82; *R.J.L* v. *State* (2004, Fla. Sup. Ct.), 887 So.2d 1268; *State* v. *Bachman* (1984, Mo. App. W.D.) 675S.W.2d41.

While not on the direct issue of sealing records, courts in California, Oklahoma and New Jersey are in accord with the federal view that a pardon does not change history and erase the crime. *In re Lavine* (1935, Cal. Sup. Ct.), 2 Cal.2d 324; *Stone* v. *Oklahoma Real Estate Comm.* (1962, Okla. Sup. Ct.), 369 P.2d 642; *Hozer* v. *State Police & Firemen's Pension Fund* (1967, N.J. Super. App. Div.), 230 A.2d 508.

There are no Ohio Supreme Court cases that have directly addressed the issue of the effect of a pardon related to sealing of records. Appellee argues that the First District's decision in *State* v. *Cope, supra* incorrectly relied on dicta. Upon a full reading of the cases discussed above, Appellee urges this Court to follow the decision of Chief Justice Marshall who gave the earliest meaning to an executive pardon in *U.S. v. Wilson, supra.*

CONCLUSION

A pardon is a forgiveness of a conviction granted to a person and if given in full has the effect of remitting all penalties not already executed. It is neither a request nor an order to the courts to order a sealing of records. The legislature may determine any additional benefits to be derived from a pardon as it has done in regards to voting, jury service and holding office. The

Ninth District Court of Appeals correctly found that the legislature has not provided for an automatic expungement of a conviction following an executive pardon.

Respectfully submitted,

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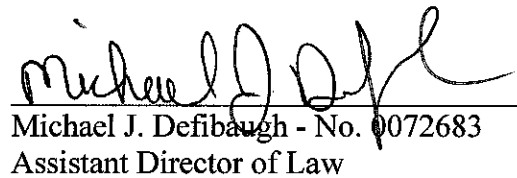
Director of Law



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CERTIFICATE OF SERVICE

This is to certify that a true and accurate copy of the foregoing Appellee's Motion in Opposition to Appellant's Memorandum in Support of Jurisdiction was sent this 6TH day of June, 2012 to:

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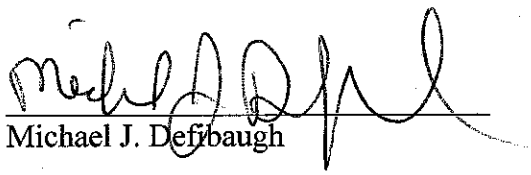

Michael J. Defibaugh

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	

STATE OF OHIO Appellee v. MONTOYA L. BOYKIN Appellant	C.A. No. 25752 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO CASE No. CR 92 03 0635
CITY OF AKRON Appellee v. MONTOYA L. BOYKIN Appellant	C.A. No. 25845 APPEAL FROM JUDGMENT ENTERED IN THE AKRON MUNICIPAL COURT COUNTY OF SUMMIT, OHIO CASE Nos. 87 CRB 05482 91 CRB 07522 96 CRB 14102

DECISION AND JOURNAL ENTRY

Dated: March 30, 2012

CARR, Judge.

{¶1} Appellant, Montoya Boykin, appeals orders of the Summit County Court of Common Pleas and Akron Municipal Court that denied her motions to seal the record of her convictions. We affirm.

I.

{¶2} In 1992, Boykin pled guilty to one count of receiving stolen property in a case originating in the Summit County Court of Common Pleas. She moved to seal her record in

APPENDIX A

1996 and 2000, and the trial court denied both motions. In 1996, she pled no contest to and was convicted of two counts of theft by the Akron Municipal Court. In 2009, Governor Ted Strickland pardoned Boykin for these three offenses. Boykin moved both courts to seal her record, arguing that the trial courts were required to exercise their inherent judicial authority to do so by virtue of the pardon. Both motions were denied, and Boykin appealed. This Court consolidated the appeals for oral argument and decision.

II.

ASSIGNMENT OF ERROR

THE TRIAL COURT ERRED BY DENYING APPELLANT BOYKIN'S MOTION TO SEAL HER PARDONED CONVICTIONS.

{¶3} Boykin's assignment of error is that the trial courts erred by denying her motions to seal her records. Specifically, she has argued that the existence of the executive pardon required the trial court to do so as an exercise of its inherent judicial powers.

JUDICIAL EXPUNGEMENT

{¶4} Underlying Ms. Boykin's argument is the assumption that a trial court has the inherent authority to seal criminal records when the defendant has been pardoned, even when the defendant is not eligible under the relevant statute. This is not, however, a foregone conclusion, nor is it an insignificant issue in this case. Boykin concedes that she is not eligible to have her records sealed under the relevant statutes. If the trial courts did not have the authority to seal her records from some other source, then our inquiry need go no further.

{¶5} A first offender may move to have the record of conviction of eligible offenses sealed under R.C. 2953.32. *See also* R.C. 2953.36 (describing the convictions that preclude sealing). R.C. 2953.52 also permits the official record of a criminal case to be sealed if the defendant was acquitted, the case was dismissed, or a grand jury returned a no bill. Apart from

these statutes, a record of conviction may be sealed only "where such unusual and exceptional circumstances make it appropriate to exercise jurisdiction over the matter[.]" *Pepper Pike v. Doe*, 66 Ohio St.2d 374 (1981), paragraph two of the syllabus. In *Pepper Pike*, the Ohio Supreme Court considered whether the case record of a defendant could be sealed when the charges against her were dismissed with prejudice before trial. *Id.* at paragraph one of the syllabus. Because the predecessor of the current statutes only provided for expungement of a conviction, the Court considered whether trial courts had authority to grant expungement without statutory authorization. *Id.* at 377. The Court concluded that trial courts have the inherent authority to expunge records apart from the statutes when justified by "unusual and exceptional circumstances" founded on constitutional guarantees of the right to privacy. *Id.* The Court emphasized, however, that this judicial power should not be exercised as a matter of course:

> Again, this is the exceptional case, and should not be construed to be a carte blanche for every defendant acquitted of criminal charges in Ohio courts. 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., citing *Chase v. King*, 267 Pa.Super. 498 (1979). The Court also concluded that exercise of this discretionary power should, for purposes of consistency, not obliterate the fact of the criminal record, but that a record so expunged "will remain an historical event," available for inspection and use as provided in the expungement statute then in place. *Id.* at 378.

{¶6} *Pepper Pike* has not been broadly applied. Before the enactment of R.C. 2953.52(A), for example, this Court held that trial courts did not have the authority to expunge the records of individuals who had been acquitted of the charges against them. *See State v. Stadler*, 14 Ohio App.3d 10, 11 (9th Dist.1983). Other courts concluded that judicial expungement was not available to defendants who had been convicted of a crime but were

ineligible for statutory expungement. *See State v. Netter*, 64 Ohio App.3d 322, 325-326 (4th Dist.1989); *State v. Weber*, 19 Ohio App.3d 214, 217-218 (1st Dist.1984); *State v. Moore*, 31 Ohio App.3d 225, 227 (8th Dist.1986). *See also State v. Spicer*, 1st Dist. No. C-040637, 040638, 2005-Ohio-4302, ¶ 12 ("Prior to the passage of R.C. 2953.52, expungement was an equitable remedy reserved for extraordinary cases in which the defendant was not only acquitted, but also factually exonerated."). In other words, courts concluded that "[w]here there has been a conviction, only statutory expungement is available." *State v. Davidson*, 10th Dist. No. 02AP-665, 2003-Ohio-1448, ¶ 15.

{¶7} Nonetheless, "the judicial power to grant an expungement request still exists, * * * [but] 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." *State v. Chiaverini*, 6th Dist. No. L-00-1306, 2001 WL 256104, *2 (Mar. 16, 2001). Despite the enactment of R.C. 2953.32 and 2953.52, exercise of judicial authority to expunge records is warranted in exceptional cases:

> [w]hile it may be argued that it is inappropriate for courts to supersede legislative judgment by granting judicial expungement where the legislature has specifically removed statutory expungement as a remedy, it is in such situations where the judicial expungement remedy may well be most appropriate. Judicial expungement is a *constitutional* remedy, and it is elementary that although the legislature has freedom to provide greater protections, it has no authority to place limits on rights guaranteed under the Constitution.

(Emphasis in original.) *In re Application to Seal Record of No Bill*, 131 Ohio App.3d 399, 403 (3d Dist.1999). It therefore stands to reason that, the limitations of R.C. 2953.32 notwithstanding, a trial court has the authority to grant judicial expungement in situations in which an executive pardon is at issue.

EFFECT OF PARDON

{¶8} Given that trial courts have the authority to grant judicial expungement when a pardon is at issue, the question remains whether the nature of the executive pardon itself requires them to do so in every case. We conclude that it does not.

{¶9} The Ohio Constitution gives the governor "power, after conviction, to grant reprieves, commutations, and pardons * * * upon such conditions as the governor may think proper[.]" Ohio Constitution, Article III, Section 11. A "pardon" is defined as "the remission of penalty by the governor in accordance with the power vested in the governor by the constitution." R.C. 2967.01(B). It "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). The recipient of a pardon is, therefore, relieved of the disabilities imposed by R.C. 2961.01(A)(1) and is no longer "incompetent to be an elector or juror or to hold an office of honor, trust, or profit." R.C. 2961.01(A)(2).

{¶10} Noting that a pardon restores the civil rights of the recipient, the Ohio Supreme Court has described the effect of pardons:

> "In contemplation of law it so far blots out the offense, that afterwards it cannot be imputed to him to prevent the assertion of his legal rights. It gives him a new credit and capacity, and rehabilitates him to that extent in his former position", and hence its effect "is to make the offender a new man." It is, in effect, a reversal of the judgment, a verdict of acquittal, and a judgment of discharge thereon, to this extent, that there is a complete estoppel of record against further punishment pursuant to such conviction.

(Internal citations omitted.) *Knapp v. Thomas*, 39 Ohio St. 377, 381 (1883). Context is key to understanding the Court's explanation in *Knapp*, which Boykin cites in support of her assignment of error. A careful reading of the Court's language, however, leads to the conclusion that a pardoned individual is "a new man" insofar as the restoration of competency and the

further imposition of punishment are concerned. *See id.* A pardon, so understood, does not wipe away all traces of the criminal case.

{¶11} Current laws support this conclusion. For example, R.C. 2961.01(A)(2) provides:

> [t]he full pardon of a person who under division (A)(1) of this section is incompetent to be an elector or juror or to hold an office of honor, trust, or profit restores the rights and privileges so forfeited under division (A)(1) of this section, *but a pardon shall not release the person from the costs of a conviction in this state, unless so specified.*

(Emphasis added.) R.C. 2961.01 does not provide that a pardon restores the recipient's competency under R.C. 2961.01(B) to "circulate or serve as a witness for the signing of any declaration of candidacy and petition, voter registration application, or nominating, initiative, referendum, or recall petition," although such a person may be restored by operation of R.C. 2967.16(C). 2010 Ohio Atty.Gen.Ops. No. 2010-002, 2010 WL 292684, *2. A pardon does not automatically remove the recipient's disability with respect to carrying a concealed weapon. *See* R.C. 2923.14(C) (requiring an individual to petition the court of common pleas for the removal of the disability, reciting "any partial or conditional pardon granted" as well as "facts showing the applicant to be a fit subject for relief[.]").

{¶12} Consistent with the definition of a pardon as "remission of penalty," as set forth in R.C. 2967.01(C), it is also apparent that an executive pardon does not eradicate the fact of the underlying conduct. Despite a pardon, for example, the character of an offense may be relevant for purposes of employment. *See State ex rel. Atty. Gen. v. Hawkins*, 44 Ohio St. 98, 117 (1886) ("Whatever 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."). An attorney who has been indefinitely suspended from practicing law is not automatically entitled to reinstatement when the underlying

offense has been pardoned. *See In re Bustamante*, 100 Ohio St.3d 39, 2003-Ohio-4828, ¶ 3-5 (requiring an attorney to complete the prerequisites for reinstatement that had been set by the Supreme Court of Ohio notwithstanding a presidential pardon.). A pardoned offense may be considered in subsequent prosecutions. *Carlesi v. New York*, 233 U.S. 51, 59 (1914). Although evidence of a conviction is not generally admissible in Ohio to impeach a witness, it may be admitted if the witness subsequently committed certain crimes. Evid.R. 609(C).

{¶13} If it is to be maintained that "in the eye of the law, [a pardoned] offender is as innocent as if he had never committed the offense," these examples of collateral consequences that remain after a pardon lead us to agree with one commentator, who has observed that in that case, "the eyesight of the law is very bad." Williston, *Does a Pardon Blot Out Guilt?*, 28 Harv.L.Rev. 647, 648 (1918), quoting *Ex Parte Garland*, 71 U.S. 333 (1866). We conclude, therefore, that a pardon does not conclusively entitle the recipient to have the record sealed. This conclusion is in accord with the majority of courts that have considered the question. *See U.S. v. Noonan*, 906 F.2d 952, 960 (3d Cir.1990); *R.J.L. v. State*, 887 So.2d 1268 (Fla.2004); *State v. Blanchard*, 100 S.W.3d 226, 228 (Tenn.App.2002); *State v. Aguirre*, 73 Wash.App. 682, 690 (Wash.App.1994); *State v. Skinner*, 632 A.2d 82 (Del.1993); *State v. Bachman*, 675 S.W.2d 41, 52 (Mo.App.1984); *Commonwealth v. Vickey*, 381 Mass. 762, 771 (Mass.1980); *People v. Glisson*, 69 Ill.2d 502, 506 (Ill.1978).

{¶14} We recognize that a minority of courts that have addressed the issue disagree. *See State v. Cope*, 111 Ohio App.3d 309 (1st Dist.1996); *State v. Bergman*, 558 N.E.2d 1111, 1114 (Ind.App.1990); *Commonwealth v. C.S.*, 517 Pa. 89, 92 (Pa.1987). Nonetheless, we conclude that this result is correct. In Ohio, the legislature has not provided for sealing records of a

pardoned individual by statute. Some other jurisdictions have done so. *See R.J.L.*, 887 So.2d at 1279 fn4. In this respect, we must defer to the legislative process.

CONCLUSION

{¶15} A pardon under Article III, Section 11, of the Ohio Constitution does not automatically entitle the recipient of the pardon to have the record of conviction sealed. A trial court may exercise its authority to order judicial expungement but, as the Ohio Supreme Court concluded in *Pepper Pike*, this authority should not be exercised as a matter of course, but "where such unusual and exceptional circumstances make it appropriate to exercise jurisdiction over the matter[.]" *Pepper Pike*, 66 Ohio St.2d 374 at paragraph two of the syllabus. In this case, Boykin's motions to seal her record relied exclusively on her position that she was entitled to relief by virtue of the pardon, and the record on appeal does not contain evidence beyond that argument. Consequently, consideration of whether her motions should have been granted under the analysis set forth above is premature, and this Court takes no position in that respect.

III.

{¶16} Boykin's assignment of error is overruled, and the judgments of the Summit County Court of Common Pleas and the Akron Municipal Court are affirmed.

Judgments affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas and Akron Municipal Court, County of Summit, State of Ohio, to carry this judgment into

execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(C). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

DONNA J. CARR
FOR THE COURT

DICKINSON, J.
CONCURS.

BELFANCE, P. J.
DISSENTING.

{¶17} I respectfully dissent. The question presented to this Court is whether a person who has received a full and unconditional pardon for certain offenses is entitled to have the public records of those convictions sealed.

{¶18} As an initial matter, and as discussed by majority, I agree that the trial court has inherent authority to order the sealing. *See Pepper Pike v. Doe*, 66 Ohio St.2d 374, 377-378 (1981).

{¶19} Even prior to the existence of statutory sealing provisions, the Supreme Court of Ohio discussed the effect and breadth of an unconditional pardon. It has stated that:

> a pardon reaches both the punishment prescribed for the offense and the guilt of the offender. It obliterates, in legal contemplation, the offense itself. In contemplation of law it so far blots out the offense, that afterwards it cannot be imputed to him to prevent the assertion of his legal rights. It gives him a new credit and capacity, and rehabilitates him to that extent in his former position and hence its effect is to make the offender a new man. It is, in effect, a reversal of the judgment, a verdict of acquittal, and a judgment of discharge thereon, to this extent, that there is a complete estoppel of record against further punishment pursuant to such conviction.

(Internal quotations and citations omitted.) *Knapp v. Thomas*, 39 Ohio St. 377, 381 (1883). The legal effect of a pardon is grounded upon the Supreme Court's recognition of the executive's constitutional authority to make a pardon. *See* Ohio Constitution, Article III, Section 11. The Ohio Supreme Court has more recently reiterated the principle that a full pardon has the effect of removing both the punishment and guilt of the offender. In *State ex rel. Gordon v. Zangerle*, 136 Ohio St. 371 (1940), it stated "[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." *Id.* at 376. If a full pardon leaves a person from a legal standpoint as if the crime had never been committed, and obliterates the offense itself, it is difficult to envision how a public document that contains the imposition of guilt could appropriately remain in the public domain.

{¶20} In examining whether sealing is appropriate subsequent to a full and unconditional pardon, I find the reasoning and analysis of the First District's *State v. Cope*, 111 Ohio App.3d 309 (1st Dist.1996), to be very logical and persuasive. As noted in *Cope*, R.C. 2967.04(B) provides that "[a]n unconditional pardon relieves the person to whom it is granted of *all* disabilities arising out of the conviction or convictions from which it is granted." (Emphasis added.) *See Cope* at 311. While the majority concludes that a pardon relieves a person of only those disabilities imposed by R.C. 2961.01(A)(1), R.C. 2967.04(B) does not reference R.C. 2961.01(A)(1), nor does it include limiting language. I would interpret the word "all" to mean

just that, *all disabilities*. I think any reasonable person would agree that having a conviction be part of public record for all to see is a disability. Moreover, I do not find the majority's recitation of actions that persons granted pardons must take to restore themselves to full competency to be a compelling argument in support of its position. The fact that someone has to take action to receive the full benefits of the pardon does not necessitate the conclusion that the person is not entitled to those benefits. Thus, in my view, it is logical that sealing the public records of a conviction would go hand in hand with a full and unconditional pardon. As the Court in *Cope* stated, "[a] pardon without expungement is not a pardon." (Internal quotations and citation omitted.) *Cope* at 312. Furthermore, even though a public court record might be sealed, it does not mean that is destroyed. *See, e.g., Pepper Pike,* 66 Ohio St.2d at 378. ("[E]xpungement does not literally obliterate the criminal record * * * [as] [t]he sealed record of the case may be inspected by any law enforcement authority or prosecutor to aid in the decision to file charges on any subsequent offenses involving the defendant.").

{¶21} Accordingly, the only way to give full effect to the broad language of Supreme Court precedent and the statute, and thus the pardon itself, is to order the sealing of the records of a person who has received a full and unconditional pardon. Thus, I respectfully dissent.

APPEARANCES:

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