

A Fresh Start: Incorporating Expungement and Other Second-Chance Remedies into Specialized Docket Programs

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Introduction

The Ohio Justice & Policy Center works to create fair, intelligent, redemptive criminal justice systems.

We provide direct legal assistance to clients, advocate for better policies and laws, and conduct community education – like this session!

This includes our “Second Chance” work.

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Agenda for today

**Understand how criminal records
create barriers to successful
community integration**

Understand tools to reduce and
remove these barriers

Understand how special dockets can
successfully incorporate these tools to
give participants a fresh start

Q&A



Criminal Records Create Barriers

“Criminal” background checks can show...

- **Convictions for felonies, misdemeanors, and minor misdemeanors**
- **Non-convictions: not guilty, dismissed, ignored**
- **Traffic**
- **Sealed offenses (depends on request)**
- **Juvenile offenses (rare)**
- **Civil/non-criminal citations and violations**

It depends on the type of background check!

Criminal Records Create Barriers

There are different types of background checks

- Police check, county check
- Court clerk website
- Private background check companies
- BCII & FBI -- the “fingerprint” check

County – State – Regional – National



Criminal Records Create Barriers

Who wants to see a criminal record?

Employers, Licensing Boards,
Military, Colleges, Landlords,
Schools, Training Programs,
Volunteer Programs, Family
Services, Neighbors, etc.



Records create barriers to recovery, employment, housing, education, family reunification, civic engagement, recreation, and other aspects of successful community integration.

Criminal Records Create Barriers

An estimated **1 in 11** adult Ohioans has a felony conviction.

1 in 6 has a felony or misdemeanor conviction.

1 in 3 has a criminal record of some kind.

90% of employers conduct background checks

Presence of a record lowers chances of a call back by **50%**

Formerly incarcerated people are nearly **5x** more likely to be unemployed
– and if employed, make **40%** less



Barrier: Negative perception

Criminal Records Create Barriers

...which has far-reaching consequences, especially for low-income communities and communities of color.



Barrier: Collateral Consequences in the Law

- ▶ Federal and state laws and regulations. Limit opportunities due to criminal record. Do not include imprisonment, fine, supervision, or court costs. Include mandatory and discretionary consequences for **employment, housing, education, family, and civic-participation**.
- ▶ Over **1000 barriers in Ohio law**, including 700+ related to employment. Roughly ¼ of Ohio jobs (~1.3 million jobs) are restricted by a collateral sanction.

This is where sealed records can come up, too!

Criminal Records Create Barriers

Even juvenile records? Yes.

Can they show up on background checks?

Yes, some offenses show up on BCII and FBI (fingerprint) checks and can sometimes be shared with schools. Jobs in military, hospitals, schools, daycares, security, and others can be impacted. Also, juvenile records are available to the police, courts and prosecutors, sometimes. Sealed juvenile records may still show up on BCI/FBI checks for jobs with vulnerable populations.

Can they trigger collateral sanctions?

Yes. Records can sometimes impede some jobs. Records should not influence housing, but sometimes do. Sometimes, records can impact school and continuing education. Military too. Colleges ask. There should be VERY LIMITED access to juvenile records.



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Terms

	Definition	Context
Expungement	An expunged record is no longer retrievable – like a file being destroyed 	<ul style="list-style-type: none">Limited to juvenile records, some weapons charges, and records related to being a victim of human trafficking
Record sealing	A sealed record is no longer publicly available – like a file being locked away 	<ul style="list-style-type: none">Can be viewed by some individuals for specific purposes¹May appear on BCI/FBI background checks (e.g., healthcare, education, employment)Restores “rights and privileges”;² “proceedings ... shall be considered not to have occurred” for <u>most</u> purposes³

People may use the terms interchangeably, but it is important to understand the differences.

¹ See R.C. 2953.32(D).

² R.C. 2953.33(A).

³ R.C. 2953.32(C)(2); see R.C. 2953.52(B)(4).



Adult Safe Harbor Expungement



Adult Safe Harbor Expungement

Expungement is the **strongest tool for removing criminal-records-based barriers.**

In 2012, Ohio's Safe Harbor Law opened a new expungement process to reverse the damage created by arresting human-trafficking victims who were compelled to commit criminal acts.

Adult Safe Harbor Expungement

ORC 2953.38; 2953.521

**Applicant is
a victim of
human
trafficking.**



**Offenses
result from
trafficking.**

Cannot be
conviction for
agg murder,
murder, rape.



**Applicant's
interests are
not outweighed
by legit. needs
of government**



**To expunge a conviction record: applicant must have been convicted
of **prostitution, soliciting, or loitering to solicit****

Adult Safe Harbor Expungement

ORC 2953.38; 2953.521

1. Filing applications: in the **sentencing court** for each offense; **any time**; add documentation and evidence; a **\$50 filing fee** for convictions, that should be **waived** if indigent. (R.C. 2953.38)
2. The court may deny the application if it finds that the application fails to assert grounds on which relief may be granted. (R.C. 2953.38 (C))

Adult Safe Harbor Expungement

ORC 2953.38

3. If the court does not deny the application, it must set a **hearing** date.

(R.C. 2953.38 (D))

- Court may direct a probation officer to make **inquiries/reports**.
- Court considers the prosecutor's **objections** (if any are filed prior to hearing) and considers Safe Harbor Expungement requirements.
- Courts consider additional factors for **1st and 2nd degree felonies**. (R.C. 2953.38 (E)(2)(a-f))

4. After expungement, records related to the charge must be **destroyed**, deleted, or erased in all physical or electronic forms. They are considered not to have ever existed.



Juvenile Safe Harbor Expungement



Juvenile Safe Harbor Expungement

ORC 2152.021 (F)

Step 1

Law creates a “**diversion**” program pre-adjudication if the court *has reason to believe*:

Child is a victim of human trafficking

OR

The charge would have been 2907.24, 2907.241, or 2907.25 (prostitution, soliciting, or loitering to solicit) as an adult.

Court “shall promptly appoint for the child a guardian ad litem”.

“The threshold question is low: Does the court have reason to believe the juvenile is a trafficking victim? Safe Harbor response is not dependent on either the juvenile’s participation or cooperation in the case against the trafficker, or the trafficker’s identification, prosecution, or conviction.”

<https://www.supremecourt.ohio.gov/JCS/CFC/resources/juvenileHumanTrafficking.pdf>

Juvenile Safe Harbor Expungement

ORC 2152.021 (F)

Step 2

GAL, child, child's attorney, or prosecutor ask court to hold complaint in abeyance if:

Child is a victim of human trafficking **PLUS charge is related victimization**

OR

The charge would have been 2907.24, 2907.241, or 2907.25 (prostitution, soliciting, or loitering to solicit) as an adult.

Court may grant without hearing if prosecutor consents.

Court may grant without hearing.

Step 2.5

Court can hold a hearing on whether to hold complaint in abeyance.

Prosecutor can participate in the hearing and make objections.

Statements made by the child may NOT be used against the child in a later proceeding.

Preponderance of evidence findings + child's consent = hold in abeyance.

Step 3

Make a plan for “diversion actions”!

GAL makes recommendations.

Also, defense attorney, prosecutor, psychiatrist, psychologist, counselor may make recommendations.



Juvenile Safe Harbor Expungement

ORC 2152.021 (F)

Step 4

If the child “*actively engages* in the diversion actions to the court's satisfaction”, that court shall:

Dismiss the complaint(s)

Order that all case records be expunged immediately

If child is not actively engaging within 90 days, court can extend time or proceed to complaint.

**Also, under 2151.358:

Can also expunge past adjudications for prostitution/soliciting/loiter (would be 2907.24, 2907.241, or 2907.25 for adults) if they result from human trafficking. Any time. No wait period. No limitations.



General Juvenile Record Sealing & General Juvenile Expungement



“Regular” Juvenile Sealing & Expungement

ORC 2151.356; 2151.358

Juvenile record sealing – in general

All juvenile offenses except for Aggravated Murder, Murder, and Rape may be sealed. Sealed juvenile records will not appear on any background checks for employment. They’re visible to courts and sometimes schools. Apply to seal a juvenile record 6 months after the final discharge of the offense or anytime after age 18.

Juvenile expungement – in general

An expunged juvenile record is totally destroyed. Juvenile records can be expunged any time after being sealed. Or expunge prostitution/soliciting/loitering charges resulting from HT anytime, even if not sealed. Expungement will occur automatically 5 years after sealing or at age 23 (whichever happens first).

No filing fee.



Adult Record Sealing



Adult Record Sealing: **Convictions**

ORC 2953.31-.32

To seal convictions,
ask 3 questions.

1) *Is the person eligible?*

2) Is the record eligible?

3) When can the application be made?

An applicant needs to satisfy only one of the two pathways.

Pathway 1 – after HB1 (4/12/21)¹

Can have any number of convictions,
BUT

- ☐ Cannot have any F1s, F2s, or F3s
- ☐ Cannot have any “offenses of violence”²
 - Includes lower-level misdemeanor offenses, e.g. DV threats, menacing, misdemeanor assault
- ☐ Cannot have any felony “sex offenses”³

Pathway 2 – after HB1 (4/12/21)⁴

Can only have

- ☐ 0-1 felonies and up to 4 misdemeanors OR
- ☐ 2 felonies and up to 2 misdemeanors

Note:

- Sometime connected convictions can be “clumped” together as one.
- Minor misdemeanors (MMs) and most traffic offenses do not count toward the limit

¹ R.C. 2953.31(A)(1)(a).

² See generally R.C. 2901.01(A)(9)(a) .

³ See generally R.C. ch. 2907.

⁴ R.C. 2953.31(A)(1)(b).

Adult Record Sealing: Convictions

To seal convictions, ask 3 questions.

- 1) Is the person eligible?
- 2) *Is the record eligible?***
- 3) When can the application be made?

For one applicant, it's possible that some convictions will be sealable and others won't be.

Some convictions that can't be sealed:

- Convictions w/ mandatory prison terms
- F1 and F2 convictions
- Offenses of violence that are Fs and most M1s
- Felonies or M1s where victim was under 16
- Many sex offense
- Traffic convictions

R.C. 2953.36

Adult Record Sealing: Convictions

To seal convictions,
ask 3 questions.

1) Is the person
eligible?

2) Is the record
eligible?

**3) *When can the
application be
made?***

- No pending cases
- Waiting periods for each conviction
- Rehabilitation

Adult Record Sealing: Convictions

To apply for record sealing, a person must not have any criminal proceedings “pending.”¹

Varies across appellate districts:

- No longer “pending” at sentence or at final discharge?
- In the 10th District, probation counts as a pending case. The 1st District has held the opposite.²
- The same argument might be made for restitution.³

Applicant A

- No cases being prosecuted
- All records have reached final discharge



Applicant B

- Is currently being prosecuted



Applicant C

- No cases being prosecuted
- On probation or owes fines (compare *Floyd* and *JMS*)



¹ See R.C. 2953.32(C)(1)(b); R.C. 2953.52(B)(2)(b).

² *State v. J.M.S.*, 2019-Ohio-3383, 142 N.E.3d 142 (10th Dist.); *State v. Floyd*, 1st Dist., 2018-Ohio-5107 (mooted out prior to decision by Supreme Court of Ohio, see Case No. 2019-0141).

³ Cf. *State v. Aguirre*, 2014-Ohio-4603, 144 Ohio St. 3d 179, ¶ 29.

Adult Record Sealing: Convictions

WAITING PERIOD:

Amount of time someone must wait **after final discharge**, before sealing a conviction **depends on the type of conviction**.¹

Time starts when all sentencing requirements are satisfied, like jail, probation, or fines.² But court costs don't count; are not part of sentence.³

- Misdemeanors: 1 year from final discharge
- F4 or F5: 1 year from final discharge
- F3: 3 years from final discharge

So long as none of the offenses is a violation of R.C. 2921.43

¹ R.C. 2953.32(A)(1)(b).

² *Aguirre* at ¶ 28.

³ *See, e.g., State v. Weirauch*, 2018-Ohio-5001, 126 N.E.3d 316, ¶ 18-19 (2d Dist.); *State v. Ushery*, 1st Dist. Hamilton No. C-120515, 2013-Ohio-2509, ¶ 15; *see also State v. Davis*, 2020-Ohio-309, ¶ 7; *State v. Moore*, 135 Ohio St.3d 151, 2012-Ohio-5479, 985 N.E.2d 432, ¶ 11.

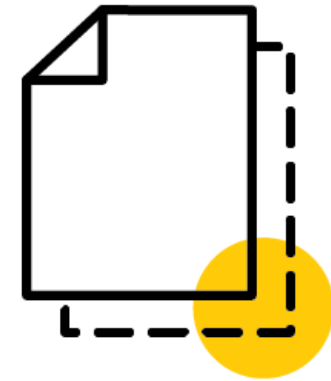
Adult Record Sealing: **Non-convictions**

ORC 2953.51-.52

Cannot have any pending charges¹ (other conviction-eligibility considerations do not apply)

Dismissals and acquittals: No waiting period

No bill / ignored cases: Wait 2 years



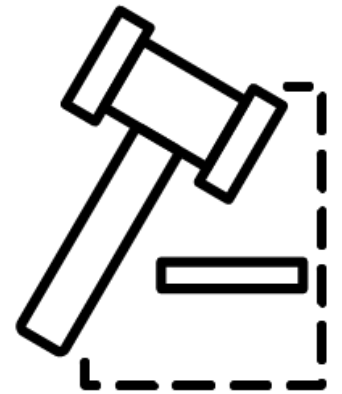
Non-convictions that happened at the same time as convictions may have other considerations.²

¹ R.C. 2953.52(B)(2)(b).

² R.C. 2953.61(B)(1); See *State v. Pariag*, 137 Ohio St.3d 81, 2013-Ohio-4010, 998 N.E.2d 401, ¶ 21.

Other considerations

- *Apply in each sentencing court (but not necessarily each judge)*
- *\$50 filing fee for convictions. Waive if indigent.*
- *Hearing. Prosecutor can make objections*





Certificate of Qualification for Employment (CQE)



(1) Eliminates mandatory legal restrictions on employment/licensing

- Secures case-by-case determination from employers

(2) Gives employers immunity from negligent hiring liability

- Employer must know about the CQE

(3) Creates rebuttable presumption of rehabilitation for professional licensing

- Conviction alone insufficient evidence

State-certified redemption!

Certificate of Qualification for Employment

A CQE does NOT effect:

- Federal or out-of-state offenses
- Sex-offender registration and related requirements
- Driver's license suspension/issues
- Restrictions on employment as a prosecutor or law enforcement officer
- Restrictions on Title 47 licensing for health-care professionals based on convictions/ILCs for certain severe offenses
 - Specifically: aggravated murder, murder, voluntary manslaughter, felonious assault, kidnapping, rape, sexual battery, gross sexual imposition, aggravated arson, aggravated burglary, unlawful distribution of abortion-inducing drug
- License suspensions for Title 47 health-care professionals for addiction to, or improper distribution of, controlled substances
- Restrictions on working in a pain clinic
- Mandatory license suspensions for Title 47 health-care professionals for child-support issues
- A CQE does NOT seal/expunge the record
- A CQE does NOT guarantee employment or licensing

Wait times

- Felony: 1 year
- Misdemeanor: 6 months
- Sometimes can apply early, see OAC 5120-15-01
 - Early release from prison (certain types)
 - Jail release with sheriff's recommendation
 - No incarceration or community control at all
 - Certificate of Achievement and Employability ("CAE")
 - Early termination of community control

Certificate of Qualification for Employment

Must be able to show:

- a) CQE “will materially assist the individual in obtaining employment or occupational licensing”
- b) “substantial need for the relief requested in order to live a law-abiding life”
- c) granting CQE “would not pose an unreasonable risk to the safety of the public or any individual”

Application will also require brief summary of rationale; conviction history; employment history; references; family member support.

Filing fee. Waive if indigent.



Certificate of Qualification for Employment

Submit Online

- Submit application at <https://drccqe.com>
- Wait for DRC approval and complete any missing pieces

File in Court

- When approved by DRC, print & file in court of common pleas where applicant resides
- Include supporting documents as desired (recommendation letters, certifications, etc.)
- Filing fee or indigence

Court Decides

- Court gathers information
- Prosecution may object
- Hearing may happen
- If granted, CQE shows up at <https://drccqe.com>



Pardons

ORC 2967.04

Forgiveness from the state

Does not hide/erase record

Expedited Pardon Program under Gov. DeWine



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Adult Specialized Dockets



If the person on your docket ...

☐ has charges that resulted from human trafficking in your court*

- EXPUNGE all non-conviction charges, past and instant. R.C. 2953.521
- Determine if the person has been convicted for prostitution, soliciting, loitering to solicit. If yes, EXPUNGE all conviction charges, past and instant. R.C. 2953.38.

☐ has other records in your court*

- RESOLVE outstanding fines/costs for charges in your court. Waive court debt due to indigence or convert to community service.
- After sentencing (or at final discharge, depending on district) for instant case, if there are no other pending cases:
 - SEAL past convictions that are eligible. Instant conviction is subject to waiting period. R.C. 2953.31, .32, .36
 - SEAL all non-conviction charges, past and instant. R.C. 2953.52

*Depending on local rules and practices, that could all cases in that courthouse.

If the person on your docket ...

☐ has juvenile cases

- **EXPLAIN** that there might be an opportunity to seal and expunge juvenile records. Partner with juvenile courts where possible. R.C. 2151.356, .358.

☐ has adult criminal records under the jurisdiction of another court

- **EXPLAIN** that there might be an opportunity to seal and expunge adult records, as well as to mitigate court debt.

☐ has criminal records that will show up on a background check (including sealed)

- **EXPLAIN** that they may consider applying for a CQE.
(If the specialized docket is in the common pleas court of the county where the person resides, it might be able to handle the CQE petition directly; or partner/connect with the judge(s) who do CQEs.)



Juvenile Specialized Dockets



If the child on your docket ...

- ❑ might be a victim of human trafficking or is charged for prostitution, soliciting, or loitering to solicit
 - **APPOINT a GAL.** Can put current complaint in abeyance, set diversion, dismiss and expunge current charge(s), pursuant to Safe Harbor requirements. R.C. 2152.021.

- ❑ has other juvenile records
 - **EXPLAIN** that there might an opportunity to seal *and* expunge juvenile records.
 - At discharge of the instant case, **SET a hearing** for 6 months out or after 18th birthday, whichever sooner, to seal and expunge that case. R.C. 2151.356, .358.
 - **SEAL and EXPUNGE past juvenile records** in your court* that are eligible. R.C. 2151.356, .358.

*Depending on local rules and practices, that could all cases in that courthouse.

And always consider how to

Educate

**Partner
(public defender, legal aid, OJPC)**

**Ensure that the criminal-legal
system supports reentry**



Discussion and resources

Some other helpful resources:

- OJPC Resource Center: <https://ohiojpc.org/resources/>
- OJPC Sealing Handout: <https://ohiojpc.org/wp-content/uploads/2020/11/Record-Sealing-One-Pager-Revised.pdf>
- OJPC Manual: https://ohiojpc.org/wp-content/uploads/2020/11/OJPC-Ohio-Criminal-Records-Manual_May-2020.pdf
- OJPC Expungement Handout: <https://ohiojpc.org/wp-content/uploads/2020/11/Safe-Harbor-Expungement-Attyjudge-doc-copy.pdf>

**Thank you for being interested in this work.
Feel free to reach out to OJPC with questions.**

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THANK YOU



Questions?