

## **Suggested procedure for expunging a previously sealed conviction record.**

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### Introduction

Senate Bill 288 of the 134<sup>th</sup> General Assembly gives individuals with criminal convictions the ability to apply to the sentencing court to have the records of those convictions either sealed or expunged. It was the sponsor's intent that the person submit one application to the court, leaving the judge to determine which remedy, sealing or expunging, is appropriate. However, because the waiting period for eligibility is different for sealing a record than for expunging a record, it is entirely possible that someone will want to return to court to expunge a record that has previously been sealed. This document attempts to provide some guidance for courts in how to approach those situations.

### Terminology

Prior to April 4, 2023, most criminal records were sealable, with only a few eligible for expungement (namely, criminal records of human trafficking victims and criminal charges of under a gun possession law that was later revoked). If a petition for sealing was granted, a criminal record was removed from public view and, except for some circumstances laid out in statute, unavailable and treated as if the underlying criminal conviction had not occurred. In contrast, to "expunge" is "to destroy, delete, and erase a record as appropriate for the record's physical or electronic form or characteristic so that the record is permanently irretrievable." R.C. 2953.31(B)(2)(b). In other words, shred.

"Sealing" was not separately defined in SB 288, but inferred from the usage in R.C. 2953.34(A), permitting inspection of sealed records, to have the record of conviction removed from the public record, but still maintained so that it may be accessed by statutorily enumerated persons or agencies.

Expunging or physically destroying a record of conviction is a remedy that was unavailable for most offenses prior to April 4, 2023.<sup>1</sup> A defendant is eligible to apply to either seal or expunge a misdemeanor conviction record six (6) months from final discharge for a minor misdemeanor and one (1) year for all other misdemeanors.<sup>2</sup> The same time limits apply to both remedies. Final discharge is not statutorily defined, but generally includes expiration of any period of community control supervision and payment of all fines and restitution.

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<sup>1</sup> Although an applicant may seek to seal or expunge a record of conviction, a dismissal is limited to sealing only. R.C. 2953.33. R.C. 2953.33 was amended, effective October 3, 2023, to expunge a dismissal, acquittal, or no bill for any case or charge that the applicant would be able to seal.

<sup>2</sup> The time for either sealing or expunging a misdemeanor offense after final discharge is the same. A felony conviction has a different and longer period of time after final discharge to expunge the record of conviction. (For example, fourth or fifth degree felony convictions are eligible to be sealed one year after final discharge and expunged eleven years after final discharge.)

### Expunging a previously sealed conviction record.

Currently, a defendant may apply to have the conviction record either sealed or expunged. Prior to April 4, 2023, the record of conviction, if granted, would be sealed, regardless of the terminology used. An issue arises, however, of disclosure of a previously sealed record of conviction.

Upon receipt of an order to seal the conviction record, the court shall order all official records of the case that pertain to the conviction sealed and all index references to the case that pertain to the conviction deleted. R.C. 2953.32(C). The court may maintain a manual or computerized index of the sealed records which shall contain only the name of the persons who are the subject of the sealed records, alphanumeric identifiers that relate to that person, the word "sealed," the name of the person, agency, office, or department that has custody of the sealed records, and shall not contain the name of the crime committed. R.C. 2953.34(C). The effect of an order to seal is that the criminal proceedings shall be considered not to have occurred. R.C. 2953.32(D)(2)(b). See also, R.C. 2953.34(K)(1), R.C. 2953.34(L)(1), and R.C. 2953.521(F)(2).

Sealed criminal records are confidential. R.C. 2953.34 sets out who may inspect sealed criminal records. A court employee, other than the clerk or custodian of the index and records, may only inspect a sealed criminal record for the purpose of assessing points against a person under R.C. 4510.36 or for taking action with regard to points assessed. R.C. 2953.34(A)(13). There are numerous statutory provisions that unlawful disclosure of this information is a fourth degree misdemeanor. The person liable for disclosure varies based on the employment status of the person and the purpose of disclosure. R.C. 2953.34(I)(2)(b)(3), (J)(1), (J)(3), (K)(2), (L)(2), and R.C. 2953.60(B).

An issue occurs when a person with a previously sealed record calls the court to expunge the record, a remedy now available thanks to S.B. 288. The court or clerk employee should not disclose to an unknown caller the existence of a sealed criminal record. R.C. 2953.34(A)(3) permits inspection of records included in a sealing order upon application by the person who is the subject of the records, by the persons named in the application. Thus, while a person who has sealed his/her own records has a right to inspection, verification of identity is critical.

A recommended procedure would be to simply inform any caller to file a motion with the court explaining what the caller is requesting from the court. The motion may be filed under seal to prevent inadvertent disclosure and be accompanied by a driver's license or any other form of identification as determined by the court. This procedure protects court staff from any charge of unauthorized disclosure of a criminal record. The journal entry expunging the record should note that the record had been previously sealed. For immigration purposes if the applicant is not an American citizen, the journal entry should also set out the original charge and any amendment.

### Hearing requirement on motion to expunge previously sealed conviction record.

R.C. 2953.32(C) requires the court to conduct a hearing on an application to expunge a record of conviction. The hearing requirement is mandatory. *State v. Haas*, 6<sup>th</sup>. Dist. Lucas, No. L-04-1315, 2005-Ohio-4350. See also, *State v. B. J.*, 8<sup>th</sup>. Dist. Cuyahoga, No. 105764, 2018-

Ohio-177. The standard for granting an application to expunge the record is the same standard for sealing the record. R.C. 2953.32(D). Arguably, if the court previously granted the motion to seal, the court has determined valid grounds to expunge the record and an additional hearing is unnecessary.

Putting aside the mandatory requirement for a hearing, there is the issue of the applicant's change in circumstances from the time of the original order to seal the conviction record. For example, R.C. 2953.32(D)(1)(b) requires the court to determine whether criminal proceedings are pending against the applicant. New, unrelated criminal charges may have been brought against the applicant in the period since the prior order to seal the record. In addition, the prosecutor has the right to file any written objections thirty days prior to the hearing. Also, if the offense involved a victim, then the victim, victim's representative, or the victim's attorney has a right to notice of the hearing as well as the right to be heard at the hearing. R.C. 2930.171(A) and R.C. 2953.32(C) & (D)(1)(e).

The recommended procedure would be to set the case for a hearing with notice to the prosecutor and, if applicable, the victim. A victim has an ongoing responsibility to provide current contact information with the court's probation department. R.C. 2930.161. If the victim cannot be located, it should be noted on the record. If the victim cannot be located or there is no victim in the underlying offense and the prosecutor waives any objection, based on the updated probation report and incorporation of the evidence presented at the prior hearing to seal the record, the court may dispense with a second hearing to grant the application to expunge the record.

#### Additional fee for application to expunge conviction record after sealing.

R.C. 2953.32(D)(3) provides that a court shall charge of fifty dollars (\$50.00) as an application fee for a motion to expunge a conviction record. The statute does not exempt the fee because of a prior fee paid for a motion to seal the record. Based on the work involved to process the motion and subsequent order, as well as a hearing on the motion, it would appear that the fifty dollar fee is permitted for a motion to expunge even though the applicant paid a prior filing fee for a motion to seal the conviction record.

This application fee is allocated between or among the municipal, county and/or state government based on the underlying offense(s) convicted set out in the application. Effective October 3, 2023, R.C. 2953(D)(3) permits the court to charge an additional fee up to fifty dollars (\$50.00) for the expense of processing the motion and subsequent order. (135 H.B. 33). Both fees are subject to waiver if the applicant presents proof of indigency. If a poverty affidavit showing the applicant is indigent is filed with the clerk along with the application to expunge, a recommended procedure is to accept the application without the fee with the court reserving the right to charge a fee at a later date if at the hearing or while the application is pending the court determines that the applicant is not indigent.