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The Expungement Dilemma: Amended Ohio Rev. Cod Ann. § 2953.521(A) (West 2023)

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Ohio’s record sealing and expungement laws have changed yet again.¹ The new laws go into effect April 4, 2023.² To expunge³ a criminal record means “the process by which a record of criminal conviction is destroyed or sealed from state or federal record.”⁴ Thus, an expungement order “directs the court to treat the criminal conviction as if it had never occurred, essentially removing it from a defendant’s criminal record as well as, ideally, the public record.”⁵

To expunge an Ohio criminal record, one must fully serve her sentence. Only when all fines have been paid, all jail sentences have been served, and all probation or parole has been completed does waiting period start to be eligible to apply for expungement.⁶ For minor misdemeanors, the waiting period⁷ is six months.⁸ For a misdemeanor of the first through fourth

¹ Ohio Rev. Code Ann. § 2953.521 was approved and made effective Sept. 28, 2018. CRIMES AND OFFENSES—EXPUNGEMENT, 2018 Ohio Laws File 70 (Sub. S.B. 4). It was amended in 2022. OH LEGIS 160 (2022), 2022 Ohio Laws File 160 (Am. Sub. S.B. 288). The language conditioning that dismissed cases or cases found not guilty could only be expunged if the applicant was a victim of human trafficking never changed.

² In addition to Ohio Rev. Code Ann. § 2953.521 (West 2023), amended Ohio criminal record sealing and expungement statutes going into effect on April 4, 2023 include Ohio Rev. Code Ann. § 2953.31 (West 2023); Ohio Rev. Code Ann. § 2953.32 (West 2023); Ohio Rev. Code Ann. § 2953.33 (West 2023); Ohio Rev. Code Ann. § 2953.34 (West 2023); Ohio Rev. Code Ann. § 2953.35 (West 2023); Ohio Rev. Code Ann. § 2953.38 (West 2023); Ohio Rev. Code Ann. § 2953.39 (West); Ohio Rev. Code Ann. § 2953.57 (West 2023); Ohio Rev. Code Ann. § 2953.58 (West 2023); Ohio Rev. Code Ann. § 2953.59 (West 2023); and Ohio Rev. Code Ann. § 2953.61 (West 2023). For the purposes of this paper’s discussion, the author will only address Ohio Rev. Code Ann. § 2953.32 (West 2023) and Ohio Rev. Code Ann. § 2953.521 (West 2023) to discuss sealing Ohio criminal records.

³ Courts treat an expungement as “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.” OH LEGIS 160 (2022), 2022 Ohio Laws File 160 (Am. Sub. S.B. 288). In contrast, “sealing an Ohio criminal conviction removes the conviction from public court records but does not erase it. If a conviction is sealed, it does not have to be disclosed when applying for jobs, and most employers will not be able to see the conviction. A criminal conviction that has been sealed may still be viewed by some government entities and some employers.” *Expunging and Sealing Criminal Convictions in Ohio*, The Legal Aid Society of Cleveland, (Apr. 3, 2023) [hereinafter Legal Aid (2023)].

⁴ *What Is “Expungement?”* American Bar Association (Nov. 20, 2018) [hereinafter ABA (2018)], https://www.americanbar.org/groups/public_education/publications/teaching-legal-docs/what-is-_expungement/

⁵ *Can I Get My Criminal Record Sealed?* The Legal Aid Society of Cleveland (Apr. 2022), <https://lascleve.org/recordsealingbrochure/>.

⁶ *Can I Get My Criminal Record Sealed?* The Legal Aid Society of Cleveland (Apr. 2022), <https://lascleve.org/recordsealingbrochure/>.

⁷ A waiting period is “a time period that must expire before some legal right or remedy can be enjoyed or enforced.” *Waiting Period Law and Legal Definition*, USLegal, <https://definitions.uslegal.com/w/waiting-period/>. “Typically, during a waiting period the person must be free from certain forms of involvement with the justice system: from a felony conviction, from any conviction, or from any arrest, again depending on state law.” *Waiting for Relief: A National Survey of Waiting Periods for Record Clearing*, Collateral Consequences Resource Center (Feb. 23, 2022), <https://ccresourcecenter.org/2022/02/23/waiting-for-relief-a-national-survey-of-waiting-periods-for-record-clearing/>.

⁸ Ohio Rev. Code Ann. § 2953.32(B)(1)(b)(ii) (West 2023).

The Expungement Dilemma: Amended Ohio Rev. Cod Ann. § 2953.521(A) (West 2023)
Eleanor Salsbury

degree, the waiting period is one year.⁹ If a felony can be expunged, the waiting period is between eleven to thirteen years.¹⁰

However, there is no way to expunge a criminal record if one were charged but found not guilty of an offense or were a defendant named in a dismissed complaint, unless the finding “was the result of the applicant having been a victim of human trafficking.”¹¹

While the amended expungement statutes have expanded opportunities for those to expunge charges that were convicted, lawmakers overlooked those who have been charged but not convicted.

This discrepancy is significant for the number of people charged, but not convicted, or for those whose cases have been dismissed in Ohio. Although The Ohio Criminal Sentencing Commission¹² found it's nearly impossible to estimate how many people have been found not

⁹ Ohio Rev. Code Ann. § 2953.32(B)(1)(b)(i) (West 2023).

¹⁰ Ohio Rev. Code Ann. § 2953.32(B)(1)(b)(iii) (West 2023); Ohio Rev. Code Ann. § 2953.32(B)(1)(a)(i) (West 2023); Ohio Rev. Code Ann. § 2953.32(B)(1)(a)(ii) (West 2023).

¹¹ Ohio Rev. Code Ann. § 2953.521(A) (West 2023).

¹² The Ohio Criminal Sentencing Commission is an “an independent entity, legislatively established within the Supreme Court [that] brings together judges, prosecuting and defense attorneys, behavioral health professionals, academics, corrections officials, law enforcement, victims’ advocates, community corrections experts, and others with a direct interest in criminal sentencing.” *Ohio Criminal Sentencing Commission*, The Supreme Court of Ohio, <https://www.supremecourt.ohio.gov/criminal-br-sentencing/sentencing/>. The purpose of the commission is “to ensure fair sentencing in the state of Ohio.” *Id.* “To fulfill its vision, the Ohio Criminal Sentencing Commission will develop and recommend sentencing policy to the General Assembly that is designed to advance public safety; realize fairness in sentencing; preserve meaningful judicial discretion; distinguish the most efficient and effective use of correctional resources; provide a meaningful array of sentencing options. The Ohio Criminal Sentencing Commission will achieve its mission by analyzing current adult and juvenile criminal statutes and law in Ohio and other states; studying sentencing patterns and outcomes and balancing the needs of criminal sentencing and available correctional resources; researching and recommending evidence based approaches to reducing recidivism; recommending reasonable and specific criminal justice reforms.” *Id.*

The Expungement Dilemma: Amended Ohio Rev. Cod Ann. § 2953.521(A) (West 2023)
Eleanor Salisbury

guilty or whose cases have been dismissed due to lack of “uniform, statewide data collection.”¹³

Judges have intentionally pushed back against creating a statewide, uniform data collection system on sentencing statistics due to fears that data coming from the system “could be cherry-picked and lead to criticism of the courts.”¹⁴

The Ohio Criminal Sentencing Commission has created a website “to help courts implement a uniform sentencing entry system, which will lead to the development of a statewide criminal sentencing database called the Ohio Sentencing Data Platform, or OSDP.”¹⁵ The database is only available to to Ohio Court of Common Pleas judges and their authorized staff.¹⁶ Public data collected by the federal judiciary found that that eight percent of federal criminal defendants had their cases dismissed in 2018.¹⁷

A case can be dismissed or sentenced as not guilty and still be unable to be expunged as a criminal record. Individuals with dismissed cases or found not guilty will be barred from employment and housing opportunities due to their criminal records.

One option to address this expungement dilemma is for an individual harmed by the amended statute’s oversight to litigate their injury. This option will cost the individual and the

¹³ Laura Bischoff, *Can a Spreadsheet Improve Fairness and Justice in Sentencing in Ohio Courts? Some Judges Say Yes* (June 28, 2021), <https://www.dispatch.com/story/news/2021/06/28/fairness-ohio-criminal-court-sentencing-depends-data-collection/7768981002/>.

¹⁴ Cory Shaffer, *Statewide Judges’ Group Wants Sentencing Data Collected under Proposed Database Kept Secret*, Cleveland.com (Jul. 19, 2022), <https://www.cleveland.com/court-justice/2022/07/statewide-judges-group-wants-sentencing-data-collected-under-proposed-database-to-be-kept-secret.html>.

¹⁵ Csaba Sukosd, *New Platform Provides Path to Accessible Sentencing Data*, Court News Ohio (Jun. 25, 2021), https://www.courtnewsOhio.gov/happening/2021/sentencingDataPlatform_062521.asp.

¹⁶ *Explore the Ohio Sentencing Data Platform*, The Ohio Criminal Sentencing Commission, <https://www.ohiosentencingdata.info/explore-the-osdp>.

¹⁷ John Gramlich, *Only 2% of Federal Criminal Defendants Go to Trial, and Most Who Do Are Found Guilty* (June 11, 2019), <https://www.pewresearch.org/fact-tank/2019/06/11/only-2-of-federal-criminal-defendants-go-to-trial-and-most-who-do-are-found-guilty/>; *U.S. District Courts—Criminal Defendants Disposed of, by Type of Disposition and Offense, During the 12-Month Period Ending September 30, 2018*, United States Courts, <https://www.uscourts.gov/file/23295/download>.

The Expungement Dilemma: Amended Ohio Rev. Cod Ann. § 2953.521(A) (West 2023)
Eleanor Salsbury

court system resources, time, and prolong the individual's suffering until a judge makes a decision. This decision may not solve the individual's injury or be as effective as avoiding retroactive remedies altogether.

Another option is to change the language of the statute's section to include individuals who have dismissed cases or have been found not guilty and are not victims of human trafficking. Ohio Rev. Code Ann. § 2953.521(A) can state that "any person who is found not guilty of an offense by a jury or a court or who is the defendant named in a dismissed complaint, indictment, or information may apply to the court for an order to expunge the person's official records in the case."

Until the expungement dilemma is corrected, individuals will have criminal records for having dismissed cases and being found not guilty. This will harm their quality of life by creating barriers between employment¹⁸ and housing.¹⁹ These impacts cannot be erased through sealing criminal records.²⁰ The only solution is to address this oversight and expand expungement opportunities.

¹⁸ *Licensing & Other Barriers to Growing Occupations That Unfairly Exclude People with Records*, National Employment Law Project (Nov. 2020), [chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://s27147.pcdn.co/wp-content/uploads/Ohio-Barriers-to-Growing-Occupations-Fact-Sheet-12-2020.pdf](https://efaidnbmnnnibpcajpcglclefindmkaj/https://s27147.pcdn.co/wp-content/uploads/Ohio-Barriers-to-Growing-Occupations-Fact-Sheet-12-2020.pdf).

¹⁹ Legal Aid (2023), *supra*, note 3; Ohio Rev. Code § 2923.14 (West 2019).

²⁰ *Id.*