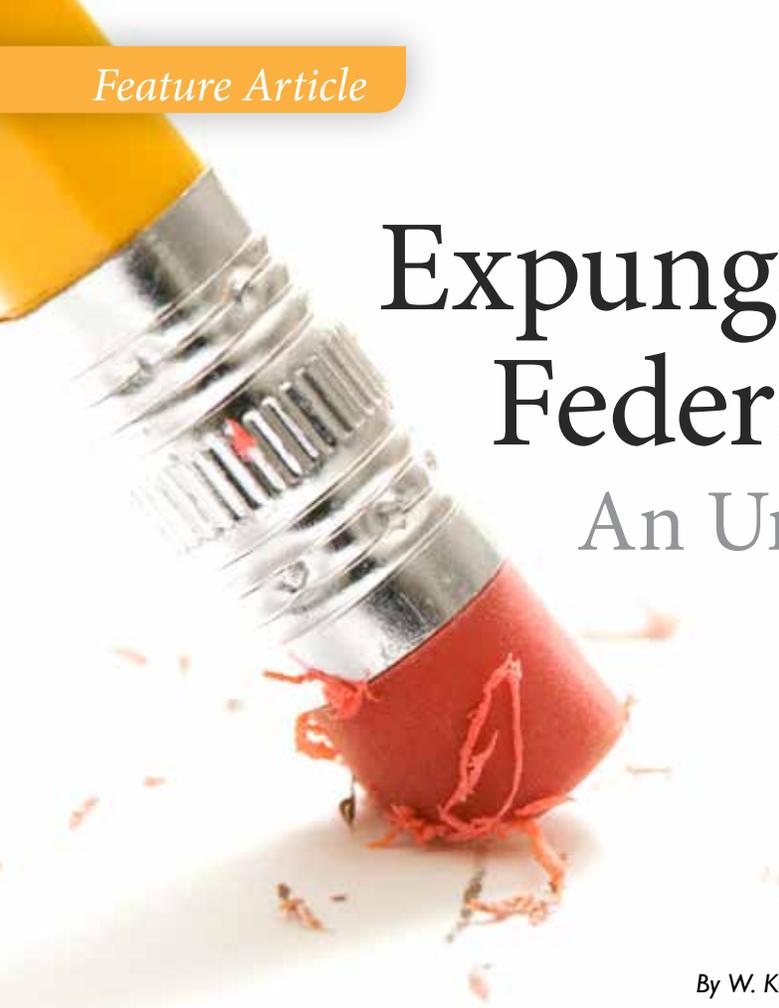


Expungement of Federal Convictions: An Under-Utilized Remedy



By W. Kelly Johnson and Jared M. Klaus

Ohio law allows for the expungement of convictions for federal offenses, although many individuals with federal convictions are unaware that they may also be entitled to this benefit. Expungement provides the path to a clean slate for many individuals with aging convictions on their records. Similar to a marriage that is annulled, a conviction that is expunged is treated as if it never occurred.

Ohio Revised Code §2953.32(A)(1) provides that:

“An eligible offender may apply to the sentencing court if convicted in this state, or to a court of common pleas if convicted in another state or in a federal court, for the sealing of the record of the case that pertains to the conviction. Application may be made at the expiration of three years after the offender’s final discharge if convicted of a felony, or at the expiration of one year after the offender’s final discharge if convicted of a misdemeanor.”

The State of Ohio has provided, in §2953.32(A)(1) a method by which a federal conviction, or conviction in another state, may be sealed under Ohio law.

Expungement of federal convictions is generally governed by the same rules as expungement of state-law convictions. That is, a person is eligible for expungement of a conviction (state or federal) if he or she has:

- (a) not more than one felony conviction,
- (b) not more than two misdemeanor convictions if the convictions are not of the same offense, or
- (c) not more than one felony conviction and one misdemeanor conviction.

In counting convictions for purposes of determining eligibility for expungement, two or more related convictions may be counted as one. For example, two or more convictions arising from the same act or resulting from offenses committed at the same time are counted as one conviction. Similarly, up to three convictions that were charged or imposed at the same time and resulted from related criminal acts that were committed within a three-month period are counted as one conviction. Minor misdemeanors and most traffic offenses do not count at all and may be expunged regardless of how many of them an individual has on his record.

Ohio’s expungement statute provides that an expunged conviction does not need to be reported on an application for employment, any type of license, or any other right or privilege, and, with limited exceptions, actually prohibits employers and others from even asking questions about an expunged conviction during any such application process. For that reason, expungement can remove barriers for individuals seeking new career opportunities, housing, membership in professional organizations, and other benefits. It also provides an ex-offender with the personal satisfaction of seeking closure to a trying phase of his life.

There are important limitations on the ability to have a federal conviction expunged that do not apply to state convictions. Because of the Supremacy Clause of the United States Constitution, an Ohio court cannot order the sealing of records in the custody of federal courts, agencies, or officials. Nor can an Ohio court order the sealing of records kept by the state if the state maintains or uses those records pursuant to federal law. Outside of those limitations, Ohio courts have held that it does

not offend the Supremacy Clause for a state court to order the sealing of federal conviction records — i.e., those records in the possession of state courts, agencies, and officials that are not required to be maintained under federal law.

Several Ohio cases support the finding that §2953.32 cannot be construed as affecting federal records either maintained or in the custody of federal officers.¹ The case of *In re Pacifico* noted that despite the fact that common pleas “courts in the state are without jurisdiction or constitutional authority to order federal courts, agencies, or officials to seal federal criminal records, common pleas courts may, nevertheless, expunge federal conviction records maintained in Ohio by state officials or agencies, provided that the records are not maintained or utilized by those state officials or agencies pursuant to any federal law.”² *Id.* The issue was further clarified when the Supreme Court of Ohio stated that “where the State of Ohio has created disability resulting from a federal conviction, it may constitutionally provide for the removal of that disability; by contrast, where the federal government has created, or mandated, a disability from a federal conviction, the State of Ohio may not provide for the removal of the federally created disability without offending the supremacy clause.”³

Applying to have a federal conviction expunged can be a nuanced process and the assistance of experienced counsel is highly recommended. A court that receives an application for expungement must conduct a hearing on the application and must give notice of the hearing to the state prosecutor, who will be given the opportunity to object to the application. Some courts have also adopted the practice of notifying the United States attorney who originally prosecuted the case. The court may also order a probation officer to conduct an investigation of the applicant. Ultimately, the decision of whether to grant the application resides in the discretion of the judge.

Although expungement can go a long way toward removing evidence of a conviction from the public domain, it is not a perfect solution. Employers, landlords, and licensing boards may be prohibited from asking an applicant about

an expunged conviction, but nothing prevents them from learning about such a conviction by searching old newspaper archives or typing a person’s name into Google — none of which is erased by an order granting expungement. Nor is an individual protected from an adverse employment or other decision should an expunged conviction come to light. Expungement merely makes the conviction harder to find.

Equally, Ohio law allows state agencies or officials to obtain access to sealed records under specific circumstances. Ohio Revised Code §2953.32(B) permits inquiries about expunged convictions where, “the question bears a direct and substantial relationship to the position for which the person is being considered.”⁴ This provision has been utilized to allow the consideration of a sealed conviction in an application to carry a concealed handgun,⁵ in the ability to hold public office,⁶ and in registration as an intern before the State Board of Pharmacy.⁷

Finally, expungement of a federal conviction by an Ohio court does not eliminate disabilities resulting from a federal conviction. For example, a felony conviction, even after expungement, continues to act as a bar to the possession of a firearm imposed under federal law.⁸

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1 *In re Pacifico*, 129 Ohio App. 3d 152, 157 (8th Dist. 1998).

2 *Id.*

3 *State ex rel. Gains v. Rossi*, 86 Ohio St. 3d 620 (1999).

4 Ohio Revised Code §2953.32(B).

5 *In re Forster*, 161 Ohio App.3d 627 (11th Dist. 2005).

6 *State v. Bissantz*, 40 Ohio St. 3d 112 (1988).

7 *Szep v. Ohio State Board of Pharmacy*, 106 Ohio App. 3d 621 (11th Dist. 1995).

8 18 U.S.C § 922((g)).