Hannah Miller: From the Drug Enforcement and Policy Center at The Ohio State University, this is Drugs on the Docket. Each episode will tell the story of how U.S. court decisions impact drug law and policy and continue to shape the War on Drugs. I'm your host, Hannah Miller.

A new chief justice is settling in as the head of the Supreme Court of Ohio. At the same time, an omnibus crime bill has been enacted, significantly expanding eligibility for record relief in the state of Ohio. Legislators play an important role in shaping the re-entry experiences of justice-involved people through law, but other actors such as court officials and city officials are oftentimes the ones dealing with the real world application of those laws. Record relief looks different across all 50 states. Sealing and expungement are used interchangeably and mean different things. In Ohio for example, sealing is the removal of a record from public view. An expungement refers to the destruction of the record. The first provision for record sealing in Ohio was enacted in 1974. Little changed for Ohio’s record sealing laws until 2012, when eligibility began to expand, enabling more and more residents with criminal convictions and dismissals to remove those records from public view. In 2023, expungement became available for offenses other than those related to juvenile or human trafficking matters. And while the laws are becoming more expansive, one potential kink in the system remains: Ohio’s record relief process is petition based.

Building on our discussion with the former Ohio Supreme Court Chief Justice Maureen O’Connor, we drill into the world of record relief in Ohio and what the most recent legislative changes mean for petitioners, judicial officials and prosecutors.

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While we're working hard to bring you more content, Doug and I are providing some updates and additional commentary on the topics we covered in season one of Drugs on the Docket. Ohio Supreme Court Chief Justice Maureen O'Connor retired at the end of 2022, but before she did, she sat down with us to record episode 3 of season 1 and we covered a range of topics, from drug courts to record relief, to the Ohio redistricting commission. Now we have a new Chief Justice Sharon Kennedy.

Doug, in what ways do you think new leadership is going to shape or influence drug policy in Ohio?

Douglas Berman: A new chief justice, whomever they may be, at any point are always going to have perhaps slightly different priorities slightly different focal points that can influence a range of policy related matters. Of course their main job is to preside over the state Supreme Court and resolve cases that come to that court. But every Chief Justice in the past in Ohio has put together a task force or shown what their priorities are and the way they use their time, what they address in their speeches. For example, new Chief Justice Kennedy has created a new re-entry task force which is a signal that she's concerned about the way the state is handling getting folks out of prison and re-entering the community in a safe and just way. That focus necessarily is going to involve a range of drug policy issues. You know both folks who are brought into the criminal justice system because of drug related activity and folks who may be still struggling with drug problems, you know, as they emerge from the system. And so I expect that task force may have something to say and may make some recommendations that could impact drug policy in the state. In addition, you know, the past Chief Justice and maybe the new Chief Justice may weigh in on some ballot initiatives.

I remember Chief Justice O'Connor was quite vocal in opposition to a constitutional amendment ballot initiative that tried to decriminalize a lot of drug offenses. Unclear whether with the new marijuana initiatives qualifying for the ballot, if the new Chief might speak to that one way or another. These are all the kind of ways the Chief Justices have a kind of soft power uh that can sort of influence what happens. And of course, you know, think about the role that the
old Chief played in the redistricting conversations not just the cases that came to her court but also in sort of the broader debates over redistricting that I now know that she's engaging in. There's really kind of no issue of policy that doesn't end up impacting the law in Ohio and because it impacts the law you know every Chief Justice, every jurist, in the state thinks it's important for them to at least give their perspective on that topic. And again, how a drug policy and particularly how the new Chief Justice wants to use her power to speak to those issues is is something I'll be watching in in the months and years to come.

Hannah Miller: Well switching over from the Ohio Supreme Court to the General Assembly, so from the justice system to the legislature, let's talk about how the General Assembly has been incrementally expanding record relief mechanisms over the last decade. The most recent legislative action being the passage of Senate Bill 288 that went into effect in April of this year. So what aspects of Senate Bill 288 did you find most interesting or could you maybe summarize some of the more important aspects of the bill as it relates to drug policy.

Douglas Berman: If you don't mind me, I'd like to really focus on the record relief piece of it both because I think providing a little more context for what 288 does, but also where the politics and policy and law of record relief in Ohio and nationwide has been going. I think this is one of these issues that I really like to emphasize uh how criminal justice reform can be a bipartisan or non-partisan dynamic, even though there are other settings in which we often see lots of sort of politicking around crime and punishment.

There may be some handful of of opponents here but we see prominent leaders on both sides of the political aisle in all branches of government emphasizing concern about the way in which collateral consequences, a range of laws and stigmas and issues that preclude people once they've served their time, once they've been subject to any kind of criminal sanction or conviction. Oftentimes just even an arrest ends up being a profound barrier to getting one's life in order, whether it's housing, whether it's education opportunities, whether it's employment, which is often the biggest one. And there are many more that are there. A past conviction, even a very old conviction, even a very minor conviction, even one that we can't even imagine would would still be retained in records, can show up on a record search, can pop up on a Google Search, and ultimately lead to all sorts of barriers to individuals moving their life forward effectively. And politicians across the political aisle have really come to understand that and have really moved forward in red States and blue States, in purple states which I still sometimes think Ohio is, creating broader and broader mechanisms for individuals to get relief from a criminal record. But Ohio has been part of that wave where almost every General Assembly in recent years has expanded the authority to get a record sealed or expunged with fewer and fewer restrictions on who's eligible, more and more availability, though one big debate in this area as we know, and this gets to Senate Bill 288, is what a former offender, a person with the conviction, needs to do in order to start the process of getting a record sealed or expunged. And generally speaking Ohio has always been a petition-based state, that the individual had to pay a fee and make a filing to a court in order to get their records sealed or expunged. And what's been going on in some other states though, and what really led to the interesting part of 288, is some other states have been moving towards what's often called automatic record relief. A person with a conviction wouldn't need to make any kind of application, wouldn't need to pay any money. The court system on its own automatically seals or expunges or does some other kind of uh work to make the record no longer available to persons and eliminate some of those sets of barriers. Ohio hasn't, though there's been some talk of it, moved to a fully automated system but there's been strong interest in making it easier and easier for offenders, and of course Hannah your own work with Opportunity Port is one part of that story is trying to make it easier for offenders to file their petitions. But we saw out of one jurisdiction in Ohio a couple years ago in Cleveland, prosecutors were actually trying to, thinking about collecting the records necessary to be the ones who would move in court to help let low-level drug offenders get their records uh sealed or expunged and that process looked encouraging until after they collected the records the Cleveland prosecutors found out that then existing law, this was before 288, didn't provide any mechanism for anyone other than the defendant to be the petitioner who seeks record relief. It was impossible for prosecutors to do this on behalf of defendants unless the defendants, unless the persons with convictions, did it on their own. Against that backdrop, there was a push, and 288 ultimately made this law, to make it possible under our state law for prosecutors to initiate the applications for expungement or sealing. And so that's what I think is the most interesting aspect of Senate Bill 288. Not only reflecting this eagerness to continue to expand eligibility for record sealing and expungement but also to make it possible for the state to do this on their own through a prosecutor-initiated process rather than put all the burden on a defendant to pay the fee and initiate the the record dealing process on their own.
Hannah Miller: I'd be remiss if I did not plug the panel that we had back in April about Senate Bill 288 and prosecutor-led expungement. I remember the law director in Cleveland saying that the court said this is creative maybe a little too creative in terms of your interpretation of who an applicant is per Revised Code.

Douglas Berman: Cleveland has a fairly Progressive you know city leadership and city prosecutors. Some would say oh this was part of a progressive prosecutor's movement to try to go in and be the applicants for these record-sealing applications but then a very red General Assembly, Ohio's general assembly is very conservative, much more conservative because of redistricting rules uh than probably the state as a whole, was comfortable putting that into law, making it possible for prosecutors, even so-called progressive prosecutors, to go do this. And so oftentimes, especially when it comes to these kind of record relief mechanisms, uh it's not a question of having a will it's often the challenge is finding the way. And the prosecutor initiated legal reform in 288 provided more of that way. However, we've started to do some studying and surveying of prosecutors around the state and we're discovering that they, even in jurisdictions where they might be interested in this, there's still the fees that are in place that can be a barrier for even a prosecutor initiated process and prosecutors of course have a lot of other things on their plate. Right? And so it's not just the resources economically, it's time resources that may also continue to present burdens on the ability to do the kind of record relief work that it seems like the general assembly is supportive of but that even when you pass a law allowing for record sealing or expungement there's still that important next step of implementing that law effectively so that it can be a remedy available to many people.

Hannah Miller: Right. I know that here in Franklin County there's a special process put together, but it took time and it took effort, it took a lot of actors collaborating and being open to the idea of waiving fees. And also it makes it a lot easier to know where to start when you have a list of individuals who might fit the bill if you will, which is what DEPC was able to provide to the City Attorney's Office here in Columbus to get that process started for at least, I believe, two to three thousand individuals. And then ultimately they came back and they asked for the full list of six thousand. So, interested to see how that evolves.

Douglas Berman: And again this is one one of those areas where you know numbers, precise numbers, are hard to come by but general numbers tell such a powerful story about how important this can be. By some estimates, at least nationwide, in one or three adults have some kind of criminal record. Now that may be mostly arrests or very low level type convictions, but when you think about that in terms of just the number of adults in Ohio, we're talking millions of people with criminal records. Now some of them will have very serious records that aren't eligible for sealing and and expungement but the vast majority of records are for relatively uh low-level offenses. So, you know, probably the population that are at least kind of record sealing or expungement eligible in Ohio is certainly in the hundreds of thousands, maybe in the millions, and yet, you know, the data showing how many records are actually getting sealed, how many are getting expunged, uh is a whole significant number of magnitudes below that. So we know there's, what's often talked in in this literature as an uptake gap, a big gap between who's eligible to get the benefit of these remedies and who actually takes it up. And that's one of the things we'll be studying, but it's also something that you know talking to defense attorneys, prosecutors, court officials, all sorts of administrators and of course obviously the people who actually have the records, is critically important to fully understand, you know, how we can be sure to meet people where they are and make sure we don't find contentment, in a sense false contentment, from well we passed the law and that made it possible to do this, but but if it's not really possible for most people who really need it. we should not rest on our laurels.

Hannah Miller: I really quickly want to quote a prosecutor who responded to the survey because I think that it really does showcase the frustration I believe some prosecutors feel by the inclusion of this in the statute. Now it doesn't say that prosecutors must, it just says that they have the option to, but this prosecutor is quoted as, "in my opinion, the statute is ridiculous. I have no secretary nor an assistant to assist with anything, let alone searching out and filing such motions. I've been a city prosecutor for 28 years. I'd be surprised if you found one that has the time, motivation and inclination." And I'm not shocked to see sentiments like that in the survey results, but it also tells the story of why these offenses are not dealt with in some automatic fashion to begin with. And so, question for you, in terms of automatic record relief, is there a strict definition in policy in terms of what automatic record relief is or is it just any mechanism by which an individual is not burdened with the process of petitioning or removing an offense from their record?

Douglas Berman: I think at times automatic is thought of and defined in the kind of the negative, meaning the individual with the record doesn't have to do anything and they get the benefit of whatever relief or kind of help is built into the law. But what the specifics of what that looks like, and of course to me what I've always thought about and
worried about in the context of automatic record relief is, well what if the person doesn't know they're getting that benefit or doesn't understand you know that's that way? And of course the most obvious example is, and this goes again to the burdens and the stigma that all kind of wrap up together both formally and socially, if an individual thinks perhaps because they've applied for a job have failed at a background check and so think then they can't get any job job in a certain field because of a past record, they may not even apply for a job anymore. They may not only know not know that they can get maybe their record sealed or expunged, they may not think or know even if I do get that sealed or expunged one would it still show up on a Google search, won't it still possibly be a barrier to me getting that job. And so I'm so worried about that I'm not going to seek that job. And that doesn't show up in any statistic, that doesn't show up in oh here's how this person's affected or not. But a if that person doesn't know that there's some automatic form of relief and even if they're informed of that relief if they're not helped to be shown that that relief can really make a difference in a way that they care about, again there's this risk of are we really helping people or are we just you know doing things that are starting the path towards helping but not getting us all the way there?

**Hannah Miller:** Or doing things that feel good?

**Douglas Berman:** That's certainly, that's certainly right. Although you know it's funny because the prosecutor you quote I want to sort of you know either give them some love, certainly give them some respect. He's, I don't think he's saying I don't want to ever do this, he's just saying that's not what I need to have resources to do, and this is the other part that I think goes to the heart of not just record relief, but I can certainly speak to this, you know as a law professor for many years, lawyers not only don't see themselves as social workers or persons who are you know sort of community workers and that broad and important respect, but in some sense kind of feel like I'm not good at that. Right? That's not what I'm trained to do, that's not what I thought I was going to law school to do. And so it's not just the I don't have the resources, I don't have the opportunity to kind of work in this way under this new law, it's this isn't what my training and what my understanding of my role was supposed to be and now you're telling me this is part of what I'm supposed to do. Well good luck finding somebody who thinks that's what being a prosecutor is about. Right?

Of course, the irony, and that's why it's so nice we gave the backstory, this came to pass because there were prosecutors in Cleveland saying we want to do this. Right? So you know it's certainly obvious there are prosecutors who are happy and eager, right, to take advantage of that law. It's just that again it's not just meeting the persons with records where they are, we got to meet the prosecutors where they are if we think they're going to be integral toward getting this work done.

**Hannah Miller:** It's not black and white in terms of how a prosecutor is supposed to think or feel about the law or defendants, however, I think back to what Mark Osler said in episode one. He was a prosecutor and he was representing the public and not the defendants and at some point he decided maybe what I'm doing is not actually helping the public. And so then he switches sides if you will. And also a trend, maybe you can speak to a possible trend, of students learning about criminal law and heading towards a prosecutor pathway of practicing law that is in some ways advocacy. You know the best way that they can change the system is to be part of the system.

**Douglas Berman:** I think that's certainly right although you know your comments really get me thinking about both the opportunity and the challenge in helping prosecutors and other individuals who are deeply concerned about public safety to recognize that record relief may be a significant part of that. The difference of course, the challenge of course, is oh there's a really bad guy, let any help him get caught and sent to prison. That feels very tangibly as a way of keeping the community safe versus, oh here's a former bad guy, it seems like they're better, let me help make sure the world knows they're better by helping to seal their record or whatever the case may be, and hopefully that will mean they're less likely to go commit another crime. That's, you know, much less tangible. It feels I think for the average prosecutor, well that sounds good, but I'm not here for that. That's a different way to try to make the community safe. And I think it's not just helping to educate, helping to do research to see the relationship between these collateral consequences and recidivism rates and re-entry and the like, but you know it may be a part of bringing those conversations to law school too. Right? So that folks who are very concerned about public safety, are very concerned about encouraging people to desist from crime, can understand that that's not a focus of let's deter people with really tough sentences answers, let's also let society know that when you start demonstrating that you're a responsible citizen we take the the badges of dishonor, which a criminal record can be, off so that you can move forward effectively. That can advance public safety as well. I think the evidence certainly shows that but again it's something that's so much harder to make fundamental to just sort of a basic conversation about crime and punishment.
Hannah Miller: Right. And I’m looking at another quote of a prosecutor saying that the prosecutor-led expungement mechanism, "it's a terrible rule and another step towards holding people less accountable for their actions." So then there's a spectrum represented here of attitudes about individuals with criminal records too. For some, a criminal record is just, as you said, a badge of dishonor that does not necessarily speak to the type of person you are currently, and there are others potentially who believe that the badge of dishonor should remain with you forever.

Douglas Berman: We have to recognize that everybody in the system necessarily sees a incomplete picture of all of the individuals that come through it. Prosecutors tend to see the worst of folks. Those of us working on record relief, on pardons and the like, often get to see the best of folks. And it's, it's heartening, yeah, but it's also important for us to realize not every former offender, not every person with a record, has turned their life around quite so much. And it's understandable that when the prosecutors see the other side of that, they're a little more dismissive of the entire project of record relief than might be the folks who are working on the other side.

Hannah Miller: Drugs on the Docket is a production of the Moritz College of Law Drug Enforcement and Policy Center. This episode is produced by me, Hannah Miller, and Holly Griffin. Doug Berman is our editorial adviser. The music is composed by Joe DeWitt.