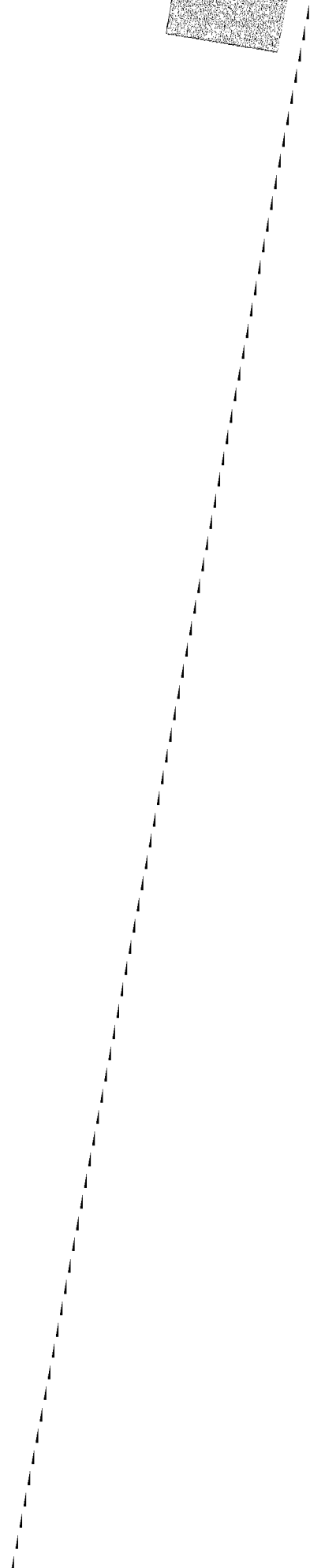
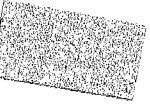


Exhibit V



STATE OF MICHIGAN
IN THE COURT OF APPEALS

DAVID SCHIED,

Plaintiff/Appellant,

Court of Appeals No. 267023
Washtenaw County Circuit
Court Case No. 04-577-CL

v

LINCOLN CONSOLIDATED SCHOOLS,
LINCOLN CONSOLIDATED SCHOOLS BOARD
OF EDUCATION and DR. SANDRA HARRIS,

Defendants/Appellees.

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APPELLANT'S REPLY BRIEF

ORAL ARGUMENT REQUESTED

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STATEMENT OF FACTS

Mr. Schied relies on the statement of facts set forth in his principal brief.

ARGUMENT

Standards of Review

Mr. Schied relies on the standards of review set forth in his principal brief.

Argument

- I. **Under established Texas law, David Schied was not a convicted individual when he truthfully responded such in his employment application.**

Appellees' argument fails to address the essential issue in this case. In his application to Lincoln Consolidated Schools, David Schied was asked to represent that he had or had not "been convicted of, or pled guilty or nolo contendere (no contest) to any crimes." He was not asked about legal penalties or disabilities. (See Appellee's brief at 13) He was only asked about convictions and pleas. Mr. Schied correctly and truthfully answered that he had not been convicted of a crime because, in accordance with Texas law, as of December 20, 1979, when the 183rd Criminal District Court of Harris County, Texas entered the set aside order he was no longer subject to a conviction.

The effect of a Tex Code Crim Proc 42.12 §20 Early Termination Order setting aside a conviction was delineated by the Court of Criminal Appeals in *Cuellar v Texas*, 70 SW3d 815; 818-19 (Tex Ct of Crim Appeals, 2002). In this seminal case the Court held that when a trial judge invokes the discretionary "judicial clemency" provision of Tex Code Crim Proc 42.12 §20, "the conviction is wiped away . . . [it] disappears[.]" *Cuellar*, 70 SW3d at 819-20 (emphasis added). The necessary corollary to the holding

that the conviction has disappeared is that the “person whose conviction is set aside pursuant to an Article 42.12, § 20, order *is not a convicted felon.*” *Id* at 820 (emphasis in original).

The singular legal issue regarding the viability of Mr. Schied’s breach of contract claim is whether he truthfully denied that he was a convicted felon as of September 11, 2003 (the date he completed the employment application). Under the controlling Texas law, when the set aside order was entered on December 20, 1979, Mr. Schied’s conviction disappeared and he was not a convicted felon.

On December 20, 1979, the 183rd Criminal District Court entered the following order:

It is therefore the order of the Court that the defendant be and he is hereby permitted to withdraw his plea of guilty, the indictment against defendant be and the same is hereby dismissed and the Judgment of Conviction be hereby set aside as provided by law.

(Ex A) The order’s terms are clear on its face. The plea is removed, the indictment no longer is applicable and the conviction is wiped away. Without an indictment there can be no conviction. From December 20, 1979, as *Cuellar* explicitly concludes, Mr. Schied’s conviction disappeared and he is not a convicted felon.

Appellees attempt to deflect this Court’s attention from *Cuellar*’s plain meaning by ignoring the majority opinion in favor of the dissent. They wrongly suggest to this Court that the dissent and some antedated, advisory attorney general opinions constitute the clear expression of Texas law. (Appellees’ brief at 13) Nothing could be farther from accurate. *Cuellar* is the controlling law with regard to “judicial clemency” set aside orders. *Cuellar* unequivocally holds that Mr. Schied, having received a “judicial clemency” set aside “*is not a convicted felon.*”

Moreover, the attorney general opinions do not address circumstances that exist in this case. Mr. Schied received both a set aside order and a governor's pardon. The pardon works hand-in-glove with the set aside order. As *Cuellar* holds, the set aside wipes away the conviction and removes the penalties and disabilities engendered by the conviction. The pardon, by express terms, restores "Full Civil Rights of Citizenship." (Ex B) Thus, in Mr. Schied's case not only has the conviction disappeared but also all of his civil rights have been completely restored. The attorney general opinions cited by Appellees simply do not address the symbiotic effect of the set aside and pardon.

II. The Texas Expunction Statute and Expunction Order have no bearing on Mr. Schied's conviction status.

Appellees again mislead this Court when they claim that the Texas expunction statute, Tex Code Crim Proc 55.01 *et seq.*, expressly provides a party the ability to deny a crime. (Appellees Brief at 15) The argument made is that the only circumstance under which Mr. Schied could deny the 1977 conviction was if he had first garnered an expunction order. What Appellees fail to recognize is that the expunction statute does not concern the conviction, at all. To the contrary, an expunction wipes away the vestiges of an arrest and the prosecution thereafter. It does not address the conviction.

Articles 55.01 and 55.03 provide in pertinent part (emphasis added):

Art. 55.01. Right to Expunction

(a) A person who has been placed under a custodial or noncustodial arrest for commission of either a felony or misdemeanor is **entitled to have all records and files relating to the arrest expunged if:**

* * *

(b) Except as provided by Subsection (c) of this section, **a district court may expunge all records and files relating to the arrest of a person who has**

been arrested for commission of a felony or misdemeanor under the procedure established under Article 55.02 of this code if the person is:

* * *

Art. 55.03. Effect of Expunction

When the order of expunction is final:

(1) the release, maintenance, dissemination, or use of the expunged records and files for any purpose is prohibited;

(2) except as provided in Subdivision (3) of this article, the person arrested **may deny the occurrence of the arrest** and the existence of the expunction order; and

(3) the person arrested or any other person, **when questioned** under oath in a criminal proceeding **about an arrest** for which the records have been expunged, may state only that the matter in question has been expunged.

A plain reading of Texas law makes clear the legislative scheme regarding set aside orders and expunctions. Under Tex Code Crim Proc 42.12 §20 the conviction disappears; a set aside negates the conviction, permitting the person to truthfully state that he has not been convicted. The remaining vestiges, the arrest and prosecution records, are erased by an expunction. Article 55 permits the person to deny the arrest and is not related to the ability to deny the conviction.

III. Appellees continue to rely on "facts" that they know to be erroneous.

Uncontroverted affidavits (exs C, D and E) presented by Mr. Schied directly dispute Appellees "factual" assertions regarding the information provided to the superintendent at the so called pre-termination meetings. By ignoring these affidavits, Appellees misrepresent material facts to this Court.

It is factually and legally significant that Mr. Schied attempts to correct the errant FEI report were rebuffed and ignored by the superintendent. Had the superintendent reviewed the set aside order and the pardon presented to her, and/or listened to Mr.

Schied's explanation, she would have realized that Mr. Schied completed the application truthfully.

Each affidavit submitted by Mr. Schied attests to the facts that the set aside order and the pardon were presented to the superintendent and that Mr. Schied attempted to explain the documents. Each demonstrates that the superintendent was unwilling to listen or to consider the documents. In the face of these affidavits, however, Appellees continue to assert that the documents were not shared and no explanations were forthcoming. (Appellees' brief at 5-6) Yet without having challenged the affidavits, Appellees statements constitute factual misrepresentations of the record. Appellees' brief should be carefully scrutinized and misstatements should not be tolerated by this Court.

RELIEF REQUESTED

For all the reasons set forth in his principal and above, Appellant David Schied requests that this Honorable Court reverse the trial court's dismissal of this matter and remand the case for trial on the merits.

Respectfully submitted,

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Dated: March 7, 2006