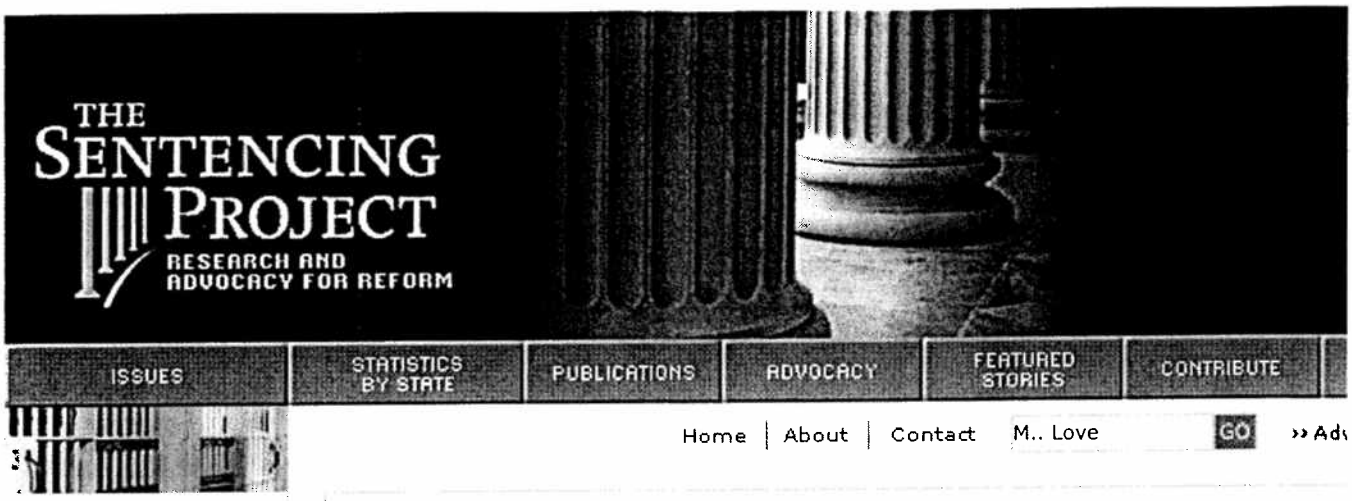

Publication

August, 2007

RELIEF FROM THE COLLATERAL CONSEQUENCES OF A CRIMINAL CONVICTION: A STATE-BY-STATE RESOURCE GUIDE

A collection of individual state documents that can be downloaded; includes state law regardi loss of rights due to a felony conviction, process of restoration, pardon/expungement information, and contact information of corresponding agencies. (documents updated as developments warrant)

Author: Margaret Colgate Love
Issue Area(s): Felony Disenfranchisement, Collateral Consequences, Felony Disenfranchisement : F

This comprehensive survey describes for each United States jurisdiction th and practices relating to restoration of rights and obtaining relief from the disabilities and penalties that accompany a criminal conviction. It is the firs kind, and it illustrates the extraordinary variety and complexity of state an laws that impose a continuing burden on convicted persons long after the c imposed sentence has been fully discharged. It is an important resource fo policymakers interested in offender reentry and reintegration, for practitior levels of the criminal justice system, and for people with a criminal record seeking to put their past behind them.

It is essential for government officials to be able to determine the rights ar responsibilities of individuals with a criminal conviction, both to ensure con with the law and to provide appropriate advice to affected individuals seeki guidance. It is also critically important for individuals with a criminal recorc understand their rights, and how they can overcome or mitigate the lingeri collateral consequences of their conviction. Finally, it is important for policy and citizens to understand the continuing burden that the law places on cri offenders seeking a fresh start, so that they can make informed decisions a whether particular legislative and policy choices make sense.

The resource guide concludes:

[w]hile every jurisdiction provides at least one way that a criminal offende avoid or mitigate the collateral penalties and disabilities associated with a conviction, in most jurisdictions this relief mechanism is inaccessible and u Moreover, applicants for relief cannot expect success upon satisfaction of s clear standard of behavior or accomplishment. As a practical matter, in mo jurisdictions people convicted of a crime have no hope of ever being able t discharge their debt to society. Notwithstanding our fond national self-imag

is not a land of second chances, at least as far as the legal system is conce

[A]s more and more people have a criminal record, relief from the collatera consequences of conviction has never seemed more elusive in most of the and for federal offenders. It would seem that if rehabilitation of criminal ofl is a desirable social goal, it would be helpful to begin serious discussion of growing contrary pressures that seem to consign all persons with a crimina to the margins of society, and to a permanent outcast status in the eyes of

Below are 54 profiles of the law and practice in each U.S. jurisdiction for dc in Adobe Acrobat format. These state guidelines will be included in the app the full resource guide. In addition there is a set of eight tables illustrating national patterns in restoration practices, as well as comparing policies acr jurisdictions.
Comments and contributions are warmly welcomed by the author, who will the study on a regular ongoing basis. You may also visit the author's Web

For more information or to order the book, please visit the website of W.S.

Alabama	Hawaii	Michigan	North Carolina	Texas
Alaska	Idaho	Minnesota	North Dakota	Utah
Arizona	Illinois	Mississippi	Ohio	Vermont
Arkansas	Indiana	Missouri	Oklahoma	Virginia
California	Iowa	Montana	Oregon	U.S. Virgin Islands
Colorado	Kansas	Nebraska	Pennsylvania	Washington
Connecticut	Kentucky	Nevada	Puerto Rico	West Virginia
Delaware	Louisiana	New Hampshire	Rhode Island	Wisconsin
District of Columbia	Maine	New Jersey	South Carolina	Wyoming
Florida	Maryland	New Mexico	South Dakota	Federal System
Georgia	Massachusetts	New York	Tennessee	

Table #1: Models for Administration of Pardon Power in the United States

Table #2: Characteristics of Independent Pardon Boards

Table #3: Characteristics of Boards Whose Recommendations Bind Govern

Table #4: Characteristics of 13 Most Active Pardon Authorities

Table #5: Judicial Expungement, Sealing, and Set-Aside

Table #6: Consideration of Criminal Record in Licensing and Employment

Table #7: Right to Vote After a Felony Conviction

Table #8: Discretionary Restoration of the Vote After a Felony Conviction

The Sentencing Project is pleased to make available here an executive summ
the conclusions of the study, which is available in its entirety from William S.
& Co.

12/16/05

RELIEF FROM THE COLLATERAL CONSEQUENCES OF A CRIMINAL CONVICTION: A STATE-BY-STATE RESOURCE GUIDE

by

Margaret Colgate Love

Prepared with support from an Open Society Institute fellowship
October 2005

BACKGROUND

Persons convicted of a crime are generally exposed to a number of legal penalties and disabilities that remain with them long after they have fully served the sentence imposed by the court. These so-called "collateral consequences of conviction" take many forms and vary widely from jurisdiction to jurisdiction. In addition to permanent changes in an individual's legal status as a result of conviction, the stigma of a criminal conviction brings into play more subtle and wide-ranging forms of discrimination and shaming.

Limited employment opportunities are perhaps the most troublesome of the secondary legal consequences of conviction, since an inability to get or keep a job has been identified as a major factor in recidivism. The natural reluctance to hire people with a criminal record has been exacerbated since the 9/11 terrorist attacks, so that it is now more likely than ever that a criminal record will be discovered, and that it will result in loss of a job or other professional opportunity. Indeed, federal law now compels background checks, and mandates disqualification based on conviction, for a wide variety of employments, including education, healthcare services, child and elder care, financial institutions, and transportation.

Our reluctance to welcome convicted persons back into the community is reflected in the air of mystery surrounding the existing legal mechanisms for obtaining relief from collateral consequences. Offenders generally don't understand the multiplicity of changes brought about in their legal status by virtue of a conviction, much less what can be done to remedy the situation. Often the mechanics of restoration are unclear even to those responsible for administering and enforcing the law, and one jurisdiction often has very little idea of what is going on in others. Once someone has been tagged as a criminal, it is almost impossible to get rid of the label; the public is easily persuaded that "convicted felons" must be segregated and excluded from the rest of society. This phenomenon is hardly new; what is new is the scale of the problem.

It should come as no surprise that not a single U.S. jurisdiction has attempted a comprehensive assessment of its regime of collateral consequences. More to the point for the present study, not a single jurisdiction has considered it necessary or appropriate to develop a systematic and accessible way for convicted persons to overcome or avoid the legal barriers to reentry and reintegration. At a time when the front-end mechanics of the justice system have become increasingly efficient in processing people in, the mechanics of processing them out have been largely ignored.

In almost every U.S. jurisdiction, offenders seeking to put their criminal past behind them are frustrated by a legal system that is complex and unclear and entirely inadequate to the task. Categorical disqualifications are generally overbroad, and discretionary decision-making is often unfair and unreliable. A few states enacted comprehensive statutory restoration schemes in the 1970s, but in the intervening years these schemes have been riddled with exceptions and in some cases dismantled altogether. Pardon has never been routinely available to ordinary people in more than a handful of states, and administrative certificates of rehabilitation have not caught on

outside of New York. Authority for courts to expunge or seal adult felony convictions, where it exists at all, is narrowly drawn to exclude many offenses. While more than half the states have laws that limit consideration of criminal history in the workplace, these laws are generally subject to significant exceptions and often have no mechanism for enforcement.

As a practical matter, therefore, in most jurisdictions people convicted of a crime have no hope of ever being able to fully discharge their debt to society. Notwithstanding our fond national self-image, ours is not a land of second chances, at least as far as the legal system is concerned.

PLAN OF THE RESOURCE GUIDE

There is presently no single source of information about the mechanisms available in each U.S. jurisdiction for avoiding or mitigating the collateral legal consequences of conviction. In 1988 the National Governors Association published a survey of executive clemency in the 50 states, and in 1996 the Office of the Pardon Attorney in the U.S. Department of Justice published a state-by-state survey of "civil disabilities" of convicted persons. While still useful, neither of these surveys is currently a reliable guide for policymakers, practitioners or potential beneficiaries, in part because neither presents a full picture of the various possibilities for obtaining relief from collateral consequences, and in part because the law has changed so much since they were published. The present publication is intended to fill that gap.

The first three sections of the resource guide, whose research findings and conclusions are summarized here, analyze the principal avenues to restoration available in U.S. jurisdictions today: 1) the executive pardon power; 2) judicial expungement and sealing of adult felony convictions; and 3) laws that limit consideration of conviction in employment and licensing. A fourth section describes how voting rights are regained after a felony conviction, focusing on those jurisdictions where restoration depends upon a subjective test of suitability, as opposed to an objective test like release from prison or satisfaction of sentence.

The guide's two appendices are reprinted here in full. One consists of charts that give an overview of each type of restoration mechanism, and allow state-to-state comparisons. The second appendix consists of individual profiles of law and practice in 54 U.S. jurisdictions, organized into three categories: 1) automatic restoration of rights; 2) discretionary restoration mechanisms, including pardon and judicial expungement; and 3) nondiscrimination provisions. The extraordinary variety and uncertainty in the law, and the dysfunction of the institutional arrangements for administering it in most jurisdictions, reflect the absence of a political constituency for people with criminal records.

One goal of this resource guide is to raise public awareness of the inefficiency and unfairness of keeping criminal offenders forever branded and apart, and to encourage policymakers to consider the advantages of allowing them to discharge their debt to

society at some point. A more modest goal is to help people understand what the law is and what their options are, whether they are offenders seeking to overcome the disadvantages of a criminal record, practitioners seeking to advise their clients, or officials looking for more functional approaches to criminal law enforcement. Hopefully it will prove useful for jurisdictions considering changes in their laws or policies to know what the experience of other jurisdictions has been. If all it does is start a conversation among practitioners and policymakers in different jurisdictions with similar interests, it will have served its purpose.

SUMMARY OF RESEARCH FINDINGS AND CONCLUSIONS

This resource guide surveys the legal mechanisms available in each U.S. jurisdiction by which a person convicted of a crime may avoid or mitigate the collateral penalties and disabilities that accompany a criminal conviction. These mechanisms sometimes recognize and reward rehabilitation after the court-imposed sentence has been fully served, such as executive pardon and judicial expungement. Sometimes they are aimed at keeping certain types of offenders from incurring a criminal record in the first place, such as deferred adjudication and set-aside. Whether preemptive at the front end of the system or restorative at the back-end or, they represent an effort to neutralize the negative effect of a criminal record on an offender's ability to reenter and reintegrate into the community after an adverse encounter with the criminal justice system.

The principal conclusions from the research undertaken for this resource guide are as follows:

- ***In every U.S. jurisdiction, the legal system erects formidable barriers to the reintegration of criminal offenders into free society.*** When a person is convicted of a crime, that person becomes subject to a host of legal disabilities and penalties under state and federal law. These so-called "collateral consequences of conviction" may continue long after the court-imposed sentence has been fully served. Their scope and duration are often unclear not only to those who experience them, but also to those who administer and enforce them. While most states now routinely restore the right to vote upon completion of the court-imposed sentence, a criminal record can be grounds for exclusion from many benefits and opportunities, including employment in education, health care, and transportation. The collateral consequences of conviction have grown more numerous and more disabling since the terrorist attacks of 9/11, and criminal background checks have become a routine and pervasive way of identifying who should be subject to them. This web of "invisible punishment" can frustrate the chances of successful offender reentry, and thereby actually increase risk to public safety.

- ***These legal barriers are always difficult and often impossible to overcome, so that persons convicted of a crime can expect to carry the collateral disabilities and stigma of conviction to their grave, no matter how successful their efforts to rehabilitate themselves.*** Most states have not yet developed a comprehensive and

effective way of "neutralizing" the effect of a prior criminal record in cases where it is no longer necessary or appropriate to take it into account. In almost every U.S. jurisdiction, offenders seeking to put their criminal past behind them are frustrated by a legal system that is complex and unclear and entirely inadequate to the task. As a practical matter, in most jurisdictions people convicted of a crime have no hope of ever being able to fully discharge their debt to society.

- ***While every jurisdiction provides at least one way that convicted persons can avoid or mitigate the collateral consequences of conviction, the actual mechanisms for relief are generally inaccessible and unreliable, and are frequently not well understood even by those responsible for administering them.*** Relief mechanisms of the same nominal type (e.g., pardon, expungement, sealing, set-aside) vary widely in effect and availability from state to state, and there is no national model to which state or federal authorities seeking guidance may refer. There is also no central clearinghouse of information about state and federal restoration of rights mechanisms, so that authorities in one state have little or no information about law and practice even in their neighboring states. Often officials responsible for administering one type of relief are unaware of alternatives available in their own state for mitigating or avoiding collateral consequences. Federal regulatory schemes sometimes give effect to state pardon and expungement remedies, apparently without considering their wide variation. Few jurisdictions provide information about avenues of relief from collateral disabilities to offenders leaving prison or completing probation, even where the law requires that this be done. It is often unclear what if any relief may be available for persons with convictions from other jurisdictions. The scope or effect of relief is also not well-understood, either by those seeking it or by those responsible for administering it.

- ***Pardon remains the most common relief mechanism, but it has been allowed to atrophy in recent years.*** In most U.S. jurisdictions, executive pardon is the only way to mitigate the impact of collateral legal penalties and disabilities, and the governor has exclusive and unreviewable authority to exercise the pardon power. At the same time, most governors no longer regard pardoning as a routine function of their office. In at least a dozen states where a governor's pardon is the exclusive means of avoiding or mitigating collateral disabilities, the governor has not exercised the power with any regularity for many years. The federal pardoning process has also withered in the past 20 years, producing only a handful of grants despite a steady stream of applications from people who may long since have completed their court-imposed sentences.

- ***The states that have issued the greatest number of pardons are generally ones in which the pardon power has some degree of protection from the political process, through exercise or administration by an independent appointed board.*** There are only 13 states in which there have been more than a handful of pardons granted each year since 1995, and in only nine of these states is pardon regularly available to ordinary people whose circumstances are not in some way exceptional. In most of

the states where pardons are still routinely available, the pardon power is either exercised or controlled by an appointed board.

- ***Judicial restoration remedies like expungement and sealing are generally available to adult felony offenders in only a few states, but where they exist they appear to be widely utilized.*** In some states expungement and/or sealing are available only to first offenders, or to misdemeanants, and serious or violent offenses are almost always ineligible for this relief. Persons whose convictions are expunged or sealed are frequently authorized by law to deny their conviction, including for purposes of employment, though the conviction ordinarily remains available for law enforcement purposes.

- ***A number of jurisdictions provide for some form of deferred adjudication or deferred sentencing, whereby minor offenders or persons without a prior criminal record can avoid a criminal record entirely if they successfully complete a term of community supervision.*** The growing popularity of deferred adjudication and deferred sentencing schemes appears to reflect a recognition that public safety is better served by keeping certain kinds of offenders out of the justice system entirely. Many such schemes offer not only the possibility that the conviction will be set aside or "erased" after successful completion of a period of probation, but also that the record itself will be expunged or sealed.

- ***Two- thirds of the states have laws that forbid denial or termination of employment and/or licensure "solely" because of a conviction, and/or require that a conviction by "substantially related" to the license or employment at issue; but it is unclear how effective these laws are.*** Thirty-three states have laws on their books that purport to limit consideration of conviction in connection with employment and/or licensing decisions, requiring that the offense of conviction be "substantially" or "directly" related to the license and/or employment sought. A few states allow consideration of an offender's rehabilitation, establishing a standard that, if met, precludes denial of licensure or employment. In a few states rehabilitation is presumed after the passage of a certain period of time. Some states apply a general limitation on consideration of conviction only if the conviction has been pardoned or expunged or sealed. However, these general nondiscrimination laws are subject to significant exceptions in the form of specific prohibitions under state or federal law that apply to particular jobs or licenses. Also, many states have no mechanism for enforcement, so that it is not clear how effective these laws are in discouraging employers from firing or refusing to hire people on grounds related to conviction.

- ***In all but a handful of states, most offenders regain the vote upon completion of sentence.*** A total of 39 States, the District of Columbia and the territories, either do not suspend the right to vote at all upon conviction, or restore it automatically to <u>all</u> felony offenders upon the satisfaction of some objective criterion (e.g., release from prison, discharge from sentence, or expiration of sentence plus an additional specified term of years). Eleven states make restoration of the right to vote discretionary for at least some offenders who have completed their court-imposed sentences, but only

three states (Florida, Kentucky and Virginia) currently disenfranchise all felony offenders for life, unless and until they can successfully navigate an executive pardon or restoration process, or obtain a judicial restoration order.

- ***The ability to overcome the disabling effect of a criminal record is becoming an important issue in the national conversation about offender reentry.*** Of the hundreds of thousands of people coming home from prison each year, many will make a reasonable effort to stay out of further trouble with the law, but will be frustrated by unreasonable legal barriers to their rehabilitative efforts. Particularly since 9/11, people with a felony conviction in their past are disqualified from a wide variety of jobs and licenses. The widespread availability of criminal record information has made it easier for employers and licensing boards to identify and reject people with a criminal record. Existing relief mechanisms in many jurisdictions have been flooded with applications from people seeking relief from employment barriers. In order to encourage rehabilitation of offenders and reduce recidivism, it has become essential to develop an accessible and reliable way to neutralize the effect of a criminal conviction in appropriate cases.

II. Pardoning Policy and Practice in the United States

- ***Pardon is assigned a central role in overcoming the legal barriers to reintegration of criminal offenders in almost every U.S. jurisdictions, and in most jurisdictions it is the only mechanism by which adult felony offenders can avoid or mitigate collateral penalties and disabilities.*** Every state constitution provides for an executive pardon authority, and in most states pardon continues to play a key role in the criminal justice system. Indeed, in 42 states, and for federal offenders, pardon provides the only system-wide relief from collateral sanctions and disqualifications based on conviction. Particularly since 9/11, there has been increased pressure on pardoning mechanisms in many of those 42 jurisdictions. In every state, a pardon is sufficient to overcome most legal disabilities imposed by state law, and many federal laws and regulations also give effect to state pardons. While most states now restore basic civil rights automatically upon release from prison or completion of sentence, few states have established any systematic alternative to pardon that would allow adult felony offenders to avoid or mitigate conviction-related disabilities and disqualifications affecting employment, housing, and a myriad of other benefits and opportunities.

- ***Notwithstanding the central role it is assigned in the justice system, pardon has little operational usefulness in most U.S. jurisdictions.*** The research confirms that pardons are sparingly granted in all but a very few U.S. jurisdictions. Even in jurisdictions where pardon is the only way to avoid or mitigate collateral disabilities, granting pardons is evidently not regarded as an integral and routine part of a chief executive's job. While the modern politician's reluctance to pardon may be

attributable to a pragmatic concern about making a politically costly mistake, it takes comfort in a theory of pardon as a generally unwarranted interference with the proper functioning of the justice system. In all but a handful of states, the pardon power is thought of as "a lightning strike, like a winning lottery ticket, that almost never will be deployed except for some extremely unusual or distinctive case." But in a few states, pardon still functions as an integral part of the justice system, and is available to ordinary people with garden variety convictions who can meet the basic eligibility requirements and demonstrate their rehabilitation. With the new interest in facilitating offender reentry and "neutralizing" the effect of a criminal record in appropriate cases, the experience of these states will presumably be of interest.

- ***The pardon power is administered differently from jurisdiction to jurisdiction, and tends to play a more operational role in the justice system where its exercise is regulated and somewhat insulated from politics.*** The jurisdictions in which pardoning is most frequent and regular are those in which decision-making authority lies in an independent board of appointed officials, and least frequent and regular where the governor exercises the power without administrative constraint. In states where the pardon power is unconstrained, there are very few governors who exercise their power in a routine accountable manner. (The applicable administrative model for each state is shown in Chart #1, Appendix A.) The states that presently issue the most pardons are ones in which the pardon process is regulated by law and reasonably transparent, and in which the pardoning authority has some degree of protection from the political process. This may be accomplished by placing the pardon power in an independent statutory board, or by making the governor's power dependent upon a favorable board recommendation (though neither model necessarily produces a large number of pardon grants).

- ***Only nine states administer the pardon power in a regular manner and issue a significant number of pardons each year.*** There are only 13 states in which there have been more than a token number of pardons each year since 1995. And, pardon appears to be a reasonably attainable form of relief in only nine of these. *See* Appendix A, Chart #4. Alabama, Arkansas, Connecticut, Delaware, Georgia, Nebraska, Oklahoma, Pennsylvania, and South Carolina all issue a substantial number of pardons each year, and grant a substantial percentage of the applications filed. Of these nine states, all but Georgia and Arkansas administer the power through a public application process and hold hearings at regular intervals. Most are required to publish the reasons for their recommendations or, in the case of the independent boards, their grants. Several other states also hold public pardon hearings at regular intervals, but are not counted among the nine either because of recent irregularities in the pardon process, or a sluggish pardoning rate by the current governor, or both. Maryland's current governor has shown a commendable interest in pardoning, but he does not have the benefit of a statutory administrative apparatus that would give him a regular stream of reliable recommendations and a measure of political protection.

- ***Even in jurisdictions that routinely grant pardons to eligible applicants, relatively few people apply for pardon.*** Considering the many thousands of people with a criminal conviction even in the smallest states, it is surprising that so few people apply for a pardon. Even in states where pardon is granted to more than half of those who apply, the absolute number of applicants is very small. *See* Appendix A, Chart #4. A number of state pardon authorities reported a recent upswing in pardon applications since the 9/11 terrorist attacks, which they attribute to increased reliance by employers on criminal background checks and greater reluctance (sometimes mandated by law) to hire or retain people with criminal convictions. The relative paucity of applications could be attributable to the time and expense involved, the uncertain prospects of success, doubts about the efficacy of a pardon, or some combination of these factors.

III. JUDICIAL EXPUNGEMENT, SEALING AND SET-ASIDE OF ADULT FELONY CONVICTIONS

A. Findings

- ***Judicial procedures for avoiding or mitigating collateral disabilities and penalties are found in more than half the states, and sometimes are accompanied by expungement or sealing of the record. In most states, however, these procedures are made available only to first offenders, to minor offenders sentenced to probation, or to misdemeanants.*** The popularity of expungement and sealing statutes peaked in the 1970s, and by the 1990's this form of relief had been severely cut back in most jurisdictions. At the present time, many jurisdictions no longer authorize expungement of any adult felony convictions.

- ***Only a handful of jurisdictions have a comprehensive judicial restoration scheme available to adult felony offenders.*** Eight jurisdictions (Arizona, Kansas, Massachusetts, Nevada, New Hampshire, Puerto Rico, Utah, Washington) have general sealing or expungement schemes applicable to most adult felony convictions. Most of these states impose an eligibility waiting period that varies depending upon the seriousness of the offense, and exclude the most serious offenses altogether. An additional number of states offer an expungement or sealing remedy only to first offenders and/or non-violent offenders, or only to probationers or misdemeanants, or only to those who have received an executive pardon.

- ***What it means as a practical matter to have a record set aside or sealed or expunged (or vacated or annulled) varies widely from state to state.*** There is no common understanding of the terminology used to describe judicial restoration mechanisms. In most jurisdictions the purpose and effect of expungement or set-aside is to restore convicted persons to the legal status they enjoyed prior to conviction, at least until they commit another crime, but this is not always the case. Many jurisdictions regard expungement as a more comprehensive remedy than

sealing, but even expunged convictions generally remain available to courts and law enforcement agencies, and ordinarily revive in the event of a subsequent offense. (Connecticut appears to be the only state that authorizes the actual destruction of criminal records after expungement.) Most jurisdictions permit persons whose records have been sealed or expunged to deny that they were ever convicted, including when asked to report prior convictions on an employment application.

- ***Often judicial relief from collateral consequences takes the form of deferred adjudication or deferred sentencing, followed by a set-aside of the conviction upon successful completion of period of probation. In some jurisdictions, the court is also authorized to expunge or seal the record.*** The purpose of relief in these cases is to allow minor offenders or persons with no prior conviction to come away from an adverse encounter with the justice system without a permanent mark on their record. Upon successful completion of probation the charges are dismissed (or the record of conviction set aside), and in at least twelve states the record may be expunged. Eligibility for deferred adjudication tends to be controlled by prosecutors, and its use has grown in popularity in recent years.

- ***Judicial expungement and sealing are evidently perceived as both more effective and more attainable than pardon, and are widely sought after in jurisdictions where they are available.*** On balance, at least until there is a sea change in public attitudes, the expungement or sealing of a conviction would seem to offer the most effective form of relief from the collateral consequences of conviction. Certainly the fear generated in employers and others by a criminal record makes it convenient to indulge the fiction that it does not exist. And, the courts as decision-makers offer the necessary accessibility, reliability, and respectability to make their relief at least as effective as an executive pardon. On the other hand, the limited and/or uncertain legal effect of expungement in some jurisdictions, the general unreliability of criminal record systems and the additional uncertainties introduced by new information-sharing technologies, and the anxiety necessarily produced by a system built upon denial, all combine to raise questions about the usefulness of expungement as a restoration device. Also, it is likely to be more expensive for a criminal offender to hire a lawyer to go to court to seek expungement, than it is to file an application for pardon, which can generally be done pro se.

IV. STATE LAWS REGULATING LICENSURE AND EMPLOYMENT OF CONVICTED PERSONS

- ***Thirty-three states have general laws that prohibit a refusal to hire and/or issue a professional or occupational license to a person "solely" because of their criminal record, or otherwise limit consideration of a conviction in connection with employment or licensing.*** Most of these "nondiscrimination" laws, originally enacted in the 1970's, provide that disqualification is lawful only if the criminal offense is "directly related" (or "substantially related" or "rationally related") to the license or employment sought. A few states apply a general limitation on consideration of conviction only if it has been pardoned or expunged or sealed. In

some states, specific "non-discrimination" provisions are incorporated into particular licensing laws. Exceptions to the general rule against disqualification have been separately enacted in laws prohibiting employment or licensure of convicted persons in particular professions, notably education and health care, and the federal government has more recently introduced conviction-related hiring requirements into federally regulated areas such as health and child care, transportation, education, and banking.

- ***Few states have an administrative mechanism for enforcement of these "nondiscrimination" laws, and all carve out large areas of exception.*** In a few states, laws protecting people with convictions against indiscriminate exclusion from employment and licensing have been enacted as a part of the state's fair employment practices scheme. Some of the laws provide for enforcement through the state's administrative procedure act, but in most states they are free-standing with no mechanism for administrative enforcement. It is therefore hard to suggest any conclusions about the effectiveness of a particular state's nondiscrimination policy in helping people with convictions secure employment. It is therefore hard to assess the effectiveness in practice. Yet nondiscrimination laws are important insofar as they express a public policy of the state that can be built upon by law reformers.

V. Regaining the Right to Vote in the 50 States

- ***In 48 states and the District of Columbia, some or all felony offenders lose the right to vote upon conviction, but in all but a handful of states most offenders regain the vote upon completion of sentence.*** In Maine, Vermont and Puerto Rico, conviction does not result in loss of the franchise, and even prisoners are entitled to vote. In Mississippi and Alabama disenfranchisement may or may not result from conviction, depending upon the nature of the offense (drug offenders may vote from prison in Mississippi). In 19 states, and the District of Columbia and the Virgin Islands, disenfranchisement results only while if a person is actually incarcerated; in 12 of these 19 states the vote is restored upon release from prison, and in seven states released prisoners must complete their supervision before being permitted to vote again. In 17 additional states, including most recently Iowa, the vote is lost upon conviction of a felony but restored automatically upon completion of the court-imposed sentence, including any period of parole or probation. Four more states, including most recently Nebraska, restore the vote automatically to some or all offenders after an additional eligibility waiting period.

- ***A total of 39 States, the District of Columbia and the territories, either do not suspend the right to vote at all upon conviction, or restore it automatically to <u>all</u> felony offenders upon the satisfaction of some objective criterion*** (e.g., release from prison, discharge from sentence, or expiration of sentence plus an additional specified term of years). Other civil rights lost upon conviction of a felony, notably the right to run for office and sit on a jury, are sometimes restored automatically along with the franchise, and sometimes they can be regained only through a pardon or judicial

expungement.

- ***Eleven states make restoration of the right to vote discretionary for at least some offenders who have completed their court-imposed sentences, but only four states permanently disenfranchise all felony offenders.*** These 11 states are formally distinguishable from the states where restoration of the right to vote depends only upon satisfaction of an objective eligibility criterion, such a discharge from sentence or the passage of a specific period of time. On the other hand, some so-called "automatic" states erect logistical obstacles that discourage felony offenders from registering. Within the group of 11 there is considerable variety in approach. Only three states (Florida, Kentucky, and Virginia) disenfranchise all felony offenders for life, unless and until they can successfully navigate an executive pardon or restoration process, or obtain a judicial restoration order. Tennessee may be added to this list as a fourth state, insofar as it requires all persons convicted since 1996 to petition the governor or a court for a restoration order. Arizona, Maryland, and Nevada allow first offenders and/or non-violent offenders to vote as soon as they have completed their court-imposed sentence. Delaware and Wyoming have recently modified their laws to permit non-violent and/or first offenders to petition for administrative restoration five years after completion of sentence, and Alabama now has an expedited administrative restoration process applicable to all but murderers and sex offenders. Anyone who does not fall within the class of individuals eligible for administrative restoration in these states must obtain a court restoration order or executive pardon before being permitted to vote.

CONCLUSION

Many people who commit a crime – or even more than one crime – make a reasonable effort to turn their lives around and stay out of trouble with the law. It would seem sound public policy to encourage them to do so. Where they encounter unreasonable legal barriers to their rehabilitative efforts, the law should also provide a way to overcome or mitigate the effect of these barriers. In addition, at some point offenders may seek to neutralize the disabling effect of having a criminal record through official confirmation that they have been successful in their rehabilitative efforts, such as a pardon or certificate of good conduct. Such relief mechanisms have become all the more necessary where employment and other opportunities are concerned, because of the current widespread availability of and interest in criminal record information.

And yet, as more and more people have a criminal record, relief from the collateral consequences of conviction has never seemed more elusive in most of the states and for federal offenders. It would seem that if rehabilitation of criminal offenders is a desirable social goal, it would be helpful to begin serious discussion of the growing contrary pressures that seem to consign all persons with a criminal record to the margins of society, and to a permanent outcast status in the eyes of the law. It is hoped that this survey will be helpful in moving this discussion forward.

APPENDICES

APPENDIX A: CHARTS

APPENDIX B: JURISDICTIONAL PROFILES

DISCLAIMER

It is important to emphasize several limitations of this resource guide:

1) The guide does not purport to identify all of the collateral consequences of conviction in each jurisdiction, but deals primarily with avenues of relief and mitigation. The Herculean (perhaps Augean is a better word) task of cataloguing all of the legal sanctions and discriminations that accompany a criminal conviction has been attempted for only a few jurisdictions, and remains in most an outstanding obligation of sentencing reform. Similarly, while the guide describes general laws limiting consideration of conviction in employment and licensure, it does not catalogue the many specific statutory exceptions to the general law.

2) The guide does not deal with relief mechanisms that may be available to persons who are incarcerated, such as executive commutation or judicial sentence reduction.

3) The guide does not attempt to assess the effectiveness of the relief mechanisms it describes. While it includes some statistical information about the number of pardon applications and grants in many of the states, it contains very little information about the number of judicial expungements and set-asides that are granted each year by the courts. Nor does it include very much information about the effectiveness of various nondiscrimination provisions that exist in many of the states. This is obviously an important area for further study.

4) The guide is not intended as legal advice, but rather as a starting point for researchers and practitioners, and for those whose rights and reputations are at stake. Any lay person seeking to understand how the law applies in a particular case is encouraged to contact the relevant state agency or court, or a private attorney.

5) Finally, changes in this area of the law are frequent, and the reader is cautioned to consult the most recent pocket parts of statute books. While every effort has been made to ensure thoroughness and accuracy, errors and omissions are inevitable. Corrections and additions from readers are welcome, for this is a work in progress and it will be updated on a regular basis.

Margaret Colgate Love, Relief from the Collateral Consequences of a Criminal Conviction, July 2005

TABLE # 1 - Models for Administration of the Pardon Power in the United States

State	Independent Board Appointed By Governor	Governor Sits On Board Of High Officials	Governor, Advisory Board Must Agree	Governor, Advisory Board Must Be Consulted	Governor, Advisory Board May Be Consulted	Governor, Non-Statutory Advisory System
Alabama	X					
Alaska					X	
Arizona			X			
Arkansas				X		
California					X	
Colorado						X
Connecticut	X					
Delaware			X			
District of Columbia						X (President)
Florida		X				
Georgia	X					
Hawaii					X	
Idaho	X					
Illinois				X		
Indiana					X	
Iowa				X		
Kansas				X		
Kentucky					X	
Louisiana			X			
Maine						X
Maryland					X	
Massachusetts			X			
Michigan				X		
Minnesota		X				
Mississippi					X	
Missouri				X		
Montana			X			
Nebraska		X				
Nevada		X				
New Hampshire				X		

State	Independent Board Appointed By Governor	Governor Sits On Board Of High Officials	Governor, Advisory Board Must Agree	Governor, Advisory Board Must Be Consulted	Governor, Advisory Board May Be Consulted	Governor, Non-Statutory Advisory System
New Jersey					X	
New Mexico					X	
New York					X	
North Carolina					X	
North Dakota					X	
Ohio				X		
Oklahoma			X			
Oregon						X
Pennsylvania			X			
Puerto Rico					X	
Rhode Island						
South Carolina	X					
South Dakota					X	
Tennessee					X	
Texas			X			
Utah	X					X
Vermont					X	
Virgin Islands						
Virginia					X	
Washington					X	
West Virginia						X
Wisconsin						X
Wyoming						X
Federal						X

Margaret Colgate Love, Dealing with the Collateral Consequences of a Criminal Conviction, September 2005

TABLE # 2 - Characteristics of Independent Pardon Boards

State	Public Hearing Required	Reasons Given	Separate Restoration Of Rights (ROR)	Eligibility Requirements	Effect Of Pardon	Grants In 2004	Alternative Restoration Mechanism
Alabama	Yes	Yes (each Board member)	Yes	Following completion of sentence, incl. payment of fines, no pending charges, or after at least three years of "permanent parole;" federal and state offenders eligible	Only as specified in pardon grant	158 full pardon (71% of applications), 2000+ ROR	No
Connecticut	For serious felonies only	Only for denial	No	5 years following completion of sentence; state offenders only	Relieves all legal disabilities, may go to court to get conviction "erased"	About 400 (high percentage of applications)	No; non-discrimination in employment/licensing
Georgia	No	No	Yes	5 years following completion of sentence, incl. payment of fines, no pending charges; state offenders only. ROR available to all offenders following completion of sentence.	Relieves all legal disabilities ex. return to public office	2004: 208 pardons w/o firearms rights, 165 w/ firearms rights, and 39 "immigration pardons. 2003: 204 w/o guns, 165 w/guns (35%-50% of applicants); 439 ROR	Deferred adjudication and 'exoneration' for first offenders
Idaho	Yes	Yes	No	5 years following completion of sentence; state offenders only	Relieves all legal disabilities	12 (2/3 of applicants)	Set-aside for probationers
South Carolina	Yes	No	No	Following completion of sentence, or after 5 years under supervision, payment of restitution in full; state offenders only	Erases legal effect of conviction, including as predicate offense	200 grants, 70% of applicants	No
Utah	Yes	Yes	No	5 years following completion of sentence; only state offenders who are ineligible for expungement	Relieves all legal disabilities	10 grants in past 10 years	Broad expungement scheme for all but serious and violent offenses

State	Public Hearing Required	Reasons Given	Separate Restora-tion Of Rights (ROR)	Eligibility Requirements	Effect Of Pardon	Grants In 2004	Alternative Restoration Mechanism

Margaret Colgate Love, Relief from the Collateral Consequences of a Criminal Conviction, September 2005

TABLE # 3 - Characteristics of Boards whose Recommendations Bind Governor

State	Eligibility	Public Hearing Required	Reasons Given	Separate Restora-tion Of Rights (ROR)	Effect	Grants In 2004	Alternative Restoration Mechanism
Arizona	Following release from prison; state felony offenders only	Yes; Board of Executive Clemency must hear every case, majority decision (dissents filed)	Only favorable recommenda-tions sent to Governor, who must report all pardons with reasons to legislature	Yes, from court for recidivists	Relieves all legal disabilities, ex. Firearms disability	25 applied in 2004, Nine recommended, three granted	Judicial set-aside after completion of sentence for all but violent and sex offenses.
Delaware	3-5 years following completion of sentence, absent hardship; mis-demeanants may apply; state offenders only	Yes, Board of Pardons (cabinet officials) must hear every case, majority decision	Only favorable recommenda-tions sent to Governor; Board recommendations and reasons are public record	Yes for voting, 5 yrs. after completion of sentence (by County Election Boards). Certain offenses ineligible	Relieves all legal disabilities ex. constitutional prohibition against holding state office or employment	173 applications heard, 141 recommended favorably, and 115 granted, some deferred.	None
Louisiana	Following completion of sentence; state offenders only	Yes, Board of Pardons must hear every case; 4 out of 5 votes required	Only favorable recommenda-tions sent to Governor, no reasons given	No	Restored to "status of innocence;" conviction cannot be used as predicate, but OK to impeach	Of about 150 applications, ¼ recommended favorably; current Governor has issued only one pardon	First offender pardon automatic for all but serious violent offenders, restores most rights but does not expunge.

Massachu-setts	None; state offenders only	Yes, Advisory Board of Pardons (Parole Board), hears every case, majority decision (dissents may be filed)	All recommend-dations sent to Governor and Council, which may veto; Governor must report pardons to legislature. No reasons required.	No	Pardon seals record of conviction; may no longer be used as basis for disqualifi-cation, recipient may deny conviction	Of about 100 applications, most recommended negatively. Only 27 grants in past ten years (Governor Romney has not pardoned anyone).	Judicial sealing for misdemeanors after 10 yrs., felonies after 15 yrs, with no subsequent convictions. May deny existence of conviction. Also nondiscrimination in licensing and employment; FEP laws preclude questions about misdemeanors.
Montana	None; misdemeanants may apply; state offenders only	Yes, Board of Pardons and Parole may hear meritorious cases, majority decision	Favorable recommenda-tions sent to Governor, who must report all pardons with reasons to legislature	No	Removes "all legal conse-quences;" basis for judicial expungement	Since 2002, 12 grants and 53 denials.	None
Oklahoma	Following completion of sentence, or 5 years under supervision; misdemean-ants eligible; state offenders only	Yes, Board of Pardon and Parole must conduct hearing ("jacket review"), majority decision	Favorable recommenda-tions announced publicly and sent to Governor, published on website; no reasons given; Governor's failure to act deemed denial	No	Relieves legal disabilities ex. firearms; basis for judicial expungement for non-violent first offenders.	About 100 grants annually (80% of those that apply).	Judicial sealing for first offender misdemeanants after 10 yrs.
Pennsylvania	None; misdemean-ants may apply; state offenders only	Yes, Board of Pardons must hear meritorious cases, majority decision	Favorable recommenda-tions announced publicly and sent to Governor; no reasons given	No	Relieves all legal disabilities, including employment and licensing	Of 500-600 applications each year, Board recommends about 150 favorably, most of which are granted. 30% are misdemeanants.	No; law prohibits discrimination in employment and licensing
Texas	Following completion of sentence (fines, etc. need not be paid)	No, Board of Pardons and Paroles not required to conduct public hearing; members deliberate separately, majority decision in writing.	Favorable recommenda-tions sent to Governor; publicly available, no reasons given	Yes, for federal and foreign first offenders	Relieves all legal disabilities, including employment and licensing; grounds for judicial expungement	In 2002 and 2003, about 600 applications received, 120 favorably recommended, few granted	None

TABLE # 3 - CHARACTERISTICS OF BOARDS WHOSE RECOMMENDATIONS ARE BINDING

State	Eligibility	Public Hearing Required	Reasons Given	Separate Restoration Of Rights (ROR)	Effect	Grants In 2004	Alternative Restoration Mechanism

TABLE # 4 - Characteristics of 13 most Active Pardon Authorities

State	Type Of Administration	Type Of Process	Eligibility Requirements	Effect	Grants In 2004	Alternative Restoration Mechanism
Alabama	Independent board appointed by Governor	Public hearings at regular intervals; each Board member gives reasons	Following completion of sentence, incl. fine, no pending charges, or after 3 yrs "permanent parole;" federal and out-of-state offenders eligible	Only as specified in grant (full pardons rare)	158 full pardon (71% of applications); 2000+ ROR	None
Arkansas	Governor decides, Board consultation required but advice not binding	No hearing, Governor must give 30 days public notice of grant and reasons	No eligibility restrictions; federal and out-of-state offenders eligible	Relieves legal disabilities, grounds for expungement in most cases	About 400 applications annually, 200 grants	Deferred adjudication and expungement for first offenders
Connecticut	Independent Board appointed by Governor	Public hearings at regular intervals, reasons for denial given	5 years following completion of sentence; misdemeanants may apply; state offenders only	Relieves all legal disabilities, may go to court to get conviction "erased"	200-300 annually ("high percentage" of applicants); more than half misdemeanants	None; law prohibits discrimination in licensing and employment
Delaware	Governor decides, Board recommendation required	Public hearings at regular intervals: favorable recs. sent to Governor; Board recommendations and reasons are public record	3-5 years following completion of sentence, absent hardship; misdemeanants may apply; state offenders only	Relieves all legal disabilities ex. constitutional prohibition against holding state office or employment	115 grants in 2004 (about 70% of applications); 81 in first eight months of 2005.	None
Georgia	Independent Board appointed by Governor	Paper review, no public hearing	5 years following completion of sentence, incl. payment of fines, no pending charges; state offenders only.	Relieves all legal disabilities ex. return to public office	2004: 208 pardons w/o firearms rights, 165 w/ firearms rights, and 39 "immigration pardons. 2003: 204 w/o guns, 165 w/guns (35%-50% of applicants); 439 ROR	Deferred adjudication and 'exoneration' for first offenders

Hawaii	Governor decides, Board consultation optional	Paper review at regular intervals; Board makes confidential recommendations to Governor	No eligibility requirements, state offenders only	Evidences rehabilitation, relieves legal disabilities and prohibitions; recipient may deny conviction.	In FY 2005, 180 applications processed, 32 grants	Judicial expungement for nonviolent first offender probationers; conviction covered by fair employment practices law
Illinois	Governor decides, Board consultation optional	Public hearings at regular intervals; confidential recommendations sent to Governor	No eligibility requirements, state offenders only	Relieves legal disabilities; if authorized by the terms of the pardon, the record of conviction can be expunged	Blagojevich: 53 pardons in first two years; 1600 recommendations from board awaiting decision as of January 2005. Board receives 500-600 applications each year, 30% from misdemeanants	Administrative certificates of relief from disabilities and good conduct; judicial sealing available for certain misdemeanors and minor felonies
Maryland	Governor decides, Board consultation optional	Paper review at regular intervals; Board makes confidential recommendations to Governor, who must give prior public notice of grant and reasons	5 years following completion of sentence for misdemeanor; 10 years for felony; 20 years for violent crime; state offenders only	Relieves legal disabilities; grounds for judicial expungement	Ehrlich: 117 pardon grants in first two years (plus 14 commutations)	None
Nebraska	Governor on Board with Secretary of State and Attorney General	Public hearings at regular intervals; no reasons given	10 yrs following completion of sentence for felonies, 3 yrs for misdemeanors; state offenders only	Restores civil rights other than vote; gun rights must be separately restored.	In 2003, 69 grants of 120 applications; in 2002, 56 of 84; in 2001, 38 of 64. Since 1993, 343 of 815 applications granted. 30% from misdemeanants.	None
Oklahoma	Governor decides, Board recommendation required	Public hearings at regular intervals; favorable recommendations announced publicly and sent to Governor; no reasons given	Following completion of sentence or 5 years under supervision; misdemeanants eligible; state offenders only	Relieves legal disabilities ex. firearms; grounds for judicial expungement for non-violent first offenders.	About 100 grants annually (80% of those that apply).	Judicial sealing for first offender misdemeanants after 10 yrs.
Pennsylvania	Governor decides, Board recommendation required	Public hearings at regular intervals; Favorable recs. announced publicly and sent to Governor; no reasons given	No eligibility requirements; misdemeanants may apply; state offenders only	Relieves all legal disabilities, including employment and licensing; grounds for expungement	Of 500-600 applications, Board recommends about 150 favorably each year, most of which are granted by Governor; 20% to misdemeanors and summary offenses.	None; law prohibits discrimination in employment and licensing

South Carolina	Independent board appointed by Governor	Public hearings at regular intervals	Following completion for sentence, or after 5 years under supervision, payment of restitution in full; state offenders only	Erases legal effect of conviction, including use as predicate offense	Board reviews 60-80 cases each quarter; about 200 grants each year, 60% of applicants. Few misdemeanants.	None
South Dakota	Governor decides, board advisory	Public hearings at regular intervals, recommendations sent to Governor	Ordinarily no eligibility period, ex. first offenders must wait five years after release to apply for "exceptional pardon"; state offenders only	When recommended by board, record sealed; otherwise not	279 pardons issued between 1995 and 2002, many without involvement of Board.	Deferred adjudication and judicial sealing for first offenders
State	**Type Of Administration**	**Type Of Process**	**Eligibility Requirements**	**Effect**	**Grants In 2004**	**Alternative Restoration Mechanism**

TABLE #5 - JUDICIAL EXPUNGEMENT, SEALING, AND SET-ASIDE

STATE	All Or Most Offenses Eligible	First Offenders Only	Probationary Sentences (Incl. Deferred Adjudication)	Misdemeanors Only	Pardoned Offenses	Non-conviction records
Alabama						Non-conviction records deleted from rap sheets within 30 days of release from custody, dismissal of charges or favorable disposition
Alaska			Court may suspend imposition of sentence and "set aside" conviction after successful completion of probation, but no expungement.			
Arizona	"Set-aside" available following completion of sentence for all but violent and sex offenses; generally relieves from all penalties and disabilities,					

	but may not deny conviction.				
Arkansas		See next column	Probationers and others diverted to community corrections eligible for sealing if no more than one prior non-serious felony; first offenders who plead guilty and complete probation entitled to sealing.	Expungement must issue following pardon for all but a few serious offenses.	Non-conviction records may be expunged by sentencing court; "upon entry of an order of expungement may state that no such charges, arrest, and the resulting trial ever occurred." In diversion cases sealing limited to first offenders.
California			Set-aside for probationers, misdemeanants; rights restored and disabilities removed, may be used as predicate offense, disclosed in certain contexts. Deferred sentencing for felony convictions, treated as misdemeanors following probation. No expungement or sealing ex. for certain under-age misdemeanants.		In any case where a person has been arrested and an accusatory pleading has been filed, but where no conviction has occurred, the court may, with the concurrence of the prosecuting attorney, order that the records be sealed and destroyed. No sealing for deferred adjudication cases.
Colorado			Deferred adjudication may lead to sealing		Courts are authorized to seal a criminal record ("except basic identification information") where the

					charges were completely dismissed (including deferred adjudication) or the person is acquitted
Connecticut		Six programs for deferred adjudication may result in "erasure" of record.		Pardoned conviction "erased;" after 3 yrs records destroyed; may deny conviction	"Erasure" of criminal records where charges have been dismissed or nolled, or where person has been acquitted; may deny arrest under oath. Deferred adjudication included.
Delaware					Court may expunge records where matter results in acquittal or other termination of action in favor of the accused.
District of Columbia		Deferred adjudication, treatment, and expungement for drug use and possession.	Expungement for selected misdemeanors, one felony		Court authorized to seal nonconviction records after waiting period; law enforcement access
Florida		Adjudication may be withheld and defendant placed on probation for second and third degree felonies if requested by prosecutor or if court makes findings of mitigating circumstances; no conviction results. Sealing for certain first offenders.	Non-violent misdemeanors may be sealed and/or expunged		Court may order sealing of nonconviction records for first offenders, with certain exceptions.

Georgia		Adjudication deferred pending completion of sentence (including prison); rights restored, may deny conviction, but no expungement or sealing. Predicate offense			Expungement of noncriminal records only if no charges filed
Hawaii	See next column	Deferred adjudication for nonviolent first offenders, expungement			Expungement of nonconviction records; person "shall be treated as having not been arrested."
Idaho		Set-aside upon successful completion of probation; restores rights but does not expunge or seal.			
Illinois			Sealing for misdemeanors and two minor felonies only (marijuana and prostitution)		Arrests that resulted in acquittal or dismissal may be expunged
Indiana				Pardon "wipes out guilt" and automatically becomes basis for expungement. (Limited admin. sealing	Nonconviction records may be expunged only where no criminal charges are filed, or charges dropped because of mistaken identity or non probable cause

					also available from state police 15 yrs following completion of sentence.)	
Iowa		See next column	Deferred adjudication followed by expungement for first offenders.			
Kansas	Waiting period of 3-5 yrs; serious violent and sex offenses excluded. Presumption in favor of expungement if court makes certain findings. May deny conviction, ex. for certain employment and licensing contexts. No guns, predicate offense.					May be expunged on petition to court where no conviction results from arrest (including where charges dismissed), subject to certain court-ordered grounds for disclosure
Kentucky			Pretrial diversion for Class D felonies; no conviction results, but expungement may or may not be	Misdemeanants and Class D felony drug possession convictions		Court has discretion to expunge records of misdemeanor or felony cases that result in dismissals or acquittals

			available.	may obtain expungement after 5 yrs.		
Louisiana		See next column	Deferred adjudication for certain misdemeanor and first offender felony convictions sentenced to probation; record expunged but remains available for law enforcement and certain licensing purposes. Predicate offense.			Both felony and misdemeanor nonconviction records may be expunged, but remain available to law enforcement and for certain licensing purposes
Maine						
Maryland			Deferred adjudication available for certain crimes, record may be expunged		Non-violent first offenders pardoned may obtain judicial expungement	Arrest records not leading to charges are automatically expunged, and other non-conviction records (including probation before judgment) may also be expunged upon petition after a waiting period; records may be opened only upon court order.
Massachusetts	Felonies may be sealed after 15 years if no subsequent conviction (misdemeanors 10 years), but no				Pardon seals automatically, recipient may deny conviction.	Non-conviction records may be sealed on order of court; may not be used to disqualify a person from public employment.

	expungement. May deny conviction in employment application, but no guns, predicate offense.					
Michigan		Set-aside for first offenders 5 yrs following sentence or release from prison. Employment-related uses, predicate.				First offenders may have nonconviction record sealed by requesting court to return fingerprints
Minnesota	Trial court has common law expungement authority; balancing test applied.		Deferred sentencing for felony convictions, treated as misdemeanors following probation.	Minor marijuana convictions only statutory expungement authority.	"Pardon extraordinary" has effect of "setting aside and nullifying" conviction, but does not expunge or seal record. Recipient may deny conviction.	Expungement of nonconviction records; remain available for law enforcement purposes, for purposes of evaluating a candidate for a law enforcement position, for purposes of authorized background checks.
Mississippi		See next column	Deferred adjudication followed by dismissal, expungement of			Expungement of records not resulting in conviction; deferred adjudication first offenders only.

		arrest records for nonviolent first offenders (ex. drug trafficking); expungement of conviction for first offender misdemeanants.			
Missouri		Sealing for probationary sentences, becomes "non-conviction" record, need not be reported; "expungement" only for first-time alcohol-related misdemeanors. Sealed records remain available for law enforcement, certain licensing.	First time alcohol-related misdemeanors, after 10 yrs		Automatic sealing of records in all cases disposed of favorably to the defendant or where sentence suspended, upon successful completion of probation. Record becomes a "non-conviction record," and need not be reported as a conviction.
Montana	See next column	Deferred sentencing for first felony offenders and misdemeanants, after which charges dismissed and access to records limited (but not "expunged" or destroyed).			Fingerprints returned when charges not filed; deferred adjudication records sealed for first offenders.
Nebraska		Set-aside for probationers "nullifies" conviction, removes			Criminal history information that has not resulted in a prosecution after a period of one year

			"all civil disabilities and disqualifications" but does not expunge or seal record		may not be disseminated except to law enforcement agencies
Nevada	Seven to 15 yrs waiting period, depending on offense, court may seal all records, if no subsequent arrest; conviction may be denied (with law enforcement and firearms exceptions). Three year waiting period for misdemeanants, no waiting at all for probationers honorably discharged. Other special sealing statutes for drug – related offenses. No guns, predicate offense.				Non-conviction records may be sealed at any time after completion of case, may deny arrest

New Hampshire	Less serious non-violent offenses may be "annulled" after waiting period of 1 to 10 yrs. Recidivists wait longer. May deny conviction, questions limited. Predicate offense.					Nonconviction data may be expunged by court subject to same "public welfare" standard; arrest deemed never to have occurred.
New Jersey		Expungement for first offenders after 10 yrs. May deny ex. in connection with judicial and law enforcement jobs.				Arrest and other non-conviction data may be expunged; deemed never to have occurred.
New Mexico			Deferred sentencing is available except in first degree felony cases; rights restored but conviction remains. No expungement.			
New York			Deferred adjudication, expungement automatic upon			Sealing automatic upon termination of the action in favor of a person (including deferred adjudication),

		termination unless the district attorney demonstrates "that the interests of justice require otherwise"			unless the district attorney demonstrates "that the interests of justice require otherwise"
North Carolina	See next column	Deferred adjudication for first-time minor drug offenders. No conviction results if probation successfully completed. No predicate effect. Expungement of records only if under 21.	First offender misdemeanors committed under age 18, and first offender alcohol-possession misdemeanors committed under age 21, after 2 years.		Where charges are dismissed or the person found not guilty, may apply to the court for expungement if no prior felony convictions
North Dakota		Minor felony convictions may be "knocked down" to misdemeanor, conviction set aside after completion of probation, but no expungement.			
Ohio	First offender "sealing" after 1-3 yr. waiting period for minor nonviolent convictions, if court finds rehabilitation.			Pardon "erases" conviction, may be denied, basis for judicial expungement	Sealing for records that did not lead to a conviction, or in which conviction was overturned

		Applies to federal and out-of-state. May deny if improperly questioned. Predicate offense.				
Oklahoma		See next column	Deferred adjudication and probation leading to expungement for first offenders	Misdemeanants after 10 years	Non-violent first offenders who have been pardoned	Expungement (sealing) of records of acquittals, or cases in which charges dismissed within one year. Deferred adjudication first offenders.
Oregon	Less serious non-violent offenses may be "set aside" after waiting period of 1 to 10 yrs, no other conviction in past 10 yrs, or arrest within 3 yrs. Order must issue unless court finds it would not be "in the best interests of justice." May deny conviction. Predicate offense.					At any time after the lapse of one year from the date of any arrest, if no accusatory instrument was filed, or at any time after an acquittal or a dismissal of the charge, the arrested person may apply to the court for entry of an order setting aside the record of such arrest.
Pennsylvania	Expungement		Deferred		Pardon basis	Constitutional right to seek

	at age 70 if no arrests for 10 yrs.		adjudication of guilt, expungement after "ARD" probation		for judicial expungement.	judicial expungement of an arrest record, and records must be expunged by central repository where no disposition received within a year
Puerto Rico	Broad expungement authority for all offenses, including violent felonies, after waiting period of six months to 20 years, if applicant demonstrates "good moral reputation in the community."					All nonconviction records may be expunged
Rhode Island		Nonviolent first offenders only, after 5-10 yrs. Allows denial ex. for certain jobs and licenses. Predicate offense.				Court seal records of persons acquitted or otherwise exonerated (including charges dismissed, etc.). Three-year waiting period for domestic violence cases.
South Carolina		See next column	Deferred adjudication for first-time minor			If charges dismissed or person found not guilty, all records must be destroyed

			drug offenders. No conviction results if probation successfully completed. No predicate effect. Expungement of records if under 25.		and "no evidence of such record pertaining to such charge shall be retained by any municipal, county or State law enforcement agency."
South Dakota		See next column	Deferred adjudication for first offenders, results in no conviction, no predicate effect, records sealed.	Pardon seals record automatically	Records sealed where no adjudication of guilt, including deferred adjudication
Tennessee					Court may order "destruction" of records in case of acquittal, or where charges dismissed.
Texas			Deferred adjudication available for all offenses, results in dismissal of charges and no conviction; may result in sealing for most offenses, after 5-year waiting period for felony offenses.	Pardon basis for judicial expungement	"Expunction" of all records may be ordered in cases where an arrest does not result in a conviction, except that only Class C misdemeanants eligible in case of deferred adjudication
Utah	Most offenses may be "expunged" after 3-10 yr waiting period,				Person arrested may petition for expungement if acquitted or charges dismissed 30 days after arrest took place. Class C

	20 for recidivists. Order must issue unless court finds it would be "contrary to public interest." May deny conviction. Predicate offense.					misdemeanors where adjudication deferred may also qualify.
Vermont			Deferred sentencing and diversion both available at DA's discretion, may result in sealing of record, may deny conviction.			Deferred sentencing, first offender diversion may result in sealing.
Virgin Islands		See next column	Non-violent first offender probationers, record expunged; drug possession offenses if under age 21.			
Virginia						Nonconviction records may be expunged in case of acquittal or where charges nol prossed or dismissed
Washington	All but most serious offenses may be "vacated" after waiting period of 1 to 10 yrs.				Pardon vacates conviction automatically.	Nonconviction records in criminal justice agency files may be sealed administratively two years after disposition favorable to defendant.

	Conviction erased, limited predicate effect. Special provisions for probation and misdemeanor offenses.				
West Virginia					Pardon as basis for judicial expungement after 2 yrs, and 20 years following completion of sentence. May not be considered for licensing and teaching
Wisconsin				Misdemeanor convictions may be expunged only if committed before age 21.	
Wyoming		See next column	Deferred sentencing for first felony offenders and misdemeanants; specifically prohibits expungement.	Expungement of misdemeanors for purposes of regaining firearms privileges	
Federal				Expungement for	

STATE	All Or Most Offenses Eligible	First Offenders Only	Probationary Sentences (Incl. Deferred Adjudication)	Misdemeanors Only	Pardoned Offenses	No Provision For Expunging Adult Convictions
				misdemeanor possession of marijuana only.		

TABLE # 6- CONSIDERATION OF CRIMINAL RECORD IN LICENSING AND EMPLOYMENT

STATE	Regulation Of Licensing, Public And Private Employment	Regulation Of Licensing And Public Employment	Regulation Of Licensing Only	Regulation Of Employment Only	Limited Regulation	No General Regulation Of Licensing Or Employment
Alabama						X
Alaska						X
Arizona		Cannot be barred from public employment "solely because of" conviction or, if civil rights restored, from licensure; in both cases, offense must have "reasonable relationship" to employment or occupation.				
Arkansas			Conviction may be considered but may not bar; 5 yrs following completion of sentence is "prima facie evidence of rehabilitation." Reasons in writing			

California		A board may suspend or revoke a license if crime is "substantially related" to the qualifications, functions, or duties of the business or profession; board must take into account evidence of rehabilitation.		General nondiscrimination law bars public and private employer consideration of judicially expunged offense, or misdemeanor
Colorado	Conviction "in and of itself" does not bar, but it may be considered; several professions exempted			
Connecticut	May not deny solely on conviction, must consider nature if crime, time elapsed, rehabilitation. Reasons in writing. May not deny based on pardoned offense.			
Delaware		Crime must be "substantially related" to the profession or occupation at issue; certain non-health related occupations		

			subject to a stricter standard			
District of Columbia						X
STATE	**Regulation Of Licensing, Public And Private Employment**	**Regulation Of Licensing And Public Employment**	**Regulation Of Licensing Only**	**Regulation Of Employment Only**	**Limited Regulation**	**No General Regulation Of Licensing Or Employment**
Florida		Cannot be barred from public employment "solely because of" conviction or, if civil rights restored, from licensure; in both cases, offense must be "directly related" to employment or occupation. Additional treatment requirements for drug offenders.			Licensing boards may not reject based on conviction if the person's civil rights have been restored, unless offense conduct is "directly related" to license.	
Georgia						X

Hawaii	Crime w/in 10 years may be considered if rational relationship to job or occupation; exceptions for healthcare, corrections, and law enforcement. Arrest records may not be considered at all. Discrimination based on conviction also barred by FEP law.				
Idaho					X
Illinois				Human Rights Act prohibits employment discrimination based on conviction only if expunged or sealed; no provision covering licensing boards.	
Indiana		Conviction may be considered, but not sole basis			
Iowa					X
Kansas			Employer		

STATE	Regulation Of Licensing, Public And Private Employment	Regulation Of Licensing And Public Employment	Regulation Of Licensing Only	Regulation Of Employment Only	Limited Regulation	No General Regulation Of Licensing Or Employment
				inquiries limited, but may obtain employee waiver. Protections for negligent hiring		
Kentucky		Conviction not a bar to public employment or licensing; disqualification permissible if crime punishable by term of imprisonment, or if "directly related" to job or license; factors to be considered in determining relationship listed.				
Louisiana		Conviction must "directly relate" to employment or occupation; reasons in writing, subject to review; exceptions listed.				0
Maine			May not consider convictions more			

		than 3 years old, or which call for less than a year in prison. Certain professions (medical, nursing) have 10 year expiration period.			
Maryland					X
Massachusetts		Employers may not inquiry into misdemeanor convictions more than 5 yrs old or arrest records		Licensing agencies may not disqualify based on pardoned conviction alone.	
Michigan		Agency may consider conviction in character inquiry, but applicant may rebut.			
Minnesota	Must be "direct relationship" between occupation or license and conviction history <u>and</u> individual has not shown "sufficient rehabilitation and present fitness to perform" the duties of the public employment or licensed occupation. Rehabilitation established by 1 yr.				

STATE	Regulation Of Licensing, Public And Private Employment	Regulation Of Licensing And Public Employment	Regulation Of Licensing Only	Regulation Of Employment Only	Limited Regulation	No General Regulation Of Licensing Or
		w/o arrest after release, or successful completion of probation or parole.				
Mississippi						X
Missouri		Conviction must be "reasonably related" to employment or occupation; license may not be denied "primarily" because of conviction where sentence fully discharged. Conviction "some evidence of an absence of good moral character" but Bd. shall also consider the nature and date of crime, evidence of good character.				
Montana			Conviction shall not operate as bar, but may be considered			
Nebraska						X
Nevada						X

					Employment
New Hampshire				Inquiry from public employers and licensing boards on annulled offenses limited	
New Jersey	No disqualification in licensing unless conviction relates adversely to occupation, or involves dishonesty in office; basis for adverse finding in writing (8 factors). Forfeiture and permanent disqualification from public employment if conviction occurs while employed by government	Licensing authorities may not "discriminate" on grounds of conviction unless reasonably related to occupation; reasons in writing			
New Mexico	May be disqualified if conviction relates directly to the position sought; or if the board finds not sufficiently rehabilitated. Teaching or childcare excepted. 3 yrs post-release or completion of parole or probation "creates a presumption of				

		rehabilitation." Must state reasons in writing				
New York	Prohibits discrimination based on conviction. Must be direct relationship and unreasonable risk to property or safety. Entitled to reasons.					
North Carolina						X
North Dakota			Licenses for most professions and occupations may be denied only if offense has direct bearing, or if insufficient rehabilitation; Factors to be considered include nature of offense, evidence of rehabilitation, and date of offense (5 yrs. deemed prima facie evidence of rehabilitation). Written statement of reasons if denied in whole or in part because of conviction			
Ohio					May be questioned about sealed conviction by	

STATE	Regulation Of Licensing, Public And Private Employment	Regulation Of Licensing And Public Employment	Regulation Of Licensing Only	Regulation Of Employment Only	Limited Regulation	No General Regulation Of Licensing Or Employment
Oklahoma					employer or licensing board only if it bears if direct and substantial relationship to the position No public or private employer may ask about or consider a sealed conviction	
Oregon			May not bar solely on grounds of conviction; may consider facts of conviction and all intervening circumstances in determining the fitness of the person. Ex. Teachers licenses.			
Pennsylvania	Felony and misdemeanor convictions may be considered only to the extent they relate to the applicant's suitability for employment in the position for which he has applied.					
Rhode Island						Prohibits inquiries

				about arrests as unlawful employment practice, but specifically permits inquiries about convictions
South Carolina	Conviction must "directly relate" to occupation or profession.			0
South Dakota				X
Tennessee				X
Texas	Discipline permissible if conviction "directly relates" to occupation or profession.			0
Utah				
Vermont				X
Virginia	Conviction must "directly relate" to occupation or profession; criteria for determining relationship listed, including age of			0

			offense and age at commission, evidence of rehabilitation; notification required.			
Washington		May consider a conviction only if within the last 10 yrs and the crime "directly relates" to the employment or license sought. Several exceptions.				
West Virginia					Licensing authorities may not consider expunged convictions	
Wisconsin	Fair employment act bars discrimination by public and private employers, licensing boards, unless crime "substantially relates" to the particular job or licensed activity					
Wyoming						X
Federal			10 yr. limitation for selected felonies in regulated banking and transportation industries; pardon or expungement also waives			

STATE	Regulation Of Licensing, Public And Private Employment	Regulation Of Licensing And Public Employment	Regulation Of Licensing Only	Regulation Of Employment Only	Limited Regulation	No General Regulation Of Licensing Or Employment

Margaret Colgate Love, Relief from the Collateral Consequences of a Criminal Conviction, July 2006

tABLE # 7 – Felony Disenfranchisement in the United States

STATE	Right To Vote Not Lost	Right To Vote Lost Only If Incarcerated	Right To Vote Lost Upon Conviction, Restored Upon Completion Of Sentence	Right To Vote Lost Upon Conviction, Restored After Additional Waiting Period	Right To Vote Lost Upon Conviction, Restoration Discretionary For Some Or All Offenders
Alabama	X (offenses not involving "moral turpitude")				X (for felony offenses involving moral turpitude, restoration of rights or pardon)
Alaska			X		
Arizona			X (first offenders only)		X (recidivists must apply to court or to governor)
Arkansas			X		
California		X (suspended during period of imprisonment and parole)			
Colorado		X (restored upon completion of sentence, including parole)			
Connecticut		X (restored upon completion of sentence, including payment of fines)			
Delaware				X (five years, except for certain serious offenses)	X (pardon for certain serious offenses)
District of Columbia		X (restored upon release)			
Florida					X (restoration of rights or pardon)
Georgia			X		
Hawaii		X (restored upon release)			

Idaho		X (lost if sentenced to prison, even if sentence suspended; restored upon completion of sentence, including any period of parole)			
Illinois		X (restored upon release, includes misdemeanants)			
Indiana		X (restored upon release)			
STATE	**Right To Vote Not Lost**	**Right To Vote Lost Only If Incarcerated**	**Right To Vote Lost Upon Conviction, Restored Upon Completion Of Sentence**	**Right To Vote Lost Upon Conviction, Restored After Additional Waiting Period**	**Right To Vote Lost Upon Conviction, Restoration Discretionary For Some Or All Offenders**
Iowa			X (by executive order)		
Kansas			X		
Kentucky		X (misdemeanants confined at time of election disqualified)			X (for felony offenders, pardon)
Louisiana		X (lost if sentenced to prison, even if sentence suspended; restored upon completion of period of supervision)			
Maine	X				
Maryland			X (first offenders only, including some misdemeanants)	X (three years for recidivists)	X (pardon for two or more violent felonies)
Massachusetts		X (restored upon release)			
Michigan		X (restored upon release; includes misdemeanants)			
Minnesota			X		
Mississippi	X (offenses not constitutionally specified, including drug offenses)				X (all constitutionally specified felony offenses, governor or legislature may restore)

Missouri			X		
Montana		X (restored upon release)			
Nebraska				X (two years)	
Nevada			X (first offenders only)		X (pardon or judicial restoration)
New Hampshire		X (restored upon release)			
New Jersey			X		
STATE	**Right To Vote Not Lost**	**Right To Vote Lost Only If Incarcerated**	**Right To Vote Lost Upon Conviction, Restored Upon Completion Of Sentence**	**Right To Vote Lost Upon Conviction, Restored After Additional Waiting Period**	**Right To Vote Lost Upon Conviction, Restoration Discretionary For Some Or All Offenders**
New Mexico			X		
New York		X (restored upon completion of term of imprisonment, including parole)			
North Carolina			X		
North Dakota		X (restored upon release)			
Ohio		X (restored upon release)			
Oklahoma			X		
Oregon		X (prison only, restored upon release)			
Pennsylvania		X (restored upon release)			
Puerto Rico	X				
Rhode Island			X		
South Carolina			X (including misdemeanants sentenced to prison)		

South Dakota		X (lost if sentenced to prison, even if sentence suspended; restored upon completion of prison sentence, including parole)			
Tennessee			X (most offenses eligible to obtain certificate of restoration upon completion of sentence)		X (pardon for certain serious violent offenses, sex offenses, public corruption) or judicial restoration)
Texas			X		
Utah		X (restored upon release, except federal and out-of-state offenders)			
Vermont	X				
Virgin Islands	X (if sentenced to less than one year in prison)	X (lost if sentenced to more than one year in prison, restored upon release)			
Virginia					X (restoration of rights or pardon)
Washington			X		
West Virginia			X		
Wisconsin			X		
Wyoming				X (five years, for non-violent first offenders only)	X (for violent offenders or recidivists, restoration of rights or pardon)
STATE	**Right To Vote Not Lost**	**Right To Vote Lost Only If Incarcerated**	**Right To Vote Lost Upon Conviction, Restored Upon Completion Of Sentence**	**Right To Vote Lost Upon Conviction, Restored After Additional Waiting Period**	**Right To Vote Lost Upon Conviction, Restoration Discretionary**

TABLE # 8 - dISCRETIONARY RESTORATION OF THE Vote After a Felony Conviction

STATE	Right To Vote Not Lost	Right To Vote Lost Only If Incarcerated	Right To Vote Lost Upon Conviction, Restored Upon Completion Of Sentence	Right To Vote Lost Upon Conviction, Restored After Completion of Sentence Plus Additional Waiting Period	Right To Vote Lost Upon Conviction, Restoration Discretionary
Alabama	X (offenses not involving moral turpitude)				X (felony offenses involving moral turpitude must obtain executive restoration of rights or pardon)
Arizona			X (first offenders only)		X (recidivists must obtain pardon or judicial restoration)
Delaware				X (five years, except for certain serious offenses)	X (pardon required for certain serious offenses)
Florida					X (executive restoration of rights or pardon)
Kentucky					X (pardon)
Maryland			X (first offenders only)	X (three years for recidivists)	X (pardon required if two or more violent felonies)
Mississippi	X (offenses not specified in constitution)				X (for all constitutionally specified offenses, pardon or legislative restoration)
Nevada			X (first offenders only)		X (pardon or judicial restoration)
Tennessee			X (most offenses eligible to obtain certificate of restoration upon completion of sentence)		X (pardon for certain serious violent offenses, sex offenses, public corruption)
Virginia					X (executive restoration of rights or pardon)
Wyoming				X (five years for first-time non-violent offenders)	X (executive restoration of rights or pardon for violent offenders and recidivists)

STATE	Right To Vote Not Lost	Right To Vote Lost Only If Incarcerated	Right To Vote Lost Upon Conviction, Restored Upon Completion of Sentence	Right To Vote Lost Upon Conviction, Restored After Additional Waiting Period	Right To Vote Lost Upon Conviction, Restoration Discretionary

JANUARY 27, 2007

ALABAMA

I. Automatic Restoration of Rights:

A person convicted of "a felony involving moral turpitude, or who is mentally incompetent, shall [not] be qualified to vote until restoration of civil and political rights or removal of disability." Ala. Const. art. VIII, § 177.* There is no exhaustive list of disqualifying crimes; however, the Supreme Court of Alabama has from time to time identified felonies that are and are not disqualifying. *See* Ala. Op. Atty. Gen. No. 2005-092 (March 18, 2005), 2005 WL 1121853 (Ala. A.G.). For example, assault, felony drug possession and felony DUI are not regarded as crimes of "moral turpitude." The Alabama Supreme Court is currently considering a challenge to the administration of that state's felony disenfranchisement regime.**

Someone who is not a qualified elector may not stand for public office. Ala. Code § 15-22-36.1(a)(1), (3). The right to sit on a jury is lost if the conviction is for an offense involving moral turpitude. Ala. Code § 12-16-60(a)(4). These civil rights may be restored only through a pardon from Board of Pardons and Parole, a legislative entity.

A 2003 statute requires the Board to issue a "certificate of eligibility to register to vote" to all persons convicted of disqualifying offenses (except those convicted of serious violent offenses and sex offenses) if they have completed their sentence and paid all fines, restitution and court costs, and have no charges pending against them. Ala. Code § 15-22-36.1. Persons convicted of murder and sex offenses must still apply to Board for a pardon. *Id.* (See discussion in Part IIA below).

---

* Prior to its 1996 amendment, the Alabama constitution disenfranchised persons convicted of specified offenses, all felonies punishable by a term of imprisonment, and all "crimes of moral turpitude." Ala. Const. Art. VIII, § 182 (1996). Section 182's extension of disenfranchisement to misdemeanor crimes of "moral turpitude," interpreted at that time to include drug possession and DUI, was held unconstitutional in *Hunter v. Underwood*, 471 U.S. 222 (1985).

** The 2005 Attorney General opinion cited above came in response to a request from the Board of Pardons and Paroles for a list of disqualifying offenses, and cited a number of cases in which the Supreme Court of Alabama has held that murder, rape, burglary, robbery, income tax evasion, conspiracy to commit fraud, possession of marijuana for resale, theft, transporting stolen vehicles, unauthorized sale of a controlled substance, and bigamy are all crimes involving moral turpitude. On the other hand, assault, doing business without a license, violation of liquor laws, aiding prisoner to escape, possession of marijuana, and driving under the influence, are not. Notwithstanding this opinion, Alabama's Secretary of State continued to take the position that conviction of *any* felony prohibited voting, and so directed country registrars. On August 23, 2006, in response to a lawsuit filed by the ACLU challenging this interpretation and application of § 177, the Circuit Court of Jefferson County declared that unless and until the state legislature identifies which crimes are disqualifying under the State Constitution, the state may not prevent anyone convicted of a felony from voting. *See Gooden v. Worley*, Civ. No. CV-2005-5778-RSV. The Circuit Court's ruling has been appealed to the Alabama Supreme Court. See amicus brief filed on January 17, 2007, by The Brennan Center on behalf of a group of Alabama clergy and churches, at http://www.brennancenter.org/dynamic/subpages/download_file_47701.pdf.

II. Discretionary Restoration Mechanisms:

A. Pardon:

- *Authority*: In 1939, the Alabama legislature was granted the pardon power by an amendment to the state constitution, and created the Board of Pardons and Parole to exercise the pardon power, which extends to all offenses save treason and impeachment. Ala. Const. amend. 38 (amending art. V § 124). The Governor retains reprieve and commutation authority in capital cases. The Board's administration and procedure is governed by Ala. Code §§ 15-22-20 through 15-22-40.
- *Composition of Board:* The Board is composed of three members who are appointed by the Governor to six-year terms with the advice and consent of the State Senate. Ala. Code § 15-22-20(a)-(d). Members are selected by the Governor from a slate nominated by a board consisting of the State Chief Justice as chair, the Lieutenant Governor, the presiding judge of the court of criminal appeals, the Speaker of the House and the President pro tem of the Senate. § 15-22-20(b). Four "special members" are serving one year terms for the purpose of conducting hearings. § 15-22-20(i). The chairperson is designated by the Governor. § 15-22-20(d). Members are full-time State officials, take an oath of office, and are subject to impeachment on the same grounds as other State officials. § 15-22-20(e). The Board must make a full annual report to the Governor. § 15-22-24(b).
- *Eligibility*: Completion of sentence, or completion of at least three years of permanent parole, unless the pardon is sought on grounds of innocence. Ala. Code § 15-22-36(c). Persons convicted of a felony or certain other offenses involving danger to the person must submit to the taking of a DNA sample as a mandatory condition of the pardon. Ala. Code § 36-18-25(f). Board accepts applications from federal offenders and people convicted in other state jurisdictions residing in the state. *See* Article 8 of Ala. Board Rules, Regulations and Procedures, at http://www.paroles.state.al.us/ALABPP/ALABPP%20MAIN.htm.
- *Effect*: A state pardon does not relieve civil and political disabilities "unless specifically expressed in the pardon." Ala. Code § 15-22-36(c). *See also* Ala. Code 17-3-10. A person who has forfeited his office as a result of felony conviction is not restored to that office by a pardon. Ala. Code § 36-9-2. *See also Hendrix v. Hunt*, 607 So. 2d 1254 (Ala. 1992). Pardon that restores civil rights also restores handgun privileges. *See State ex rel. Sokira v. Burr*, 580 So. 2d 1340 (Ala. 1991). The Board may grant a full pardon, which restores all rights, or it may grant a pardon with restrictions (e.g., firearms privileges, sex offender registration, habitual offender status). Full pardons without restrictions are rarely granted.

- *Process*: Hearing required, vote by majority, decision and reasons public. Board has no power to grant a pardon or other act of clemency unless the action is taken in an open public meeting, of which 30 days' notice has been given to the Attorney General, the DA who prosecuted the case and the judge who sentenced the offender, and the victim. Ala. Code § 15-22-23. See also Article 4 of the Ala. Board Rules, supra. Application to Board of Pardons and Parole is very simple form filed with local probation office that is "intended to facilitate application by individuals who lack formal education" Ala. Admin. Code r. §640-X-6-.01. Investigation by a local probation officer includes current information on the applicant's home situation, job status, and an updated criminal arrest record, written references and other information as warranted. *See* Article 8 of Ala. Board Rules, supra. Once the investigation is complete, a hearing will be set before the Board. Required notification will be sent to the victim and concerned officials. At hearing, a decision is made by majority vote to grant or deny the pardon request, and announced. Process takes about a year from beginning to end. See Article 6 of the Ala. Board Rules. These same procedures will apply to a request for a Certificate of Eligibility to Register to Vote, except where superseded by Ala. Code § 15-22-36.1 (see below, providing for paper review).

  Board Orders granting pardons, with or without restoration of civil and political rights, are public records. The statements of reasons filed by each member voting in favor of such grant are public records.

- *Expedited Process to Restore Voting Rights:* In October 2003, the Alabama legislature enacted an expedited process for restoring right to vote to be administered by the Board, applicable to all but specified serious violent offenses and sex offenses. Ala. Code § 15-22-36.1. Eligibility depends upon applicant having completed sentence, including payment of fines, court costs, fees, and victim restitution ordered by the sentencing court; may have no pending felony charges. The Attorney General of Alabama has recently opined that if a person has been convicted of both a disqualifying and a non-disqualifying offense, the person must have satisfied all terms and conditions of the non-disqualifying offense in order to be considered for restitution. Ala. Op. Atty. Gen. No. 2005-092 (March 18, 2005). If a person is determined to be eligible, the right to vote <u>must</u> be restored. § 15-22-36.1(b).

  Restoration is also available to federal and out-of-state offenders. § 15-22-36.1(a)(1). While restoration is apparently nondiscretionary upon a determination of eligibility, the application process may include a hearing. Investigation by parole officer and report to Board w/in 45 days, paper review with five days for Board to respond. § 15-22-36.1(e). If one member of Board objects on grounds of eligibility, hearing scheduled. § 15-22-36.1(f). In the event the board determines, by a majority vote, that the criteria have been met, the executive director shall forthwith issue a Certificate of Eligibility to Register to Vote to the applicant. *Id.*

- *Frequency of Grants*: In FY 2004, Board granted 158 pardons (71.1% of applications) and denied 64 (28.8%). In first 5 months of FY 2005, Board has granted 111 (71.6%) and denied 44 (28.3 %). Some of these include people who had earlier been granted streamlined voting rights restoration. Board restored voting rights to 2,608 people in the first 17 months after streamlined process was enacted in September 2003. Source: Alabama Parole Board.
- *Contact*: Sarah Still, sstill@paroles.state.al.us

  Alabama Board of Pardons and Parole, PO Box 302405
  Montgomery, AL 36130
  Tel: (334) 242-8700
  Fax: (334) 242-1809
  TDD: (334)242-1809

  See http://paroles.state.al.us/pardons/faq.html.

B. Judicial sealing or expungement of adult felony convictions:

No statutory provision for expungement of records. However, municipal courts in recent past appear to have regularly exercised a common law expungement authority, a practice that was challenged in July 2005. *See* "All Expunged Cases Should be Made Public," Model Register, July 13, 2005, http://www.al.com/search/index.ssf?/base/opinion/1121246139244220.xml?mobileregister?oedit&coll=3.

C. Administrative certificate: See above for "certificate of eligibility to register to vote" that must be issued any person convicted of a non-violent offense who has completed his sentence and paid all fines, restitution and court costs, and has no charges pending against him. Ala. Code § 15-22-36.1.

III. Nondiscrimination in occupational licensing and employment:

Alabama has no general law regulating consideration of conviction. It does apply a direct relationship test in connection with some licenses. *See, e.g.*, ALA. CODE § 34-1A-5 (d)(2)a. ("An applicant [for an alarm system installer license] shall not be refused a license solely because of a prior criminal conviction, unless the criminal conviction directly relates to the occupation or profession for which the license is sought.").

FEBRUARY 24, 2007

ALASKA

I. Automatic Restoration of Rights:

The rights to vote and to serve on a jury are lost upon conviction of a felony and automatically restored upon completion of sentence ("unconditional discharge"). Alaska Stat. §§ 09.20.020; 15.05.030(a); 33.30.241.

A felony offender may not possess concealed weapon for 10 years following discharge (lost permanently if offense is one against the person), unless conviction set aside or pardoned. Alaska Stat. § 11.61.200(b)(1)-(3).

II. Discretionary Restoration Mechanisms:

A. Pardon:

- *Authority*: Pardon power, except in cases of impeachment, vested in the Governor alone, "subject to procedure prescribed by law." Alaska Const. art. III, § 21; Alaska Stat. § 33.20.070. By statute, governor "may not grant executive clemency to a person" unless s/he has first referred a case being considered for clemency to the Board of Parole, and until at least 120 days have passed. § 33.20.080(a). Board required to investigate each case so referred and report to governor within 120 days. Id. Board must also, within five days of receipt of notice from governor, notify the Department of Law, the office of victim's rights, and the victim if a crime of violence or arson. § 33.20.080(b).* Governor is not bound by Board's advice. Non-statutory Governor's Executive Clemency Advisory Committee (composed of Lieutenant Governor, the Attorney General or a representative from the Department of Law, and a public member) also advises Governor.
- *Eligibility*: Two years after completion of sentence. Persons convicted under federal law or convicted under the law of another state are ineligible for a Governor's pardon.
- *Effect*: Pardon is the only way to regain rights lost and remove disabilities under Alaska law. Pardon has the effect of "setting aside" the conviction, so that individual is deemed not to have been convicted (though conviction remains on the record). Conviction is no longer a bar, but

* The Governor's clemency authority was made subject to these limits by a statute passed in February 2007, in response to public outcry over a pardon granted by outgoing Governor Frank Murkowski to a construction company held criminally liable for the death of one of its employees in a landslide, the Alaska legislature. See Pat Forgey, "Governor Signs Bill Restricting Executive Clemency," Juneau Empire, February 21, 2007, http://www.juneauempire.com/stories/022107/loc_20070221002.shtml.

offense conduct may be considered in context of determining good moral character. It does not ordinarily restore gun rights, so that federal government does not regard it as "complete" for immigration purposes.

- *Process*: No formal regulations govern process. Alaska Stat. § 33.20.080(b). Applicants are warned on Parole Board website that "The clemency policies of the State of Alaska are very strict, the process is lengthy, and clemency is rarely granted." *See* Alaska Board of Parole, Executive Clemency in Alaska (2003), *available at* http://www.correct.state.ak.us/corrections/Parole/clemencyhandbook.pdf. Also, applicants are required to sign waivers permitting an investigation of their employment and personal history. Initial determination of eligibility takes 30 days. If an applicant is determined to be eligible, he is sent a form. Applications are investigated by staff of the Board of Parole, including comments from DA and sentencing court and victim if relevant, and a summary of the case with recommendation is prepared and submitted to the Governor's Executive Clemency Advisory Committee, which meets as often as necessary to review pending applications. No formal hearing.
- Frequency of Grants: In recent years, Executive Clemency Advisory Committee meetings have averaged two or three times a year. There are few pardon applications, and only two grants since 1995. Source: Alaska Parole Board.
- Contact:

  Lawrence Jones, Lawrence_Jones@correct.state.ak.us, PO Box 11200, Juneau AL 99811, 907-465-3384;

  Candy Brower, Parole Board – 907-465-3384

B. Judicial sealing or expungement of adult felony convictions:

Probationary sentences: Court may suspend imposition of sentence and "set aside" the conviction after successful completion of a period of probation, except for sex offenses and offenses involving use of firearm. Alaska Stat. § 12.55.085(e)-(f). The set-aside provisions of this section "require a substantial showing of rehabilitation," within the meaning of Alaska Rule of Evidence 609 (d)(2). *Wickham v. State*, 844 P.2d 1140, 1144 (Alaska Ct. App. 1993). Accordingly, a prior conviction may not be relied on for impeachment purposes after it has been set aside pursuant to this section. *Id.* Court has no authority to order the criminal record expunged upon "discharge by the court without imposition of sentence" and the subsequent setting aside of his conviction. *Journey v. State*, 895 P.2d 955, 962 (Alaska 1995).

Nonconviction records: Sealing authorized only in case of mistaken identity or false accusation. Alaska Stat. § 12.62.180.

C. Administrative certificate: N/A

III. Nondiscrimination in occupational licensing and employment: N/A

Alaska has no general law regulating consideration of conviction in employment or licensure. It does apply a direct relationship test in connection with disciplinary action for medical and nursing licensees. *See* Alaska Stat. § 08.68.270 ("The board [of nursing] may [discipline] a person who . . . (2) has been convicted of a felony or other crime if the felony or other crime is substantially related to the qualifications, functions or duties of the licensee"); § 08.64.326 (board of medical licensing may impose a disciplinary sanction on a licensee who h as been convicted of a Class A felony, or a class B or C felony "that is substantially related to the qualifications, functions, or duties of the licensee," or of a crime involving the unlawful procurement, sale, prescription, or dispensing of drugs).

FEBRUARY 17, 2007

ARIZONA

I. **Automatic Restoration of Rights:** Conviction of a felony suspends the right to vote, to hold office, to sit on a jury, and to possess firearms. Ariz. Const. art. VII, § 2(c); Ariz. Rev. Stat. §§ 13-904(A)(1); 16-101(A)(5); 21-201(3). *See also* § 14-3203 (right to serve as executor); § 14-5651(C)(3)(fiduciary). For a first felony offender (state or federal), civil rights, other than those pertaining to firearms, are automatically restored upon completion of the term of probation, or upon an unconditional discharge from imprisonment and upon completion of payment of any fine or restitution. Ariz. Rev. Stat. § 13-912. Repeat offenders, including federal offenders, must apply for judicial restoration or pardon (see II A and B(1), below). (If repeat out-of-state offenders lose rights under Arizona law, which is not entirely clear, it is also not clear how they may regain their rights. Presumably out-of-state recidivists must seek restoration in the jurisdiction of their conviction.)

Firearms rights may be regained only by pardon, or by application to court (see II B(2) and (3), below).

II. **Discretionary Restoration Mechanisms:**

A. Pardon:

- *Authority*: The Governor has the authority to grant pardons, except in cases of treason or impeachment, but his authority may be restricted by statute. Ariz. Const. art. V, § 5. Under Ariz. Rev. Stat. § 31-402A, "no reprieve, commutation or pardon may be granted by the governor unless it has first been recommended by the [Board of Executive Clemency]." Governor is required to publish reasons for each grant, and must report to legislature at the beginning of every regular session. §§ 31-445, 31-446.
- *Administration*: Board of Executive Clemency consists of five persons appointed by the Governor to five-year terms, from lists developed by a selection committee consisting of the director of the department of public safety, the director of the state department of corrections and three other persons. Ariz. Rev. Stat. § 31-401. Chairperson selected by Governor. *Id.* Board members serve on a full-time basis, and must meet at least once a month. *Id.* Three members constitute a quorum, ex. that the chairperson may designate two as a quorum. *Id.* The powers and duties of the Board are set forth in § 31-402.
- *Eligibility*: At any time after discharge from prison, if conviction has not been vacated or set-aside. Board does not accept applications from misdemeanants. Persons convicted under federal law or convicted under the law of another state are ineligible for a Governor's pardon. Source: Board of Executive Clemency.
- *Effect*: A state pardon "absolves convicted person of all legal consequences of his crime." 68 Ariz. Op Att'y Gen. 17. Pardoned person must still report conviction, and conviction may be considered as predicate offense. Pardon restores firearms privileges only if specified in the pardon document.

- *Process*: Board is required to meet at least once a month. Ariz. Rev. Stat § 31-401(F). Applicant submits form to Board, Ariz. Admin. Code R5-4-201(E)(2004), which asks court of conviction and county attorney to provide facts and recommendation. Ariz. Rev. Stat § 31-441. Under § 31-402C (4), Board may also receive applications for pardon "in extraordinary cases." Ariz. Rev. Stat. § 31-442 requires publication of notice of intention to apply. Board is required to hold public hearing on application, at which it votes (by majority) either to deny the request or to recommend a pardon. If denied, applicant may not reapply for three years. Ariz. Admin. Code R5-4-201(G). Majority writes up recommendation for Governor, dissents may be filed. Ariz. Admin. Code R5-4-201(F). If a clemency board vote is unanimous, automatically if the governor does not act.
- *Frequency of Grants:* Very few pardon applications through mid-1980s, but those recommended by Board were generally granted. Since 1992, the number of applications has increased steadily, but about 2/3 of those who are recommended by the Board are turned down by the Governor. For example, 25 applied in FY 2002 (12 recommended, three granted); 33 applied in FY 2003 (19 recommended, six granted); 25 applied in FY 2004 (9 recommended, three granted, three still pending). Source: Arizona Board of Executive Clemency.*
- *Contact Information* : Erin Warzecha, Executive Director, Arizona Board of Executive Clemency, 1645 West Jefferson, Suite 326
  Phoenix, AZ 85007
  Tel: (602) 542-5656
  Fax: (602) 542-5680

  Erin.warzecha@aboec.state.az.us
  http://www.az.gov/webapp/portal/displaycontent.jsp?id=2242
  http://www.sos.state.az.us/public_services/Title_05/5-04.pdf

  AZ Attorney General's office
  John Pressley Todd
  John.Todd@azag.gov

---

* The governor approves even fewer commutation applications. Under Board rules, prison inmates can apply for commutation once they are in the system for two years, or the sentencing judge can file a request with the Board to entertain an inmate petition within 90 days of admission. In 2003 and 2004, the Board reviewed over 400 commutation applications each year, and forwarded 40 and 32 petitions respectively to the Governor's Office with favorable recommendations. The Governor approved three commutations in 2003 and one in 2004. *See* Amanda J. Crawford and Ryan Konig, "Clemency voice goes unheeded: Board's advice on sentences largely ignored by governor," The Arizona Republic, May 22, 2005, http://www.azcentral.com/news/articles/0522clemency22.html. In recent years commutation applications have skyrocketed, from 67 in FY 96 to 708 in FY 03, and Board continues to recommend between 6% and 12% favorably despite the Governor's continued declination to grant more than a handful. Source: Arizona Board of Executive Clemency. Note that "any recommendation for commutation that is made unanimously by the members present and voting and that is not acted on by the governor within ninety days after the board submits its recommendation to the governor automatically becomes effective." Ariz. Rev. Stat. § 31-402(D),

Mary Jane Gregory
maryjane.gregory@azag.gov

B. Judicial restoration and set-aside:

- Judicial restoration of rights to repeat offenders: A person convicted under Arizona law of more than one felony and sentenced to a term of imprisonment for the most recent offense may apply to have his civil rights restored by the sentencing judge two years after unconditional discharge from imprisonment. Ariz. Rev. Stat. Ann. §§ 13-906, 13-908. A repeat offender completing a term of probation may have his rights restored by the court that discharged him from probation. § 13-905(A). *See also* Ariz. R. Crim. P. 29.1 ("Prior to his or her absolute discharge, a probationer shall receive from his or her probation officer, or the court if there is no probation officer, a written notice of the opportunity to have his or her civil rights restored, to withdraw his or her plea of guilty or no contest, or to vacate his or her conviction."). A person whose civil rights were lost by virtue of a federal felony conviction may apply for restoration of civil rights to the presiding judge of the superior court of his county of residence, after a two-year wait in the case of those sentenced to a term of imprisonment. §§ 13-909(A), 13-910(A)-(B). There are no provisions in Arizona law for restoration of any rights under Arizona law that may have been lost as a result of a felony conviction in another state.

- Restoration of firearms rights: The automatic restoration of civil rights provision for first offenders "does not apply to a person's right to possess weapons as defined in § 13-3101," Ariz. Rev. Stat. Ann. § 13-912(B); instead, the first offender must make an application to the court pursuant to Ariz. Rev. Stat. Ann. §§ 13-905 (following discharge from probation) or 13-906 (at least two years following discharge from prison). Persons convicted of a "serious offense" (generally common law felonies, crimes against children, and sexual offenses) must wait ten years for restoration. § 13-906. Under § 13-906(c), firearms privileges are never restored to persons convicted of a "dangerous offense" (namely the discharge or use of a deadly weapon or the intentional infliction of serious physical injury upon another); *see also* § 13-912.01 (restoration for persons adjudicated delinquent upon completion of probation).

- Judicial set-aside - Arizona law also permits all state offenders except those convicted of serious violent offenses, to have their convictions "set aside" or "vacated" by the sentencing court, and the charges against them dismissed, upon successful completion of probation or sentence and discharge. Ariz. Rev. Stat. Ann. §§ 13-907(A). Convicted persons are entitled to be informed of their "right" to a set-aside at the time of discharge. *Id. See also* Ariz. R. Crim. P. 29.1, *supra*, requiring notice to probationers at time of discharge of right to have conviction "vacated." This relief restores all rights and generally releases the person "from all penalties and disabilities resulting from the conviction." However, it does not eliminate the conviction, and thus does not relieve the offender from having to report the conviction if asked. *Id. See also Russell v. Royal Maccabees Life Ins.*

Co., 974 P.2d 443, 449 (Ariz. Ct. App. 1999)(must report conviction in application for insurance even if set aside). The fact that a conviction is set aside or vacated does not release the person from certain motor vehicle restrictions, if applicable, and the conviction may still be used as a predicate offense in any subsequent prosecution. § 13-907(A). Set-aside unavailable to anyone convicted of a criminal offense involving the infliction of serious physical injury, the use of a deadly weapon or dangerous instrument, a victim less than 15 years old, or a violation of the state's laws defining sexual offenses. § 13-907(B). Set-aside does not relieve duty to register as sex-offender, *see* Ariz. Rev. Stat. § 13-3821, and does not remove firearms disability for purposes of federal firearms prosecution. *See U. S. v. Herrell*, 588 F.2d 711 (9th Cir.), *cert. denied* 440 U.S. 964 (1978).

- Nonconviction records: Records can be amended to notate that a person has been cleared of any arrests or indictments that did not lead to conviction. Ariz. Rev. Stat. § 13-4051.

C. Administrative certificate: N/A

III. Nondiscrimination in occupational licensing and employment:

A person may not be disqualified from public employment "solely because of a prior conviction for a felony or misdemeanor," nor may a person who has had his civil rights restored be disqualified from an occupation for which a license is required "solely because of" a conviction. Ariz. Rev. Stat. Ann. § 13-904(E). A person may be disqualified from public employment or denied a license by reason of conviction only if "the offense has a reasonable relationship to the functions of the employment or occupation for which the license, permit or certificate is sought." *Id.* Subsection (E) does not apply to positions in law enforcement. § 13-904(F). Any complaints concerning a violation of this subsection shall be adjudicated in accordance with the Arizona administrative procedures act, including judicial review. § 13-904(G). *See also* "Rehabilitating the Ex-felon: Impact of Arizona's pardons and civil rights restoration statutes," Law & Soc. Ord., 1971, p. 793. No provisions governing private employment.

FEBRUARY 27, 2007

ARKANSAS

I. Automatic Restoration of Rights:

The right to vote is lost upon conviction of a felony, and automatically restored upon completion of sentence. Ark. Const. art. III, §§ 1-2; *amended by* Ark. Const. art. 51, § 11(a)(4). Restoration of the right to serve on a jury requires a pardon from the governor. Ark. Code Ann. § 16-31-102(a)(4). Eligibility to hold office has been held unaffected by a pardon, *see Ridgeway v. Catlett*, 379 S.W. 2d 277 (Ark. 1964), and can be restored only through expungement process set forth in Ark. Code. Ann. §§ 16-93-301 et seq., or similar expungement statute from another state. § 7-6-102(d). *See Powers v. Bryant*, 309 Ark. 568, 832 S.W. 2d 232 (1992). *See* discussion in Part III, below.

II. Discretionary Restoration Mechanisms:

A. Executive pardon:

- *Authority*: Governor has full clemency authority, except in cases of treason and impeachment, "under such rules and regulations as shall be prescribed by law." Ark. Const. art. VI, § 18. By statute, all applications for clemency "shall be referred to the [Parole Board]." Ark. Code Ann. § 16-93-204(a).* The Parole Board is required to investigate each case and submit to the Governor its recommendation. § 16-93-204(b). While the Governor is thus required to seek the non-binding advice of the Parole Board, his own power does not depend upon receiving a favorable recommendation. Under Constitution, Governor must report to legislature on all grants and give reasons. Ark. Const. art. VI, § 18. (Pending legislation requiring detailed reasons has stalled.)
- *Administration:* Parole Board consists of seven members appointed by Governor to seven-year terms, confirmed by Senate. All but one full-time, and four constitutes a quorum. Grounds for removal for cause may not include any proper official action. Ark. Code Ann. § 16-93-201(a).
- *Eligibility*: No restrictions on eligibility. Federal and out-of-state offenders are eligible for a Governor's pardon to restore the right to serve on a jury.
- *Effect*:
  - Restores jury eligibility but not right to hold public office. *See Ridgeway v. Catlett*, 379 S.W.2d 277 (Ark. 1964); Ark Code. Ann. §§ 16-93-301, 16-93-302, 16-93-303.

* The Arkansas legislature reconstituted the Post Prison Transfer Board as the Parole Board in 2005, and made other modifications in parole and pardon policy. See Acts 1033, 1975, and 2097, 85th Gen. Sess., 2005.

  - Pardon removes conviction-related barriers to licensing and employment.
  - Expungement follows automatically upon receipt of pardon for all but a few serious offenses: "Upon issuing a pardon, the Governor shall notify the sentencing court, and the court shall issue an order expunging the records relating to the conviction of the person pardoned." Ark. Code. Ann. § 16-90-605(a). Exceptions where victim under 18, sex offenses, and where death or serious physical injury results. § 16-90-605(c). For effect of expungement see below.

- *Firearms*: Pardon must specifically restore firearms privileges. The Governor may separately restore firearm privileges, upon the recommendation of the chief law enforcement officer of the jurisdiction in which the convicted person resides, if the offense occurred more than eight years before and did not involve the use of a weapon. Ark. Code. Ann. § 5-73-103(a)(1), (b), (d).

- *Process*: http://www.pptb.org/. Policies and procedures are at http://www.pptb.org/Policies%20&%20Procedures/pptb%20policies%20%20procedures1.pdf. Before considering an application for pardon, Parole Board must request (non-binding) recommendation of sentencing court, prosecuting attorney, and sheriff of county of conviction. Ark. Code Ann. §§ 5-4-607(d)(1);16-93-204(c)(1). (Notice to victim required only in connection with capital murder cases. § 16-93-204(c)(2).) Ordinarily no formal hearing required in pardon cases. If a majority of Board votes to recommend pardon, sends written recommendation to Governor.** Governor must act on a Board recommendation within 120 days. New procedures developed in 2004 to ensure that Governor gives proper public notice, plus a statement of reasons, before making a grant. Ark. Code Ann. § 16-93-207(a). Before acting, Governor must give 30 days notice (including statement of reasons) to Secretary of State, judge, prosecuting attorney, sheriff, and, if applicable, the victim. *Id.* Failure to give proper notice renders grant void. *Id.* No published regulations.

- *Frequency of Grants*: Pardons are processed by the Board and acted on by the governor regularly on a monthly basis. In 2003 and 2004 about 400 applications for pardon were received, of which 40-50% were granted. Source: Arkansas Department of Community Correction. In July of 2004, Governor Huckabee was reported to have pardoned a total of 567 persons since taking office in 1996. *See* Bob McCord, "Huckabee's Pardons," Arkansas-Times (July 29, 2004), http://www.arktimes.com/mccord/072904mccord.html. While sentence commutations during his tenure have given rise to controversy and legislative limits on the pardon power, no similar concerns have been expressed about post-sentence pardons.

- *Contact*:

** Legislation adopted in April 2005 requires Board to give public notice of intent to recommend pardon or commutation in capital murder cases 30 days before submitting recommendation Governor, including notice to both houses of the legislature. *See* Act 1975, 85th Sess. (April 2005).

G. David Guntharp
David Eberhard
Arkansas Department of Community Correction
2 Union National Plaza
105 W. Capitol
Little Rock AR 72201
501-682-9566
David.Guntharp@dcc.state.ar.us
David.Eberhard@arkansas.gov

Cory Cox, Governor's Office – 501-682-8184; Robyn Culver, Assistant for Executive Clemency, 501-682-8184.

A. Judicial sealing or expungement of adult felony convictions:

- *Eligibility:*

  - *Community Punishment Act of 1993* ("Act 531"): Ark. Code Ann. § 16-93-1201 *et seq*. Legislative findings: "The State of Arkansas hereby finds that the cost of incarcerating the ever-increasing numbers of offenders in traditional penitentiaries is skyrocketing, bringing added fiscal pressures on state government, and that some inmates can be effectively punished, with little risk to the public, in a more affordable manner through the use of community correction programs and nontraditional facilities." § 16-93-1201(a). Under § 16-93-1207(b)(1)(A)-(C), any person who is eligible to be placed on probation, or who is given a "judicial transfer" sentence to the Department of Community Correction for a "target offense" (offenses targeted by the legislature for community placement), may upon completion of probation have the charges dismissed. In addition, these offenders are eligible to have the record expunged ("sealed") in accordance with the provisions of §§ 16-90-901 through 16-90-905 if they have no more than one prior felony, and that prior felony is not a serious violent offense. No need for guilty plea, as in First Offender Act of 1975 (though note that first offenders are automatically entitled to expungement under Act 346, see below). Effect of sealing explained below.***

  - *Probationers:* Under Ark. Code Ann. § 5-4-311(a) and (b), probationers for whom a judgment of conviction was not entered, including those who went to trial, are entitled to apply to the sentencing court upon completion of supervision for an order dismissing the charges, and sealing the record. According to the Arkansas Department of Community Correction, a judgment of conviction is not entered in any case where a prison term or fine is not imposed, so that the relief afforded by this statute is potentially available to all persons sentenced to probation only.

*** Prior to 2005, this statute provided relief to all first felony offenders, but only persons under age 26 were eligible if they had a prior felony. In August 2005, § 477 of Act 1994 extended relief previously available only to youthful offenders to all probationers and persons serving transfer sentence.

- *First Offenders Act of 1975* ("Act 346"): First offenders who plead guilty may have adjudication deferred and, upon successful completion of probation, are automatically entitled to have conviction sealed. Ark. Code. Ann. §§ 16-93-302(a)(1), 16-93-303(a)(1). Persons convicted of a sex offense with a victim under the age of 18 are not eligible for first offender expungement. Since passage of 1993 Community Punishment Act described above, which does not require a guilty plea and is available to persons with a prior offense, this statute has not been used as frequently. However, it is useful to first offenders who plead guilty insofar as it makes them automatically entitled to expungement upon successful completion of probation.

- *First-time Drug Offenders* – Ark. Code Ann. § 5-64-413 provides deferred adjudication leading to expungement for persons who have not been previously convicted of a drug offense.

- *Pardoned offenses*: All offenders not otherwise eligible for expungement may seek a governor's pardon, which results in expungement except in the following cases: sex offenses, offenses involving minors, death or serious bodily harm. § 16-90-605(a)-(b).

- *Effect of expungement:*

  A person whose record is expunged "shall have all privileges and rights restored, shall be completely exonerated, and the record which has been expunged shall not affect any of his civil rights or liberties, unless otherwise specifically provided for by law." § 16-90-902(a). "Expunge" is defined to mean that the record "shall be sealed, sequestered, and treated as confidential in accordance with the procedures established by this subchapter," but "shall not mean the physical destruction of any records." Ark. Code. Ann. § 16-90-901(a). Upon the entry of the order to seal, the underlying conduct "shall be deemed as a matter of law never to have occurred, and the individual may state that no such conduct ever occurred and that no such records exist," including in response to questions. § 16-90-902(b). Records may be disclosed if the person applies for employment with a criminal justice agency or is subsequently prosecuted for a new crime. § 16-90-903(a)(2)-(4). A conviction that has been expunged may not be used as a predicate offense. *See State v. Ross*, 39 S.W. 3d 789 (Ark. 2001). As to whether expunged records may be used as evidence of character in subsequent prosecution, under pedophile exception to Ark. R. Evid. 404(b), *see James Orval Davidson v. State*, No. 2002-2018 (Ark. Sup. Ct., June 23, 2005).

B. Administrative certificate: N/A

III. Nondiscrimination in Licensing and Employment:

Criminal Offender Rehabilitation Act: "It is the policy of the State of Arkansas to encourage and contribute to the rehabilitation of criminal offenders and to assist them in the

assumption of the responsibilities of citizenship. The public is best protected when offenders are given the opportunity to secure employment or to engage in a meaningful trade, occupation, or profession." Ark Code Ann. § 17-1-103(a). Licensing boards "may take into consideration conviction of certain crimes which have not been annulled, expunged, or pardoned. However, such convictions shall not operate as an automatic bar to registration, certification, or licensing for any trade, profession, or occupation." § 17-1-103(b). Arrest records not leading to conviction, convictions that have been pardoned or expunged, and misdemeanor convictions (ex. misdemeanor sex offenses) may not be "used, distributed, or disseminated" in connection with an application for a license. § 17-1-103(c). Boards and agencies shall "state explicitly in writing the reasons for a decision which prohibits the applicant from practicing the trade, occupation, or profession if the decision is based in whole or in part on conviction of a felony." §§ 17-1-103(d). Completion of parole or probation supervision plus five years after release from prison will be "prima facie evidence of rehabilitation." § 17-1-103(e). Complaints to be adjudicated under Arkansas APA. § 17-1-103(f). Does not apply to teacher licensure or certification, or nursing licensure and certification, which are governed by § § 6-17-410 and 17-87- 312 respectively. § 17-1-103(g). Duty of Secretary of State to make section known. § 17-1-103(h). See *also Bolden v. Watt*, 719 S.W.2d 428 (Ark. 1986)(criminal offender act benefits DWI offender seeking licensure as taxi driver, in spite of specific prohibition in taxi licensing law, since individual could be prevented from obtaining particular job because of direct connection between nature of conviction and job).

MARCH 14, 2007

CALIFORNIA

I. Automatic Restoration of Rights:

The right to vote is suspended while a person is "imprisoned or on parole for the conviction of a felony." Cal. Const. art. II, § 4. Person whose prison sentence is suspended does not lose the right to vote unless and until actually incarcerated.

Persons convicted of a felony or malfeasance in office may not serve on a jury. Cal. Civ. Proc. Code § 203(a)(5). The California Constitution disqualifies from office anyone convicted of vote-buying, Cal. Const. art VII, § 8, and authorizes laws disqualifying persons convicted of bribery, perjury, forgery, malfeasance in office, and other "high crimes," related crimes is disqualified from public office. *See* Cal. Gov't Code § 1021; Cal Penal Code §§ 67, 68, 74, 88, 98. These civil rights may be regained only by a governor's pardon.

II. Discretionary Restoration Mechanisms:

A. Governor's Pardon:

- *Authority*: For first offenders, pardon power exclusively in Governor, who may request investigation and advisory recommendation from the Board of Parole Hearings (formerly the Board of Prison Terms. Cal. Const. art. V, § 8(a); Cal. Penal Code §§ 4800, 4812-4813. http://www.bpt.ca.gov/default2.asp. For recidivists, Governor is required to refer pardon applications to the BPH (though he is not bound by its recommendation), § 4802, and a pardon may not be granted in such a case unless a majority of the judges of the State Supreme Court so recommends, with four justices concurring. Cal. Const. art. V, § 8 Cal. Penal Code § 4852.16. Governor required by the constitution to report to the legislature each pardon, stating the facts of the case and giving his reasons for the grant. *Id.*
- *Administration*: The BPT consists of nine members appointed by the Governor to staggered four-year terms, which may be renewed. Commissioners are full-time employees, and can be removed by the Governor only for misconduct or incompetence or neglect, after a full hearing. Effective July 1, 2005, a new California Department of Corrections and Rehabilitation (CDCR) assumed responsibility for all correctional services. The BPH was created by collapsing three boards into one – the BPT, Youthful Offender Parole Board, and the Narcotic Addict Evaluation Authority. See SB 737 (enrolled May 10, 2005.) The newly constituted BPH will consist of 17 commissioners appointed by the Governor to staggered 3 year terms. Of the 17, five will handle exclusively all hearings involving youthful offenders. The other 12 will be responsible for adult offender hearings and will act as the Governor's Clemency Advisory Board. See www.cdcr.ca.gov.

- *Eligibility:* Instructions issued by the Governor's Office describe a pardon as "an honor that is traditionally granted only to individuals who have demonstrated exemplary behavior following conviction for a felony." *See* "How to Apply for a Pardon," http://www.bpt.ca.gov/apply_for_pardon.pdf (revised September 2004). The current policy of the Governor's office is to accept a pardon application only if 10 years have passed from the date of discharge from parole or probation, and no special circumstances (such as factual innocence) or special need has been shown for an exception. *Id.* (Compare the criteria for eligibility for "certificate of rehabilitation," below.) Federal offenders and persons convicted under the laws of a state other than California are ineligible for a gubernatorial pardon, and may regain their civil rights (other than the right to vote) only through a pardon or similar action in the jurisdiction of their conviction.

- *Effect*: A pardon does not seal or expunge the record of conviction. It restores civil rights lost and removes occupational bars, but the conviction may still be considered by a state agency in licensing proceedings. Cal. Penal Code §§ 4852.15, 4853. The right to possess a firearm is restored upon a pardon except when the underlying offense involved the use of a dangerous weapon. § 4852.17. Only a pardon, and not a certificate of rehabilitation (see below), restores rights and removes occupational bars. *See* http://www.bpt.ca.gov/restoration_of_rights_reference.pdf, for comparison of effect of pardon and certificate of rehabilitation.

- *Process:* There are two procedural routes to pardon. For those who reside in the state, the pardon process ordinarily starts with an application for a certificate of rehabilitation in the county of residence. Convicted persons who reside outside the state, or who are otherwise ineligible for a "certificate of rehabilitation" (e.g. sex offenders) may apply directly to the Governor. *See* How to Apply for a Pardon, above.

  - Certificate of Rehabilitation: A California resident ordinarily starts pardon application by applying to the Superior Court of his county of residence for a "Certificate of Rehabilitation." Cal. Penal Code §§ 4852.06, 4852.19. The certificate is an order embodying a court's finding that the defendant is rehabilitated and its recommendation that he be pardoned. § 4852.13.* Prison warden is required to advise prisoners of their right to apply for this certificate upon their release from prison. § 4852.21. A person may apply to court after completion of "period of rehabilitation" running from release from prison or release on probation: five years residence in CA plus four years for serious offenses and two years for less serious – court may order additional years in case of concurrent sentences. (Sex offenders who are required to register, except for indecent exposure, have an additional five-year waiting period, for a

* A certificate of rehabilitation is given independent legal effect to avoid exemption from employment in certain professions. See, e.g. Health & Saf. Code, § 1522, subd. (g)(1)(A)(ii)(licensed community care facilities); Cal. Admin. Code tit. 10, § 3723 (real estate license); *Newland v. Board of Governors* (1977) 19 Cal.3d 705, 712-714 (teaching certificate).

total necessary rehabilitation period of 10 years.) *Id.* Petitioner must contact DA where resides and where convicted.

- Petitioner is entitled to the assistance of all state rehabilitative agencies, and to be represented by public defender. § 4852.04. The public defender has a duty to appear for court proceedings. *Ligda v. Superior Court of Solano County*, 85 Cal. Rptr. 744, 752 (Cal. Ct. App. 1970).
- Court holds hearing – may require investigation by DA. If Court finds that the petitioner has demonstrated rehabilitation, court issues certificate and forwards to Governor (and Supreme Court in the case of recidivists) with a recommendation that the individual be pardoned. Cal. Penal Code § 4852.14.
- Investigation by BPT: Upon receipt of certificate of rehabilitation and recommendation from court, Governor may request BPT to conduct further investigation and in some make recommendation. DA and court are asked for views. Cal. Penal Code § 4803. BPT may sit in panels of three, decides by majority of those present.
- Supreme Court consideration – For recidivists CA Supreme Court must hold hearing and at least four justices must concur. The Governor then has the option of granting or denying the pardon. § 4852.16. Governor must give notice to DA at least 10 days before action. § 4804. Pardon applications from recidivists treated like a case, assigned a number. If indigent, applicant assigned counsel. Cal. Sup. Ct., Internal Operating Practices and Procedures, § XIVA, XV.
- Whenever a person is issued a certificate of rehabilitation or pardon, it must be recorded on the person's criminal record and reported to the FBI. Cal. Penal Code § 4852.17.

- *Frequency of Grants*: As of June 2005, Governor Schwarzenegger had issued three pardons.** Previous Governors have granted: Governor Davis: none; Governor Wilson: 13; Governor Deukmejian: 328; Governor Brown: 403; Governor Reagan: 575. Source: California Board of Parole Hearings.
- *Contact*: Connie Axelrod, Board of Parole Hearings, connie.axelrod@cdcr.ca.gov.

B. Judicial sealing or expungement of adult felony convictions:

- *Set-aside for probationers and misdemeanants*: Any offender sentenced to probation (including felony offenders, but not including any sex offenders) may upon successful completion of sentence, with no current charges pending, apply to the court to withdraw the plea and the court "shall set aside the verdict of guilty," which releases the offender "from all penalties and disabilities resulting

** As of June 2005, Governor Schwarzenegger had approved parole for 96 persons serving life sentences, 77 in 2004 alone.

from the offense of which he or she has been convicted." Cal. Penal Code § 1203.4(a). Misdemeanants not sentenced to probation may apply for this relief as well, one year from entry of judgment, except that they must show, in addition to successful completion of probation and no charges pending, that they have, "since the pronouncement of judgment, lived an honest and upright life and ha[ve] conformed to and obeyed the laws of the land." § 1203.4a. Anomalous higher standard for misdemeanants not sentenced to probation noted in *People v. Bradley,* 57 Cal. Rptr. 82 (Cal. Ct. App. 1967).

Section 1203.4(a) also provides that "the probationer shall be informed, in his or her probation papers, of this right and privilege and his or her right, if any, to petition for a certificate of rehabilitation and pardon."

These sections do not provide for expungement or sealing. *People v. Sharman,* 95 Cal. Rptr. 134 (Cal. Ct. App. 1971)(noting limited sealing authority under § 1203.45, below). *See* 11 ALR 4th 956, Judicial Expunction of Criminal Record of Convicted Adult.

- Effect of set-aside: "In any subsequent prosecution of the defendant for any other offense, the prior conviction may be pleaded and proved and shall have the same effect as if probation had not been granted or the accusation or information dismissed. The order shall state, and the probationer shall be informed, that the order does not relieve him or her of the obligation to disclose the conviction in response to any direct question contained in any questionnaire or application for public office, for licensure by any state or local agency, or for contracting with the California State Lottery." §§1203.4(a), 1203.4a(a). Does not remove duty to register as sex offender. Setting aside alien's plea of guilty, substitution of plea of not guilty and dismissal of information pursuant to § 1203.4(a) does not expunge conviction for purposes of avoiding deportation. *Garcia-Gonzales v. Immigration and Natur. Service*, 344 F.2d 804 (9th Cir. 1965), *cert. denied,* 382 U.S. 840 (1965). Defendant's state convictions that were "set aside" pursuant to California probation statute were not "expunged" for purposes of calculating defendant's criminal history under United States Sentencing Guidelines; under California law, expunged convictions could be used when sentencing petitioner for subsequent convictions, for prosecution for possession of firearm by ex-felon, for purposes of California's "three strikes" law, and for denial of professional licenses. *U.S. v. Hayden*, 255 F.3d 768 (9th Cir. 2001), *cert. denied,* 122 S.Ct. 383, 534 U.S. 969, 151 L.Ed.2d 293. *See also People* v. *Frawley,* 98 Cal. Rptr.2d 555 (Cal Ct. App. 2000).

  Notice to prosecutor: No relief shall be granted under § 1203.4 unless the prosecuting attorney has been given 15 days' notice of the petition for relief. Cal. Penal Code § 1203.4(d).

- *Sealing for Under-age First offender Misdemeanants*: Underage Misdemeanants who were under 18 at the time their crime was committed, and who are eligible for or who received relief under either 1203.4 or 1203.4a may, apply to have record sealed. Cal. Penal Code § 1203.45.

- *Nonconviction records:* Cal. Penal Code § 851.8(d): In any case where a person has been arrested and an accusatory pleading has been filed, but where no conviction has occurred, the court may, with the concurrence of the prosecuting attorney, order that the records be sealed and destroyed.

- *Certificate of Rehabilitation*: A California resident convicted of a state law offense may apply to the Superior Court of his county of residence for a "Certificate of Rehabilitation." Cal. Penal Code §§ 4852.01 through .06, 4852.19. The certificate is an order embodying a court's finding that the defendant is rehabilitated and its recommendation that he be pardoned. § 4852.13. *See* Section IIA, above. A certificate of rehabilitation is given independent legal effect to avoid disqualification from employment in certain licensed professions. See, e.g. Health & Saf. Code, § 1522, subd. (g)(1)(A)(ii)(licensed community care facilities); Cal. Admin. Code tit. 10, § 3723 (real estate license); *Newland v. Board of Governors* (1977) 19 Cal.3d 705, 712-714 (teaching certificate). *See also Doe v. Saenz,* 140 Cal. App. 4th 960, 45 Cal. Rptr. 3d 126 (2006)(limitation of certificate to certain serious offenses in connection with employment in community care and childcare facilities violates Equal Protection). To obtain a certificate of rehabilitation, a convicted person must complete his or her sentence and period of parole, remain a resident of the state for a specified period with no further violations of the law, demonstrate good conduct, and satisfy other statutory requirements. §§ 4852.01, 4852.03, 4852.05, 4852.06. Prison warden is required to advise prisoners of their right to apply for this certificate upon their release from prison. § 4852.21. A person may apply to court after completion of "period of rehabilitation" running from release from prison or release on probation: five years residence in CA plus four years for serious offenses and two years for less serious – court may order additional years in case of concurrent sentences. (Sex offenders who are required to register, except for indecent exposure, have an additional five-year waiting period, for a total necessary rehabilitation period of 10 years.) *Id.* Petitioner must contact DA where resides and where convicted. Persons convicted of misdemeanors are ineligible to obtain a certificate of rehabilitation. *See Newland v. Board of Governors,* 19 Cal.3d 705, 712-714 (1977).

- *Felony treated as misdemeanor*: A crime that is otherwise a felony ("punishable by either imprisonment in the state prison or the county jail") may be treated as a misdemeanor "for all purposes" if the court imposes punishment other than a state prison term, or "grants probation to a defendant without imposition of sentence and at the time of granting probation, or on application of the defendant or probation officer thereafter, the court declares the offense to be a misdemeanor." Cal. Penal Code § 17(b)(1) and (b)(3). Also, the prosecutor may file a complaint treating the offense as a misdemeanor. § 17(b)(4). Upon a request by California's Commission on Peace Officer Standards and Training, the California Attorney General opined that the Commission's power to revoke a peace officer license when an officer is convicted of a felony did not extend to convictions under § 17(b) which are to be treated as misdemeanors "for all purposes" unless the

conduct itself involved moral turpitude or some other indication of the applicant's unfitness to be a peace officer. 76 Op. Cal. Att'y Gen. 270, 275 (1993). However, while a blanket prohibition would be inappropriate in light of the purposes of § 17(b), case-by-case analysis of an applicant's conduct would permit denial of licensure by the California Commission on an individual basis.

C. Administrative certificate: N/A

III. Nondiscrimination in Licensing and Employment:

Cal.Bus. & Prof.Code § 490: A board may suspend or revoke a license on the ground that the licensee has been convicted of a crime, if the crime is "substantially related" to the qualifications, functions, or duties of the business or profession for which the license was issued. § 482 requires each board to take into account evidence of rehabilitation, and to develop criteria for considering the rehabilitation of a person. Criteria for determining rehabilitation for real estate license in Cal. Admin. Code tit. 10, § 3723, include passage of time, restitution to victim, judicial relief (certificate of rehabilitation), evidence of involvement in community and stability of family life, abstinence from controlled substances, testimony of affiants.

Cal. Code Regs. tit. 2 § 7287.4(d)(1) makes it unlawful for a public or private employer to inquire into or seek information on any conviction for which the record has been judicially ordered sealed, expunged, or statutorily eradicated; any misdemeanor conviction for which probation has been successfully completed or otherwise discharged and the case has been judicially dismissed pursuant to Cal. Penal Code § 1203.4; or any arrest for which a pretrial diversion program has been successfully completed pursuant to Penal Code §§ 1000.5 and 1001.5. *See also* Cal. Labor Code § 432.7 (f)(1), (2) (public and private employers may not request information about arrest not resulting in conviction, or about referral to pretrial or post-trial diversion program).

APRIL 1, 2007

COLORADO

I. Automatic Restoration of Rights:

- Vote: A person convicted of a felony loses the right to vote if sentenced to a prison term, and does not regain it until completion of parole. *See* Colo. Const. art. 7, § 10 (A person shall not be eligible to vote "while confined in any public prison," but shall be restored to the rights of citizenship "after serving out his full term of imprisonment.").* By statute, disenfranchisement continues through a period of parole. *See* Col. Rev. Stat. § 1-2-103(4)("No person while serving a sentence of detention or confinement in a correctional facility, jail, or other location for a felony conviction or while serving a sentence of parole shall be eligible to register to vote or to vote in any election.").** A person in pre-trial detention may vote. § 1-2-103(4). Persons sentenced to probation only do not lose the right to vote.
- Office, Jury: Persons convicted of a felony are disqualified from public office only while incarcerated, or while on parole from a prison sentence, Col. Rev. Stat. § 18-1.3-401(3), with certain exceptions specified in the state constitution. *See* Colo. Const. art XII, § 4 (embezzlement of public money, bribery, perjury, all result in permanent disqualification). Right to sit on jury is not lost at all (disqualification statute repealed in 1989).
- Firearms: Persons convicted of a felony may not possess firearms. Col. Rev. Stat. § 18-12-108(1), (2). Penalty enhanced if possession within ten years of conviction, or release from supervision for, burglary, arson, or any felony involving violence. § 18-12-108(2)(c).

II. Discretionary Restoration Mechanisms:

A. Executive pardon:

- *Authority*: The pardon power is vested in the Governor, except in cases of treason or impeachment. Colo. Const. art. IV, § 7. Constitution gives legislature power to regulate manner of applying, and Governor must report to legislature on all grants. The clemency power is regulated by Colo. Rev. Stat.

---

* Section 1-2-103(4) was amended in May 2005 to add "for a felony conviction" to the text of the statute. Prior to that time, the prohibition on voting applicable to incarcerated persons had been interpreted to extend to misdemeanants as well as felony offenders.

** Under the determinate sentencing law adopted by Colorado in 1993, a period of "mandatory parole" following a sentence to confinement "is no longer related to the unserved remainder of the sentence to confinement," *People v. Norton*, 63 P. 3d 339, 343 (Colo. 2003). In light of the constitutional direction that a person "shall be restored to the rights of citizenship "after serving out his full term of imprisonment," it is not clear whether the statutory extension of disenfranchisement to the period of parole in § 1-2-103(4) survives this change in Colorado's sentencing law.

§§ 16-17-101 and 102, and grants not issued in compliance with those provisions are invalid. *See People ex rel Garrison v. Lamm*, 622 P. 2d 87 (Colo. Ct. App. 1980). According to the Governor's office, Governor advised by non-statutory Colorado Executive Clemency Advisory Board, which consists of seven unpaid volunteers appointed by Governor.

- *Eligibility*: Pardon applications are not generally accepted until at least 10 years after completion of sentence. Persons convicted under federal law or in another state are not eligible for gubernatorial pardon.
- *Effect*: Restores firearm privileges. Also lifts legal disabilities, including employment disqualifications, and is likely to enhance individual's employability. E-mail from Mark Noel of Governor's staff, 303-866-2880.
- *Process*: Application must be sent for comment to DA and court, who have 10 days to comment. Colo. Rev. Stat. § 16-17-102.
- *Frequency of Grants*: Only a handful of pardons granted in recent years. Source: Colorado Governor's Office.
- *Contact*: Mark Noel, Executive Chambers, 136 State Capitol, Denver, CO 80203-1792
  Tel: (303) 866-2471

B. Judicial sealing or expungement of adult felony convictions:

Sealing: Colorado does not provide for sealing or expunging adult convictions.*

Non-conviction records: Courts are authorized to seal a criminal record ("except basic identification information") where the charges were completely dismissed (including deferred adjudication) or the person is acquitted, balancing the public's right to know against the individual's interest in privacy. *See* Colo. Rev. Stat. § 24-72-308(1); *R.J.Z. v. People*, 104 P.3d 278 (App. 2004). Paula Ison & Tom Blumenthal, *Sealing Criminal Records in Colorado*, 21 Colo. Law. 247 (1992). Court is required to give eligible defendants "written advisement" of their right to have the record sealed. § 24-72-308(2). Serious traffic infractions excepted (*e.g.,* DUI) § 24-72-308(3).

Deferred Adjudication: Colo. Rev. Stat. § 18-1.3-102. (defendant enters a pleas, put on probation; prosecutor decides whether to move to revoke, judge decides whether to revoke). § 18-1.3-101 (Deferred prosecution). Used

* The broad sealing authority given Colorado courts in the 1977 Criminal Justice Records Act, which permitted sealing of any criminal record, subject only to the court's application of the balancing test described above, was limited in 1988 to non-conviction records. The Colorado Supreme Court ruled in 1993 that the retrospective application of the more limited sealing authority did not violate the state constitution. *People v. D.K.B.,* 843 P.2d 1326, 1328 (Colo. 1993).

mostly for first-time drug offenses, referred to drug court. Sealing available (see above).

C. Administrative certificate: N/A

III. Nondiscrimination in Licensing and Employment:

Colo. Rev. Stat. § 24-5-101(1)(a): "[T]he fact that a person has been convicted of a felony or other offense involving moral turpitude shall not, in and of itself, prevent the person from applying for and obtaining public employment or from applying for and receiving a license, certification, permit, or registration required by the laws of this state to follow any business, occupation, or profession." § 24-5-101(b) excepts certain professions, including law enforcement, education, and employment that involves direct contact with vulnerable persons. *See also* § 27-1-110. Conviction "shall be given consideration in determining whether, in fact, the applicant is a person of good moral character at the time of the application." § 24-5-101(2). The intent of the section is "to expand employment opportunities for persons who, notwithstanding that fact of conviction of an offense, have been rehabilitated and are ready to accept the responsibilities of a law-abiding and productive member of society." *Id.*; *see also Givan v. City of Colorado Springs,* 897 P.2d 753 (Colo. 1995)(City manager did not abuse discretion in discharging city employee because of his incest conviction, though employee's work record was excellent, and employee could be expected to perform technical aspects of his position in future; city manager found likely impact on morale in workplace, public perception of city.)

MARCH 9, 2007

CONNECTICUT

I. Automatic Restoration of Rights:

The right to vote is lost upon conviction of a felony and actual incarceration ("committal to the custody of the Commissioner of Correction for confinement in a correctional institution or facility or a community residence"). Conn. Gen. Stat. §§ 9-46(a). Right to vote regained upon discharge from sentence, including payment of fines and any period of parole. § 9-46a(a)(vote restored upon proof that " all fines in conjunction with the conviction have been paid and that such person has been discharged from confinement, and, if applicable, parole.") Restoration of the right to vote results in automatic restoration of the right to hold public office. § 9-46a(b). Right to vote and hold office lost while on probation for an election law violation. *Id.* Commissioner of Correction required to inform prisoners of the terms on which their electoral privileges are restored, and to notify Secretary of State, for transmission to local electoral boards, when prisoners are discharged from their sentences. §§ 9-46a(d), (e).

The right to serve on a jury is automatically restored seven years after the conviction (unless the person is still incarcerated). § 51-217(a)(2). Certain crimes result in the loss of firearm rights. § 53a-217. Only a pardon will relieve this disability.

II. Discretionary Restoration Mechanisms:

A. Pardon:

- *Authority:* Pardons issue out of the State Board of Pardons and Paroles. Conn. Gen. Stat. § 54-124a(f).* Thirteen members appointed by the Governor, w/ advice and consent of Senate. § 54-124a(a). All but chair paid on a per diem basis. § 54-124a(c). Five members appointed to consider pardon applications exclusively, other seven consider paroles, and chair does both. § 54-124a. Governor appoints chair. § 54-124a(a) The Governor has limited power to grant reprieves after conviction. Conn. Const. art. 4, § 13.
- *Eligibility*: Five years after completion of sentence. Applications from misdemeanants are accepted. Persons convicted under federal law or the laws of another state are ineligible for a state pardon.
- *Effect:* Relieves all legal disabilities, including those relating to employment and licensure. Board may grant conditional or absolute pardon.

* Until 2004, pardon power was exercised by an independent Board of Pardons, under Conn. Gen. Stat. § 18-26(2003). Board was staffed by private practitioner under contract. Board of Pardons restructured and merged into Parole Board in late 2004.

Absolute pardon results automatically in "erasure" of court records relating to the offense. Conn. Gen. Stat. § 54-142a(d)(see below).

- *Process:* Conn. Gen. Stat. § 54-124a(e)-(k). Board sits in panels of three, and must have hearing at least once every three months. Application to Board describing offense, reason for seeking pardon. Board may dispense with hearing in case of misdemeanors and certain minor felonies that would have been eligible for diversion, including drug-related. § 54-124a (j)(2) (see below for listed diversion programs). According to the Board, 40% of applications are granted without hearing, the rest come to quarterly hearings held in a courtroom at alternating geographic locations throughout the state. Application sent to sentencing court and states attorney, who may appear. Board members assigned to pardons hearings must issue written statements containing the reasons for rejecting any application for a pardon. § 54-124a (j)(3). According to the chair of the Board of Pardons and Parole in March 2005, the Board is in the process of developing an administrative pardon process for certain misdemeanor and minor felonies that would not require a public hearing.

- *Frequency of Grants:* About 800 applications each year, about half of which are from misdemeanants. About 200 grants per year, about 25% of those who apply. *See* OLR Research Report, http://www.cga.state.ct.us/2002/olrdata/jud/rpt/2002-R-0874.htm. Commutations not as necessary because courts have general sentence modification authority, though commutations have occasionally been granted to make eligible for parole. Source: Connecticut Board of Pardons and Paroles.

- *Contact*:

  Greg Everett, Chair, Board of Pardons and Paroles
  55 West Main Street
  Waterbury, CT 06072
  Phone: (203) 805-6605
  Fax: (203) 805-6652

  greg.everett@po.state.ct.us

B. Judicial sealing or expungement of adult felony convictions:

- *"Erasure" of nonconviction records*: Conn. Gen. Stat § 54-142a provides general authority for "erasure" of criminal records where charges have been dismissed or nolled, or where person has been acquitted. Where erasure statute applies, court may proceed on its own motion to dismiss charges, and records will be automatically erased.

- *Erasure of pardoned offenses*: Conn. Gen. Stat § 54-142a(d) provides that where an individual is granted an absolute pardon, "all police and court

records and records of the state's or prosecuting attorney pertaining to such case [are] erased." Thereafter, "any person [or law enforcement agency] charged with retention and control of such records," may not disclose to anyone any information pertaining to the charge erased and, upon request of the pardoned individual, must "cause the actual physical destruction of [all court] records." Conn. Gen. Stat. § 54-142a(e); *see also Doe v. Manson*, 438 A.2d 859 (Conn. 1981). Although such physical destruction may not occur "until three years have elapsed from the date of the final disposition of the criminal case to which such records pertain," upon erasure, the individual is "deemed to have never been arrested ... with respect to the proceedings so erased and may so swear under oath." Conn. Gen. Stat. § 54-142a(e); *see also State v. Van Heck*, 651 N.W. 2d 174, 180 (Mich. App 2002).

- *Deferred adjudication programs leading to erasure of records:* Erasure provisions of Conn. Gen. Stat. § 54-142a applies to several separate deferred adjudication programs: § 17a-692 et seq. (Suspended Prosecution or Conviction and Probation and Court-Ordered treatment for drug or alcohol dependency); § 46b-38c (Family Violence Education Program); § 53a-39a (Alternate Incarceration Program); § 53a-39c (Community Service Labor Program); § 54-56e (Accelerated Pretrial Rehabilitation); § 54-56g (Pretrial Alcohol Education) and § 54-56i (Pretrial Drug Education Program); § 54-56j (Pretrial School Violence Prevention Program); § 29-33(h) (sale or transfer of pistols and revolvers).

- *Effect of erasure*: Under Conn. Gen. Stat. § 54-142a(e), any person whose criminal records have been erased pursuant to that provision or youthful offender statutes, "shall be deemed to have never been arrested within the meaning of the general statutes with respect to the proceedings so erased and may so swear under oath." See also Conn. Gen. Stat. § 31-51i(b), limitations on employer inquiries, below.

C. Administrative certificate: N/A

III. Nondiscrimination in Licensing and Employment:

- *General Limitations on Consideration of Conviction:* Public employers and licensing authorities may not disqualify automatically on grounds of conviction but must consider: 1) nature of crime and its relationship to the job; 2) information pertaining to rehabilitation; 3) time elapsed since conviction. Conn. Gen. Stat. § 46a-80. If a conviction of a crime is used as a basis for rejection of an applicant, such rejection shall be in writing and specifically state the evidence presented and reasons for rejection. § 46a-80(c). A copy of such rejection shall be sent by registered mail to the applicant. *See* Jennifer Leavitt, *Walking a tightrope: Balancing competing public interests in the employment of criminal offenders*, 34 Conn. L. Rev. 1281 (2002). The public policy behind this statute is

that "the public is best protected when criminal offenders are rehabilitated and returned to society prepared to take their places as productive citizens and that the ability of returned offenders to find meaningful employment is directly related to their normal functioning in the community." § 46a-79.

- *Employment inquiries into erased convictions prohibited*: No employer, including the state, may require an employee or prospective employee to disclose the existence of any arrest, criminal charge or conviction, the records of which have been erased pursuant to § 54-142a(e). Conn. Gen. Stat. § 31-51i(b), (d), (e). An employment application form that contains any question concerning the criminal history of the applicant "shall contain a notice, in clear and conspicuous language that 1) the applicant is not required to disclose the existence of any arrest, criminal charge or conviction, the records of which have been erased . . . 2) that criminal records subject to erasure . . . include records pertaining to an adjudication as a delinquent or as a youthful offender, a criminal charge that has been dismissed or nolled, a criminal charge for which the person has been found not guilty or a conviction for which the person received an absolute pardon; and 3) that any person whose criminal records have been erased . . . shall be deemed to have never been arrested within the meaning of the general statutes with respect to the proceedings so erased and may so swear under oath." 31-51i(c). No employer may refuse to hire, or discharge, "or in any manner discriminate against" any person solely because of a conviction, the records of which have been erased. § 31-51(i). Records may be available to employer's personnel department, and to broker-dealers or insured banks under FDIC requirements of background check.

MARCH 9, 2007

DELAWARE

I. Automatic Restoration of Rights:

A person convicted of a felony forfeits the right to vote. Del. Const. art. V, § 2. Persons guilty of certain misdemeanor election law violations are prohibited from voting for ten years following completion of sentence. Id.; Del Code Ann. tit. 15 § 1701. Convicted felony offenders may not serve on juries, tit. 10 § 4509(b)(6). Persons convicted of embezzlement, bribery, perjury, and other "infamous" crimes may not hold a seat in the legislature or any office of profit or trust. Del. Const. art II, § 21.

Under a 2000 amendment to the Delaware Constitution, felony offenders may apply to their County Board of Elections to have their right to vote restored five years after expiration of sentence (including payment of fines and restitution), and restoration is automatic upon a determination of eligibility. Del. Const. art. V, § 2*; Del. Code Ann. tit. 15 §§ 6103-05. Convicted persons shall not be registered earlier than five years from date of conviction, unless pardoned. Del. Code Ann. tit. 15 § 6103(c). Persons convicted of certain serious offenses (murder, manslaughter, bribery or public corruption, sex offense) are constitutionally barred from voting unless pardoned. Del. Const. art. V, § 2.**

Firearms: Persons convicted of crime of violence or drug offense lose firearms privileges. Del. Code Ann. tit. 11 §1448.

---

* Del. Const. art. V, § 2 provides in pertinent part: "Any person who is disqualified as a voter because of a conviction of a crime deemed by law a felony shall have such disqualification removed upon being pardoned, or five years after the expiration of the sentence, whichever may first occur. The term "sentence" as used in this Section shall include all periods of modification of a sentence, such as, but not limited to, probation, parole and suspension. The provision of this paragraph shall not apply to (1) those persons who were convicted of any felony of murder or manslaughter, (except vehicular homicide); or (2) those persons who were convicted of any felony constituting an offense against public administration involving bribery or improper influence or abuse of office, or any like offense under the laws of any state or local jurisdiction, or of the United States, or of the District of Columbia; or (3) those persons who were convicted of any felony constituting a sexual offense, or any like offense under the laws of any state or local jurisdiction or of the United States or of the District of Columbia."

** Under Del.. Code Ann. tit. 11, § 4347(i), "civil rights" are automatically restored by certificate from Board of Parole upon discharge of sentence, but no earlier than one year after release from prison – but these rights have been ruled by Delaware Attorney General to include only "those commonly exercised in everyday life," and not rights to vote, sit on jury, or hold office. *See* U.S. Dep't of Justice, Office of the Pardon Attorney, Civil Disabilities of Convicted Felons: A State-by-State Survey 38 (1996), http://www.usdoj.gov/pardon/forms/state_survey.pdf.

II. Discretionary Restoration Mechanisms:

A. Executive pardon:

- *Authority*: The power to pardon, except in cases of impeachment, is vested in the Governor. The Governor cannot grant a pardon or commutation in the absence of an affirmative recommendation of a majority of the Board of Pardons, but the Governor is not bound to accept the Board's recommendation, and exercises independent judgment in all cases. Del. Const. art. VII, § 1. Board of Pardons consists of Chancellor, Lieutenant Governor, Secretary of State, State Treasurer, and Auditor of Accounts. Del. Const. art. VII, § 2. Under the Board's rules, the Lieutenant Governor Chairs the Board, and the Secretary of State acts as secretary. Board of Pardons Rules, Rule 5(c) and (d), http://www.state.de.us/sos/pardrule.shtml (Jan. 22, 2004).
- *Effect*: Effective 2003, except as otherwise provided by any provision of the Delaware Code or any court rule, the granting of an unconditional pardon by the Governor shall have the effect of fully restoring all civil rights to the person pardoned. Such civil rights include, but are not limited to, the right to vote, the right to serve on a jury if selected, the right to purchase or possess deadly weapons and the right to seek and hold public office provided however, that this section shall not limit or affect the Governor's authority to place lawful conditions upon the granting of a pardon. Del. Code. Ann. tit. 11, § 4364. According to the Board of Pardons, a pardon also relieves employment-related and other legal disabilities.

  Public Office: Del. Const. art. II, § 21 - No person who shall be convicted of any felony ("embezzlement of the public money, bribery, perjury or other infamous crime") shall be eligible to a seat in either House of the General Assembly, "or capable of holding any office of trust, honor or profit under this State." Pardon does not remove this bar (at least where pardon out-of-state). *See State ex rel. Wier v. Peterson*, 369 A.2d 1076 (Del. 1976)(PA offender pardoned by PA governor may not run for DE county council).

- *Eligibility:* Waiting period informally imposed by Board: three to five years after sentence completed, depending on seriousness of offense, unless a legitimate hardship can be demonstrated (i.e., a need for employment, pending deportation, etc.). Applications from misdemeanants accepted. Out-of-state and federal convictions ineligible for a pardon.
- *Process*: Applications for a pardon or commutation are made in writing through the office of the Secretary of State, who acts as the secretary of the Board. See http://www.state.de.us/sos/pardons/. The Board meets monthly in Dover in open session, and hears every application it receives. Before the Board may consider application from certain violent and sex offenders, applicant must have been recently examined by a psychiatrist and psychologist, who must submit opinion to Board as to applicant's mental

and emotional health, likelihood of re-offending. Del. Code. Ann. tit.11, § 4362(d). The Board must also request a full report on each case, including an opinion concerning the state of rehabilitation, from the Board of Parole. Board of Pardons Rules, *supra,* at Rule 3(f). As part of the requirements for filing a petition for pardon and commutation, the Board of Pardons requires that the applicant notify the judge who imposed the sentence on the applicant, the Attorney General, the chief of Police having jurisdiction of the place where the crime occurred, and the Superintendent of the Delaware State Police. *Id.* at Rule 2(d). The Attorney General's office is responsible for notifying the victim and or surviving family members when the offender applies for a pardon or commutation. Del. Code. Ann. tit. 11, § 4361(d). The Attorney General will present the opinion of the victims. The Board requests that a legal representative from the Attorney General's office attend all sessions of the Board. Board of Pardons Rules, *supra,* at Rule 8.

- *Public Record*: The hearings of the Board are public hearings at which any person with an interest in the matter will normally be accorded an opportunity to speak. Individuals may and are encouraged to represent themselves before the Board when their cases are scheduled for presentation. The Board has full subpoena power and may require the attendance of witnesses and production of evidence. It may also administer oaths, and those who testify falsely are subject to criminal penalties Decisions of the Board with respect to an application are often made in executive session of the Board at which the Board may discuss and debate the record. A decision reached by majority is recorded and filed in the office of the Secretary of State, who in turn notifies the Governor. Del. Const. art. VII, § 1.

- *Standards*: Rules include list of reasons for recommending pardon include factors relating to nature and age of crime, rehabilitation of applicant and contributions to the community, applicant's remorse, employment-related need for a pardon, official support, and lack of opposition by the victim.

- *Frequency of Grants*: In 2003, the Board heard 131 applications for pardon, and recommended 115 favorably. Thirty-two pardons were granted, some deferred. In 2004, 173 applications were heard, 141 were recommended favorably, and 115 were granted, some deferred. In the first eight months of 2005 the Board heard 82 pardon cases, and recommended 67 positively; the governor granted 81 pardons, denied 4, and returned one with no action. commutations. (In 2003 and 2004, 45 petitions for commutation were heard, of which 9 were recommended; two were granted by the Governor, one was denied, and one was returned with no action taken. In the first eight months of 2005 the Board heard 19 commutation cases and recommended three favorably; the governor granted three and denied two.) Increase in applications relates to more stringent employer background checks since 9/11. Sixty percent of applications come from misdemeanants. Source: Delaware Board of Pardons

- *Contact*: Judy A. Smith, Board of Pardons, 401 Federal Street, Suite 3, Dover, DE 19901, Phone:302-739-4111, Fax: 302-739-3811, Judy.Smith@state.de.us.

B. Judicial sealing or expungement of adult felony convictions: No provision for expungement of convictions, except or until a person reaches age 80 or reaches age 75 with no criminal activity listed on the person's record in the past 40 years. Tit. 11, § 8506(c).

Nonconviction records: Expungement of criminal records only where matter results in acquittal or other termination of action in favor of the accused. *See* Del. Code Ann. tit. 11, §§ 4371-4375. Effect: Except for disclosure to law-enforcement officers acting in the lawful performance of their duties in investigating criminal activity or for the purpose of an employment application as an employee of a law-enforcement agency, it shall be unlawful for any person having or acquiring access to an expunged court or police record to open or review it or to disclose to another person any information from it without an order from the Court which ordered the record expunged. § 4374(a).

C. Administrative certificate: N/A

III. Nondiscrimination in Licensing and Employment:

74 Del. Laws, c. 262 (2004) creates a uniform approach throughout Title 24 of the Delaware Code relating to Professions and Occupations, regarding disqualifications for licensure; requiring that the refusal, revocation or suspension of licenses for professions and occupations regulated under Title 24 be based upon conviction of crimes that are "substantially related" to the profession or occupation at issue, and not for crimes that are unrelated to the profession or occupation. *See, e.g.,* 24 Del. Code Ann. tit. 24, § 104 (accountancy); § 301 (architecture); § 701 (chiropractic); § 1126 (dentistry); § 1207 (security systems and protective services); § 1922 (nursing). The bill requires the boards of affected professions and occupations to promulgate regulations that specifically identify the crimes that are "substantially related" to the profession or occupation.
http://www.legis.state.de.us/LIS/LIS142.NSF/vwLegislation/SB+229?Opendocument

JUNE 20, 2007

DISTRICT OF COLUMBIA

I. Automatic Restoration of Rights:

A resident of the District of Columbia convicted of a felony may vote if not actually incarcerated. D.C. Code § 1-1001.02(7); D.C. Mun. Regs. tit. 3, § 500.3. A person incarcerated for a misdemeanor violation of D.C. Stat. §§ 1-1001.14 (corrupt election practices), 1-1105.07 (lobbying violations), or 1-1107.01 (miscellaneous provisions under election laws chapter) loses the right to vote during the period of incarceration. *See* D.C. Stat. § 1-1001.02(7)(B) (violations of §§ 1-1001.14, 1-1105.07, and 1-1107.01 included in definition of "felony" for purposes of qualification to vote).

The right to hold office is also restored automatically upon release from prison. D.C. Code § 1-204.02. An individual disqualified for jury service by reason of a felony conviction "may qualify for jury service not less than one year after the completion of the term of incarceration, probation, or parole following appropriate certification under procedures set out in the jury system plan." *Id.* § 11-1906(b)(2)(B).

Convicted person may not serve as personal representative in probate of an estate if sentence has not expired or has expired within10 years (unless pardoned on the basis of innocence). D.C. Code § 20-303(b)(4). Other occupations and licenses may be revoked because of a conviction. *See, e.g.,* § 2-3305.3(a)(1)(heath care); § 25-115(g)(1)(liquor license); § 2-2729(a)(2)(veterinarian).

II. Discretionary Restoration Mechanisms:

A. Executive pardon:

- Authority: The President has authority to pardon D.C. Code offenses. The Mayor of the District also has a limited power to pardon violations of municipal ordinances. *See* D.C. Code § 1-301.76 (Mayor may grant "pardons and respites for offenses against the late corporation of Washington, the ordinances of Georgetown and the levy court, the laws enacted by the Legislative Assembly, and the police and building regulations of the District").
- Eligibility, effect and process for presidential pardon are all the same as for federal offenses.
- Frequency of Grants: very rare (none since at least 2000). Source: Office of the Pardon Attorney.

B. Judicial sealing or expungement of adult felony convictions:

Misdemeanor Convictions and Non-conviction Records: Criminal Records Sealing Act of 2006, codified at D.C. Code § 16-801 et seq., authorizes sealing of certain non-serious misdemeanors, a single felony (failure to appear), and records not leading to conviction. § 16-803. To qualify, a person cannot have been convicted of a felony or serious misdemeanor, and must have a clean record for an extensive waiting period -- 2 years in the case of an arrest for an eligible misdemeanor, 5 years for an ineligible misdemeanor or felony arrest, 10 years for conviction of an eligible offense. A person may also petition for sealing on grounds of actual innocence. § 16-802.* Sealed records remain available to law enforcement and the courts, and to certain employers for background check purposes (e.g., schools, day care centers, law enforcement, licensing agencies, health care workers). § 16-804.

C. Administrative certificate: N/A

II. Nondiscrimination in Licensing and Employment:

D.C. Code § 47-2853.17(a)(Non-Health related occupations) – A person may be denied a license based upon conviction that "bears directly upon the fitness" of the person to be licensed. Certain occupations** subject to a higher standard under § 202 of Omnibus Public Safety Ex-Offender Self-Sufficiency Reform Amendment Act of 2004, D.C. Law 15-357 (2005): a person may be denied a license in those fields only "after consideration by the Mayor of the following criteria: (1) The specific duties and responsibilities necessarily related to the license sought; (2) The bearing, if any, the criminal offense or offenses for which the person was previously convicted will have on his fitness or ability to perform one or more of the duties or responsibilities specified under paragraph (1) of this subsection; (3) The time that has elapsed since the occurrence of the criminal offense or offenses; (4) The age of the applicant at the time of occurrence of the criminal offense or offenses; (5) The seriousness of the criminal offense or offenses;(6) Any information produced by the applicant, or produced on his behalf, in regard to his rehabilitation and good conduct; and (7) The legitimate interest in protecting property, and the safety and welfare of specific individuals or the general public." § 47-2853.17(c)(1). If licensed denied on grounds of conviction, denial must be in writing and specify reasons. § 47-2853.17(c)(2).

2006 legislation passed by D.C. City Council would have included conviction as a basis of prohibited discrimination in D.C. human rights law, vetoed by Mayor.

---

* Standard of proof is preponderance of evidence for up to four years after arrest; clear and convincing evidence after four years. § 16-802.

** Asbestos worker; Barber; cosmetologist; Commercial bicycle operator; Electrician; Funeral Director; Operating engineer; Plumber/gasfitter; Refrigeration and air conditioning mechanic; and Steam engineer. See Trade Occupations Exemption from Conviction Restriction on Licensure Act of 2004, codified at D.C. Official Code 47-2853.17(a)(5).

APRIL 27, 2007

FLORIDA

Automatic Restoration of Rights: All civil rights of felony offenders are suspended upon conviction of a felony until restored by pardon or restoration of civil rights, both controlled by the Governor upon recommendation of the Clemency Board. Fla. Const. art. VI, § 4; Fla. Stat. ch. 944.292(a).* (The voting rights of out-of-state or federal offenders are determined by the jurisdiction in which they were convicted.) Under the Rules of Executive Clemency, as revised on April 5, 2007, certain less serious felony offenders* are restored to all civil rights, including certain licensing eligibility but not including firearms rights, automatically by action of Clemency Board upon determination of eligibility by Parole Commission. *See* Rule 9A of the Rules, https://fpc.state.fl.us/Policies/ExecClemency/ROEC04052007.pdf. Automatic restoration applies to about 80% of felony offenders. More serious offenders must apply to the Clemency Board and may be required to have a hearing. See below.

I. Discretionary Restoration Mechanisms:

A. Executive pardon:

- *Authority*: The power to grant a pardon and/or to restore civil rights (except in cases of treason or impeachment) is vested in the Governor, who may, "by executive order filed with the Secretary of State, suspend collection of fines and forfeitures, grant reprieves not exceeding 60 days, and, with the approval of two members of the Cabinet, grant full or conditional pardons, restore civil rights, commute punishment, and remit fines and forfeitures for offenses. Fla. Const. art. IV, §8 (a); ch. 940.01, 940.05 The Governor and three members of his Cabinet are constituted as a Clemency Board (prior to 2003 approval of all three Cabinet members required; 2/3 requirement introduced by Revision No. 8 (1998), effective January 7, 2003). Now on the Board, along with the Governor, are the Attorney General, the Financial Officer, and the Agriculture Commissioner. The Governor may deny, for any reason, any request for clemency. The Governor must report to the legislature each case of pardon at the beginning of each legislative session. *Id.* at 940.01.
- *Administration*: The Office of Executive Clemency, established in 1975, administers the day-to-day business of the Clemency Board, and interprets the Rules of Executive Clemency of Florida. The rules are available at: http://www.state.fl.us/fpc/Policies/ExecClemency/ROEC12092004.pdf. The

* In 1976, the Florida Supreme Court overturned a legislative enactment purporting to automatically restore civil rights to convicted persons, opining that the Governor's power to grant clemency and restoration of civil rights cannot be exercised or regulated by the legislature. *See In re Advisory Opinion of the Governor*, 334 So.2d 561 (Fla. 1976).

* *See* Rule 9A of the See Rules of Executive Clemency of Florida. The rules are available at: http://www.state.fl.us/fpc/Policies/ExecClemency/ROEC12092004.pdf. Rule 9A)

state Parole Commission provides investigative support to the Board. Fla. Stat. ch. 947.01- 947.27. See also Office of Executive Clemency, "Information and Instructions on Applying for Restoration of Civil Rights," *available at* https://fpc.state.fl.us/PDFs/clemency/instructionsonforrcr.pdf.

- *Eligibility*:
  - Restoration of rights: eligibility immediately following completion of sentence, including fines and court costs (latter may be waived), and restitution to victims. Persons residing in Florida with federal and out-of-state convictions are eligible for restoration of rights but not for pardon. Rules of Executive Clemency of Florida, R. 9D. Under Rule 5E, all restitution must be paid before rights will be restored, though waiver of this and other eligibility requirements may be sought under Rule 8. *Id.* at R. 5E
  - Pardon: ten years following completion of sentence, plus no outstanding financial obligations resulting from convictions, including traffic fines. *See Id.* at R. 5E.
- *Effect*:
  - Restoration restores "all or some" of rights of citizenship. *Id.* at R. 4F. By statute, person who has had rights restored may not be denied a license based solely on conviction, requiring a case-by-case inquiry in each case into whether the crime is "directly related to the specific occupation, trade, vocation, profession, or business for which the license, permit, or certificate is sought." Fla. Stat. ch. 112.011(1)(b). (Florida law independently prohibits disqualification from most public employment, even without a restoration, solely because of a prior conviction for a crime. A convicted person may be denied such public employment "if the crime was a felony or first degree misdemeanor and directly related to the position of employment sought." ch. 112.011(1)(a).) Law does not apply to law enforcement, firefighting, and county "positions deemed to be critical to security or public safety." ch. 112.011(2).
  - Pardon: Full Pardon "unconditionally releases the person from punishment and forgives guilt. It entitles an applicant to all of the rights of citizenship enjoyed by the person before his or her conviction, including the right to own, possess, or use firearms." R. 4A. Pardon may also be made conditional, and breach of condition results in revocation of pardon.
- *Process*: A different process applies for each of three different categories of offenses, identified in Clemency Rules 9A, 10A and 10B. As noted above, as of April 5, 2007, certain less serious offenders identified in Clemency Rule 9A are automatically restored to all civil rights upon determination of eligibility by Parole Commission. Department of Corrections required to submit names to Parole Commission for eligibility review immediately upon completion of sentence.

For more serious offenses, Parole Commission determines whether a person is entitled to restoration without a hearing under either Rules 10A or 10B. For 10A offenses, hearing waived upon completion of sentence if Governor and two members of the Board approve. Under Rule 10B, persons convicted of most serious offenses may waive hearing after 15 years arrest-free in the community, upon approved of Governor and two members of Board.

In cases where a hearing is required, provisions of Rule 6 apply. Notification to prosecutor and victim required, and Parole Commission conducts an extensive investigation to determine whether the person is crime-free and rehabilitated (e.g., must have no outstanding traffic fines). When the investigation is complete, examiners put their recommendations into confidential files given to the Clemency Board before the hearing. Applicants may wait years for a hearing.

Applicants are not required to attend hearing, but they have a right to make an oral presentation if they do. R.11. At hearing in person, each applicant may be questioned directly by members of the Board on matters relating to his character, rehabilitation, etc. Strict time limits in Rule 11C for presentations (5 minutes, 10 minutes for all witnesses).

Applicants who are denied must wait a year to reapply. R. 14.

- *Comments*: Between 1975 and 1991, restoration of rights in Florida was automatic upon completion of sentence, though it was still necessary to apply and demonstrate eligibility. *See Gallie v. Wainwright*, 362 So.2d 936, 938 (Fla. 1978). The practice of requiring a hearing before restoration began in 1991, and the list of qualifying offenses was lengthened in 1999 to include about 200 crimes. The list of qualifying offenses was shortened by Governor Bush in 2004 after a series of investigative reports in the Miami Herald revealed lengthy delays and other shortcomings in the clemency process. *See* Debbie Cenziper & Jason Grotto, "Clemency Proving Elusive for Florida's Ex-Cons," Miami Herald, October 31, 2004, and "The Long Road to Clemency," Miami Herald, November 7, 2004. In April 2007, in accordance with a campaign promise, Governor Charlie Crist persuaded the Board to approve new rules making restoration automatic in about 80% of all cases.
- *Frequency of Grants*: According to an investigative series by the Miami Herald the fall of 2004, 48,000 requests for restoration of rights were granted between 1999 and 2004, compared with 200,000 rejected during that period. No information available on the number of pardons granted during this period.
- *Firearms*: Any felony convictions within Florida, a federal felony conviction, or a conviction in another state punishable by a term exceeding one year results in a state bar against owning or possessing a firearm. Fla. Stat. ch. 790.001(6), 790.23(1). The Governor, upon recommendation of the Clemency Board, must specifically grant relief from this disability, and there is an eight-year eligibility waiting period. R. 5D.
- *Contact*: Office of Exec. Clemency, 850-488-2952; 850-487-3865.

B. Judicial sealing or expungement of adult felony convictions:

- *Withholding Adjudication of Guilt:* Under Fla. Stat. ch. 948.01(2), trial courts may withhold adjudication of guilt after a plea has been accepted or after a verdict of guilty has been rendered and place the defendant on probation if it appears "that the defendant is not likely again to engage in a criminal course of conduct and that the ends of justice and the welfare of society do not require that the defendant presently suffer the penalty imposed by law . . . " *See also* Fla. R. Crim. P. Rule 3.670: "where allowed by law, the judge may withhold an adjudication of guilt if the judge places the defendant on probation." Where adjudication has been withheld, there is no conviction for purposes of impeachment. *See State v. McFadden*, 772 So.2d 1209, 1213 (Fla. 2000). Under legislation adopted in 2004, trial courts have no authority to withhold adjudication in first degree felony cases; in second degree felony cases except upon request of the prosecutor or if "the court makes written findings that the withholding of adjudication is reasonably justified based on circumstances or factors in accordance with those set forth in [Fla. Stat. ch. 921.0026, "mitigating circumstances"), and only if adjudication has not previously been withheld for the defendant; and in third degree felony case where adjudication has previously been withheld except upon the request except upon request of the prosecutor or if the court makes written findings as above. See Fla. Stat. ch. 775.08435. No provision for expungement of record.

- *Misdemeanor expungement*: Expungement and sealing are not available for criminal records that include conviction of a felony or certain specified violent and/or serious misdemeanors. Fla. Stat. ch. 943.0585(1)(b)(1). If offense not among those specified in ch. 941.053(3)(b), misdemeanors may be expunged and/or sealed by the court, with the permission of the prosecutor. ch. 943.0585, 943.059. Records available only to the person who is the subject of the record, to the subject's attorney, to criminal justice agencies for their respective criminal justice purposes, which include conducting a criminal history background check for approval of firearms purchases or transfers as authorized by state or federal law, or to certain entities for their respective licensing and employment purposes. 943.059(4).

C. Administrative certificate: N/A

II. Nondiscrimination in Licensing and Employment:

The following discussion of applicable law and practice must be read in light of Executive Order 06-89 of April 25, 2006 (see below).

Public employment may not be denied "solely because of" a conviction record, but only if the crime of conviction is "directly related" to the job. Fla. Stat. ch.

112.011(1)(a). A license may not be denied a convicted person whose civil rights have been restored unless offense conduct is "directly related" to license. ch. 112.011(1)(b). These restrictions do not apply to law enforcement, firefighting, and "positions deemed to be critical to security or public safety." ch. 112.011(2). Special additional requirements for drug offenders, who must comply with certain treatment and rehabilitation requirements before they may qualify for public employment or licensing. Fla. Stat. ch. 775.16. Successful completion of Correctional Education Program by drug offenders may satisfy eligibility requirements for occupational licensure. *Id.* *See* Op.Atty.Gen., 073-355 (1973)(licensing authorities may not deny licenses to former offenders whose civil rights have been restored, nor may they revoke such persons' licenses which have been granted, unless the licensing authority determines and finds, after due investigation, that the offense directly relates to the license sought or held and the crime was a felony or first degree misdemeanor).

Conviction may be the basis for disqualification from employment or contracting with state agencies in connection with various health care and related professions, including care for children, and developmentally disabled or vulnerable adults. *See e.g.*, Fla. Stat. ch. 110.1127 (state employee positions for which screening required); ch. 409.175 (foster care); ch. 409.953 (home medical equipment); ch. 400.5572 (nursing homes); ch. 393.0655 (developmental disability direct service providers); ch. 397.451 (substance abuse services); ch. 489.129(1)(b)(construction contractor).

Case-by-case exemptions may be granted by licensing agencies, state regulated facilities, and state agencies in cases where an individual would otherwise be disqualified as a result of a criminal record, pursuant to Fla. Stat. ch. 435.07(1). This exemption procedure applies to some but not all types of conviction, and is available three years after completion of sentence. In order to qualify for exemption an applicant must demonstrate "by clear and convincing evidence" that he or she "should not be disqualified from employment." Applicants for an exemption "have the burden of setting forth sufficient evidence of rehabilitation, including, but not limited to, the circumstances surrounding the criminal incident for which an exemption is sought, the time period that has elapsed since the incident, the nature of the harm caused to the victim, and the history of the employee since the incident, or any other evidence or circumstances indicating that the employee will not present a danger if continued employment is allowed." ch. 435.07(3). The decision of the licensing department regarding an exemption may be contested through the hearing procedures set forth in Fla. Stat. chapter 120. *See* Fla. Stat. ch. 120.51 et seq. (Administrative Procedure Act). No exemption may be granted to persons who have been convicted of any offense enumerated in ch. 435.03, even if they have been pardoned. ch. 435.07(4). These offenses include specified sex offenses; abuse of a child or vulnerable adult; assault or any other violence, including domestic violence; sale of controlled substances; felony theft or robbery.

Executive Order No. 06-89: On April 25, 2006, Governor Jeb Bush issued Executive Order No. 06-89, directing each state agency 1) to conduct a comprehensive inventory of their employment disqualifications affecting people with convictions; 2) report to him the

reasons for any automatic disqualifications and any available procedures for waiver; and 3) to eliminate or modify such disqualifications that are not tailored to protect the public safety; and 4) to create case-by-case review mechanisms to provide individuals the opportunity to make a showing of their rehabilitation and their qualifications for employment. The Governor also encouraged other public entities and private employers, "to the extent they are able, to take similar actions to review their own employment policies and provide employment opportunities to individuals with criminal records." The text of the order is at http://sun6.dms.state.fl.us/eog_new/eog/orders/2006/April/06-89-exoftf.pdf

The order emerged from the work of the Governor's Ex-Offender Task Force, which found "many state laws and policies that impose restrictions on the employment of people who have been to prison," affecting "more than one-third of Florida's 7.9 million non-farm jobs, including state and local government jobs, jobs in state-licensed, regulated and funded entities, and jobs requiring state certification." The Task Force also found that "no comprehensive review of these restrictions has been undertaken to evaluate whether the restrictions are related to the safety, trust and responsibility required of the job or to determine whether a less restrictive approach could protect the public while preserving employment opportunities," and that "disqualifications for many kinds of jobs can be lifted through exemptions and other mechanisms that allow a case-by-case showing of rehabilitation, yet the disqualifications for many other jobs requiring a similar level of safety, trust and responsibility cannot be lifted, exempted or relieved." The Governor askedhis executive agencies to "assume a leadership role in providing employment opportunities to ex-offenders by reviewing their employment policies and practices and identifying barriers to employment that can safely be removed to enable ex-offenders to demonstrate their rehabilitation."

MARCH 9, 2007

GEORGIA

I. Automatic Restoration of Rights:

Civil rights lost upon conviction of a "felony involving moral turpitude." Ga. Const. art. II, § 1, para. III(a). Right to vote restored automatically "upon completion of the sentence." Id. Convicted person may not hold public office "unless that person's civil rights have been restored and at least ten years have elapsed from the date of the completion of the sentence without a subsequent conviction of another felony involving moral turpitude." Ga. Const. art. II, § II, § 2, para. III. To regain the right to sit on a jury, either a pardon or restoration of civil rights is necessary. 1983 Ga. Op. Att'y Gen. 69 (No. 83-33) (1983). State constitutional prohibition against felony offenders holding an appointment of honor or trust, such as position of deputy sheriff, unless pardoned, did not prevent General Assembly from making conviction absolute bar to qualification as peace officer, since General Assembly was authorized by law to provide for higher qualifications for the officers, citing Ga. Code Ann. § 92A-2108(d). *Georgia Peace Officer Standards and Training Council v. Mullis*, 281 S.E.2d 569 (Ga. 1981).

II. Discretionary Restoration Mechanisms:

A. Executive pardon:

- *Authority*: The power to pardon and to remove disabilities is vested in the state Board of Pardons and Paroles, although it may be prohibited from issuing a pardon or superseded by the legislature in cases involving recidivists and persons serving life sentences. Ga. Const. art. IV, § 2, para. II. The Governor is expressly precluded from exercising power or authority over pardons. Ga. Code Ann. § 42-9-56. In addition to pardons and sentence commutations, the Board may issue "Restoration of Civil and Political Rights" to felony offenders (including out-of-state and federal convictions). See Board instructions, *at* http://www.pap.state.ga.us/other_forms_clemency.htm. Board of Pardons and Paroles is a full-time, five-member board whose members are appointed by the Governor and confirmed by the senate. The Board chooses its own chairman, and also makes parole determinations. Must report annually to legislature and Governor. § 42-9-19.
- *Eligibility*: For restoration of rights, the applicant must have completed sentence (including fine), have no pending charges, and completed two years without any criminal involvement. For a full pardon, applicant must have completed a five-year waiting period after completion of sentence with no criminal involvement. Waiver available "if the waiting period is shown to be detrimental to the applicant's livelihood by delaying his qualifying for

employment in his chosen profession." Board instructions, *supra.* . Restoration of rights available to federal and out-of-state offenders living in Georgia (for non-Georgia convictions, applicant must be living in the state). Misdemeanants may apply if they are subject to deportation because of their conviction.

- *Effect*: Restoration of rights affects only basic civil rights (jury, public office). A full pardon which does not imply innocence relieves "civil and political disabilities imposed because of conviction," Ga. Code Ann. § 42-9-54, and also relieves licensing and employment restrictions. Ga Comp. R. & Regs. r. 475-3-.10(3)(2004). A pardon, however, does not restore a convicted felony offender to a public office he was forced to relinquish as a result of the conviction. *Morris v. Hartsfield*, 197 S.E. 251 (Ga. 1938).

- *Process*: The Board generally considers cases on a paper record without an in-person hearing, though it has the power to conduct public hearings. If the applicant requests restoration of firearms rights which must be explicitly stated in the pardon (see Firearms below), an investigator for the Board conducts an in person interview . Ga. Code Ann. § 42-9-43. It also acts by majority vote by written decision, and gives no reasons. *Id.* To request a full pardon, information and an application form can be obtained from http://www.pap.state.ga.us/Pardon_Application.PDF. Clemency requests are screened by Board staff. Requests deemed meritorious are forwarded to Board members for individual review and decision. Application form short (one page) and it advises that no attorney is necessary and no fee is charged.

- *Firearms*: Firearm privileges are restored only if a pardon expressly authorizes the receipt, possession, or transportation of a firearm. Ga. Code Ann. § 16-11-131(c). A pardon applicant may request that the pardon be specially worded to restore this firearm right, but he must provide in detail his reason for the request, and provide three character witnesses. *Id.* Board policy is to deny restoration of the firearm right to a pardon applicant who possessed a firearm during the commission of any offense. Special rules apply for certain white-collar crimes. *See* IIC below, § 16-11-131(d).*

- *Frequency of Grants*: In 2006, 310 pardons w/o firearms rights, 165 w/ firearms rights, 15 "immigration pardons," and 204 "Restoration of Rights." In 2005, 244 pardons w/o firearms rights, 143 w/ firearms rights, 21 immigration pardons, and 269 restorations of rights. Between 35% and 50% of those that apply are granted. Source: Georgia Board of Pardons and Paroles.

- *Contact*: Walt Davis, State Board of Pardons and Paroles
  2 Martin Luther King, Jr. Drive, S.E.
  Balcony Level, East Tower
  Atlanta, GA 30334-4909

---

* Ga. Code Ann. § 16-11-131(d) provides an administrative procedure for restoration of firearms rights by the Board of Public Safety,.for persons who have had their federal firearms rights restored by ATF, or who have been convicted of certain white-collar crimes ("antitrust violations, unfair trade practices, or restraint of trade"). All applications for firearms restoration This section is not used as a practical matter and all applications for firearms relief are handled through the Board of Pardons and Paroles..

Tel: (404) 651-5198(direct), (404) 657-9350 (general)
Fax: (404) 651-5282

B. Judicial sealing or expungement of adult felony convictions:

"First Offender Act": First offenders prosecuted under Georgia law may be placed on probation *or sentenced to confinement* without an adjudication of guilt. Ga. Code. Ann. § 42-8-60. Upon successful completion of probation or sentence, the offender is discharged without adjudication, which "completely exonerate[s] the defendant of any criminal purpose and shall not affect any of his civil rights or liberties." § 42-8-62(a). While those sentenced to confinement are considered "convicted" during the period of incarceration, § 42-8-65(c), after discharge the offender is "not considered to have a criminal conviction," § 42-8-62(a), and "is to suffer no adverse effect upon his civil rights or liberties." 1990 Ga. Op. Att'y Gen. 105 (1990). In addition, an offender sentenced to probation under this scheme is not disqualified from jury service during the probation period, *id.,* or from voting, 1974 Op. Att'y Gen. 48 (1974). A discharge restores firearms privileges, § 16-11-131(f), and the conviction not be used to disqualify the offender from employment. § 42-8-63. No provision for sealing or expungement, however. Also, a finding of guilt for a discharged offense "may be pleaded and proven as if an adjudication of guilt had been entered and relief had not been granted" to discharge the offender pursuant to this procedure. § 42-8-65(a).

Expungement of noncriminal records only if no charges filed. Ga. Code Ann., § 35-3-37.

C. Administrative certificate

N/A

III. Nondiscrimination in Licensing and Employment:

Georgia's general law governing professional licensure provides that conviction of a felony or any crime involving moral turpitude may be grounds for revocation or refusal of a license, without regard to whether it is related to the practice of the licensed business or profession. *See* Ga. Code Ann. § 43- 1-19(a)(3), (6).

MARCH 9, 2007

HAWAII

I. Automatic Restoration of Rights:

- Uniform Act on Status of Convicted Persons – Felony offender's right to vote suspended, except that "if execution of sentence is suspended with or without the defendant being placed on probation or the defendant is paroled after commitment to imprisonment, the defendant may vote during the period of the suspension or parole." Haw. Rev. Stat. § 831-2(a)(1). Right to seek and hold public office is (except for treason) restored upon final discharge of sentence. § 831-2(a)(2). Only a pardon restores the right to serve on a jury. Haw. Rev. Stat. § 612-4(4). Firearm privileges lost for convictions of crimes of violence, felonies, and drug offenses (sale or distribution). Haw. Rev. Stat. § 134-7. Only a pardon expressly authorizing possession of firearms will relieve this disability.

II. Discretionary Restoration Mechanisms:

A. Executive Pardon:

- *Authority*: The power to grant pardons of state convictions is vested in the Governor. Haw. Const. art. V, § 5. Governor may seek the recommendation of HI State Paroling Authority, but power is independent. *See* Haw. Const. art. V, § 5; Haw. Rev. Stat. § 353-72 (Paroling Authority "shall consider every application for pardon which may be referred to them by the governor"). While the Hawaii Constitution specifically permits the legislature to "authorize the governor ... to restore civil rights denied by reason of conviction of offenses by tribunals other than those of this State," Haw. Const. art. V, § 5, no such statute has been enacted.

- *Eligibility:* No restrictions for state offenders.

- *Process:* No statutory process required for considering pardon applications, but Governor as a matter of policy always asks Paroling Authority and Attorney General for advice and recommendation. See Haw. Rev. Stat. § 353-72: "The director of public safety and the Hawaii paroling authority shall consider every application for pardon which may be referred to them by the governor and shall furnish the governor, as soon as may be after such reference, all information possible concerning the prisoner, together with a recommendation as to the granting or refusing of the pardon." According to the Pardons Administrator of the Hawaii Paroling Authority, pardon applicants undergo formal investigation process conducted under direction of Authority, including face-to-face interview by parole officer w/ petitioner; affidavits attesting to character

are filed in support by persons in the community. Administrative staff develops recommendation to Parole Board, which is considered in monthly administrative session. Director of Public Safety reviews, and endorses or recommends disapproval, then sends to Attorney General's office where a second investigation and confidential summary is completed. Entire investigative process takes about 8 months from filing to get to Governor's desk.

- *Effect:* A pardon will state that the person has been rehabilitated, relieves legal disabilities and prohibitions. Recipient may deny conviction. Haw. Rev. Stat. §§ 353-62, 353-72

- *Frequency of Grants:* Ordinarily the Authority receives between 100 and 200 applications each year, which it reviews on a regular basis, sending its recommendations through Attorney General to Governor. Number of grants each year depends to some extent on political climate and comfort level of governor. In FY 2005 (ending June 30, 2005) the Paroling Authority processed 180 applications for pardon, and the Governor issued 32 pardons (some held over from the previous year.) Source: Hawaii Paroling Authority.

- *Contact:* Tommy Johnson, Pardons Administrator, Hawaii Paroling Authority (808-587-1293). Tommy.johnson@hawaii.gov.

B. Expungement: Available for nonviolent first offender probationers under Haw. Rev. Stat. § 853-1(e). If the defendant successfully completes probation, the court discharges him and dismisses the charges without an adjudication of guilt. Haw. Rev. Stat. § 853-1. One year after the discharge and dismissal, the defendant may apply for expungement. Haw. Rev. Stat. § 853-1(e). *See also* Haw. Rev. Stat. § 831-3.2(a)(5). The procedure is limited to persons with no prior felony convictions, and not available for some offenses. Haw. Rev. Stat. § 853-4. Also provision for conditional discharge and expungement for first time drug offenders. Haw. Rev. Stat. §§ 712-1255, 1256. Office of the Attorney General: 808-586-1500.

Nonconviction records: Haw. Rev. Stat. § 831-3.2 (persons entitles to expungement by virtue of not having been convicted shall be treated as having not been arrested)

C. Administrative certificate: Uniform Act on Status of Convicted Persons – arrests not leading to conviction may be expunged by the Attorney General pursuant to Haw. Rev. Stat. § 831-3.2. Info: 808-587-3106 (AG's office, criminal records section).

III. Nondiscrimination in Licensing and Employment:

Hawaii has adopted the Uniform Status of Convicted Persons Act, which prohibits the government from firing or refusing to hire any person "solely by reason of a prior conviction," except that a crime committed within the past 10 years (excluding any

period of incarceration) may be considered if it bears a rational relationship to the duties and responsibilities of a job, occupation, trade, vocation, profession, or business." Haw. Rev. Stat. § 831-1(a). Exception for liquor licenses, and for other public employments like healthcare, corrections, and law enforcement. Arrest records not leading to a conviction may not be considered at all. Haw. Rev. Stat. 831-3.2(e).

In addition, Hawaii makes discrimination based on conviction record part of its more general fair employment practices law. Haw. Rev. Stat. §§ 378-2 to 378-6. Under § 378-2.5(b), it is an unlawful employment practice to inquire into arrest and conviction records, unless the conviction "bears a rational relationship to the duties and responsibilities of the position." Moreover, this inquiry may take place "only after the prospective employee has received a conditional offer of employment which may be withdrawn if the prospective employee has a conviction record that bears a rational relationship to the duties and responsibilities of the position," Haw. Rev. Stat. § 378-2.5(b), and only if the conviction took place within the last ten years. § 378-2.5(c). The Hawaii Supreme Court held in August 2006 that this law also prohibits termination of existing employment because of a previous conviction, absent a showing that the conviction bears a rational relationship to the employment. *Wright v. Home Depot*, 142 P. 3d 265 (HI, 2006).

The law includes a long list of exceptions for various public and private employments where an employer is expressly permitted to ask about a conviction record, such as health, education, law enforcement and security services, public employment, transportation, public libraries, insurance and banks, coop or condominium housing, etc. Haw. Rev. Stat. § 378-2.5

The law is enforced by the Hawaii Civil Rights Commission. The 1998 amendments were evidently precipitated when the HCRC promulgated regulations that addressed what constitutes a "bona fide occupational qualification" and what is an "inquiry." "Significantly, an application form cannot ask the prospective employee whether he or she has an arrest record, court record, or conviction record unless 'the inquiry is pursuant to a statutory exemption and seeks information about a conviction for a specific offense within the exemption.' The HCRC makes it clear that the employer has the burden of proving a BFOQ based on the employer's business requirements and the totality of the circumstances." *See* Sheri-Ann S.L. Lau, *Recent Development: Employment Discrimination Because of Ones Arrest and Court Record in Hawaii*, 22 U. HAW. L. REV. 709, 713-14 (2000) ("it appears that the legislature's main emphasis is to provide employment opportunities for individuals with conviction records and reduce the likelihood that they will return to public assistance or a life of crime. . . The Legislature's secondary concern is protecting employers from litigation when trying to provide a safe environment for customers and employees). Arrest records not leading to a conviction may not be considered at all. Haw. Rev. Stat. §§ 378-2(1)(A) and 831-3.2(e).

February 15, 2006

IDAHO

I. Automatic Restoration of Rights:

- A sentence of custody to the Idaho state board of correction following a felony conviction suspends all the civil rights of the person so sentenced, including the right to refuse treatment authorized by the sentencing court, and the person "forfeits all public offices and all private trusts, authority or power during such imprisonment." Idaho Code § 18-310(1). Suspended sentence also results in loss of right to vote. *Id.* (any such person "may lawfully exercise all civil rights *that are not political* during any period of parole or probation"). Civil rights restored upon final discharge of sentence. § 18-310(2)("final discharge" means satisfactory completion of imprisonment, probation and parole as the case may be).
- Except for treason and other specified serious offenses, felony convictions generally result in the loss of firearm privileges only during the period of incarceration. § 18-310(2). For enumerated violent felonies committed after 1991, firearms privileges are lost until restored by "expungement, pardon, setting aside the conviction, or other comparable procedure." §§ 18-310(2), 18-3316(4).

II. Discretionary Restoration Mechanisms:

A. Pardon:

- *Authority:* Constitution empowers legislature to create a board to grant pardons. Idaho Const. art. IV, § 7. This board (Idaho Commission of Pardons and Parole) has authority to grant pardons, except in cases of treason and impeachment, subject to legislative limitations on its power and manner of proceeding. Idaho Const. art. IV, § 7; Idaho Code §§ 20-210, 20-240.* Governor has constitutional power to grant reprieves or respites. In addition, the Governor must approve the Commission's recommendation in cases of murder, voluntary manslaughter, rape, kidnapping, lewd and lascivious conduct with a minor child, or manufacture or delivery of a controlled substance, before the pardon becomes effective. In such cases, the Commission's decision constitutes a recommendation to the Governor. Idaho Code § 20-240.
- *Administration*: Idaho Commission of Pardons and Parole composed of five members appointed by the Governor, with advice and consent of Senate, for three-year terms; no more than three from the same party.

* The state constitution originally provided for a Board of Pardons composed of the Governor, the Attorney General, and the Secretary of State. In 1945 the Constitution was amended to give the legislature power to create a pardoning board. *See* Idaho Const. art. IV, § 7.

Governor appoints chair. Commission members may be removed by Governor for any reason.

- *Eligibility*: For non-violent offenses (both felony and misdemeanor), three years after completion of sentence, five years for violent and sex offenders. *See* Idaho Code § 18-310(3). *See also* Commission Rules of Procedure *at* http://www2.state.id.us/adm/adminrules/rules/idapa50/0101.pdf. Firearms restoration always five years. Only persons convicted under Idaho law are eligible for a state pardon. *See* Idaho Const. art. IV, § 7.
- *Effect:* Pardon relieves state and federal firearms disabilities; welfare and employment disabilities imposed by state law or administrative regulation, e.g., health care provider, school bus driver.
- *Process*: Section 7 of the Idaho Constitution provides that no pardon shall be granted "except by the decision of a majority of said board, after a full hearing in open session, and until previous notice of the time and place of such hearing and the release applied for shall have been given by publication in some newspaper of general circulation at least once a week for four weeks. The proceedings and decision of the board shall be reduced to writing and with their reasons for their action in each case, and the dissent of any member who may disagree, signed by him, and filed, with all papers used upon the hearing, in the office of the secretary of state." *See* IDAPA § 50.01.01; *See also* Commission Rules of Procedure, *supra*. Pardon application assigned for investigation to a parole officer in area where applicant resides, who inquires into criminal history, reputation in the neighborhood, employment, and makes a recommendation to Board. *Id.* Board decides in executive session whether to have hearing. *Id.* If a hearing is granted, notice must be published pursuant to constitutional requirement, supra, and prosecutor and victims also notified so they may participate. *See* http://www2.state.id.us/parole/. All written material (ex. pre-sentence report and victim info) relating to the application becomes a matter of public record, including dissents, and are available from Secretary of State.
  In cases where Governor retains final authority to pardon, Board conducts same full hearing and makes written recommendation to Governor; if no action within 30 days, application deemed denied.

- *Frequency of Grants*: Twenty to 30 applications received annually, of which about 2/3 are granted. Twelve pardons granted in 2004. Source: Idaho Commission of Pardons and Parole.

- *Contact*: Kenneth K. Jorgensen, Deputy Attorney General, mailto:kjorgensen@ag.state.id.us

Wendi S. Yahn
Administrative Assistant II
State of Idaho
Commission of Pardons and Parole
3125 S. Shoshone St., Suite A
Boise, Idaho 83720-1807
(208) 334-2520 ext. 229
wyahn@corr.state.id.us

B. Judicial sealing or expungement of adult felony convictions:

- Probationers: Idaho Code § 19-2601(4) provides for set-aside of conviction and dismissal of charges for persons sentenced to probation upon successful completion of sentence. The dismissal "shall have the effect of restoring the defendant to his civil rights," Idaho Code § 19-2604(1), but does not seal or expunge the record.

- Sex Offenders: Idaho Code § 18-8310: Sex offenders may petition court after ten years of law-abiding conduct for "expungement" from sex offender registry.

C. Administrative Restoration:

- Firearms Restoration: For restoration may apply to Idaho Commission of Pardons and Parole no sooner than five years after final discharge, unless sentence enhanced for use of firearm, in which case no remedy is available. Idaho Code § 18-310(3).

III. Nondiscrimination in Licensing and Employment: N/A

Idaho has no general law regulating consideration of conviction in employment or licensure. It does apply a direct relationship test in connection with licensure as a veterinarian. *See* Idaho Code § 54-2103(23) ("In good standing" means that an applicant: (e) Has not been convicted of a felony . . .; and (f) Has no criminal conviction record or pending criminal charge relating to an offense the circumstances of which substantially relate to the practice of veterinary medicine").

JANUARY 28, 2007

ILLINOIS

I. Automatic Restoration of Rights:

- Vote: Right to vote lost if sentenced to imprisonment, regained upon release. *See* Ill. Const. art. III, § 2 ("A person convicted of a felony, or otherwise under sentence in a correctional institution or jail, shall lose the right to vote, which right shall be restored not later than upon completion of his sentence."). (Note that disenfranchisement extends to misdemeanants sentenced to a prison term.) The election code provides that the right to vote shall be restored upon release from confinement. 10 Ill. Comp. Stat. 5/3.5. *See also* 730 Ill. Comp. Stat. 5/5-5-5(c).

- Office: The right to hold an office created by the state constitution (*e.g.,* any of the five statewide offices -- governor, lieutenant governor, secretary of state, treasurer, attorney general; a member of the state General Assembly; a judgeship; the chief education officer and a member of the state board of education) lost upon conviction, but automatically restored upon completion of sentence (excepting convictions for crimes involving election fraud). 5/5-5-5(b). The bar is permanent for "other elected offices," including alderman and mayor. 65 Ill. Comp. Stat. 5/3.1-10-5.

- Jury: Illinois law does not exclude convicted persons from jury service, nor is a prior conviction grounds for a juror challenge for cause, though jurors must to be "[f[ree from all legal exception, of fair character, of approved integrity, [and] of sound judgment." 705 Ill. Comp. Stat. 305/2. *See* John F. Decker, *Collateral Consequences of a Felony Conviction in Illinois*, 56 Chi.-Kent L. Rev 731, 741 (1980)(question whether a convicted person meets character standard must be decided on a case-by-case basis).

- Executor: A felony offender may not serve as executor of a will or administrator of an estate. 755 Ill. Comp. Stat. § 5/6-13(a), 5/9-1. *See In re Estate of Muldrow*, 799 N.E.2d 497 (Ill. App. 2003)(rational basis exists under the Probate Act for excluding convicted felons from serving as executors based on a felon's demonstrated inability to act within the confines of law, even if the felony conviction, "as applied" in particular case, is remote in time and the felon is able to demonstrate rehabilitation).

- Licenses: The Code of Corrections provides that "On completion of sentence of imprisonment or upon discharge from probation, conditional discharge or periodic imprisonment, or at any time thereafter, all license rights and privileges granted under the authority of this State which have been revoked or suspended because of conviction of an offense shall be restored unless the authority having jurisdiction of such license rights finds after investigation and hearing that restoration is not in the public interest." 730 Ill. Comp. Stat. § 5/5.5.5(d). This

provision does not apply to the suspension or revocation of a license to operate a motor vehicle. However, other more specific laws restrict licensure for certain professions. For example, the Child Care Act bars licensure and employment of individuals in child care facilities when they have been convicted of any of a long list of enumerated offenses. 225 Ill. Comp. Stat. 10/4.2. The Illinois Vehicle Code makes conviction of any of a long list of enumerated offenses a bar to licensure as a school bus driver. 625 Ill. Comp. Stat. 5/6-106.1.

II. Discretionary Restoration Mechanisms:

A. Pardon:

- *Authority:* The pardon power is vested in the Governor, although "the manner of applying therefore may be regulated by law." Ill. Const. art. V, § 12. By statute, the Prisoner Review Board (PRB) serves as "the board of review and recommendation for the exercise of executive clemency by the Governor." 730 Ill. Comp. Stat. 5/3-3-1(a)(3). The Board "shall hear and . . . decide all requests for pardon, reprieve or commutation, and make confidential recommendations to the Governor." 5/3-3-2(a)(6). At the same time, "Nothing in this Section shall be construed to limit the power of the Governor under the Constitution to grant a reprieve, commutation of sentence, or pardon." 5/3-3-13(e). The Supreme Court of Illinois has ruled that the constitution does not give the legislature authority to limit the Governor's power to act in the absence of an application, and that in any event the legislature has not done so. *People ex rel. Madigan v. Snyder,* 804 N.E. 2d 546, 588 (2004).

- *Administration:* PRB consists of 15 members appointed by Governor, with advice and consent, no more than 8 of the same party. Chair appointed by Governor. Six-year terms, members serve full-time and may not do anything else. 730 Ill. Comp. Stat. 5/3-3-1(b). Board charged with duty to hear by at least one member and decide by at least three members all requests for pardon. 5/3-3-2(a)(6). PRB also hears and decides whether to grant certificates of relief from disabilities or certificates of good conduct (see below). 5/3-3-2(a)(9).

- *Eligibility*: No eligibility requirements for Illinois convictions; misdemeanants may also apply. Federal offenders and those convicted in another state are ineligible.

- *Effect:* A pardon removes the penalties and disabilities resulting from a conviction and restores individual to all his civil rights. *People v. Glisson,* 358 N.E.2d 35 (Ill. App. Ct. 1976), *aff'd in part, rev'd in part on other grounds*, 372 N.E.2d 669 (Ill. 1978). If authorized by the terms of the pardon, the record of conviction can be expunged.

- *Process:* 730 Ill. Comp. Stat. 5/3-3-13. Notice of the proposed application shall be given by the Board to the committing court and the state's attorney of the county where the conviction was had. The Board is required to meet to

consider clemency petitions at least four times each year. The Board shall, if requested and upon due notice, give a hearing to each application, allowing representation by counsel, if desired, after which it shall confidentially advise the Governor by a written report of its recommendations which shall be determined by majority vote. All cases are sent to the governor with a recommendation. Guidelines *available at* http://www.state.il.us/prb/docs/exclemexg.pdf. The statute expressly provides that:
"Nothing in this Section shall be construed to limit the power of the Governor under the constitution to grant a reprieve, commutation of sentence, or pardon." 730 Ill. Comp. Stat. 5/3-3-13(e). The Illinois Supreme Court has held that the Governor's constitutional power does not depend upon an application being filed. *People ex rel. Madigan v. Snyder,* 804 N.E. 2d 546, 588 (2004).

- *Frequency of Grants*: The Board receives about 500-600 petitions for pardon per year – about 30% are from misdemeanants. Every applicant is given the opportunity for a hearing. As of December 2006, after four years in office, Governor Blagojevich had granted 63 pardons, including four for innocence, and denied 833. At that time, close to 1000 cases were awaiting decision by the Governor. Source: Illinois Prisoner Review Board. *See also* PRB website, http://www.state.il.us/prb/prbexclemex.htm:

  > Executive clemency petitions filed with the Board for hearing and recommendation to the Governor have increased in recent years. The average size of the Board's quarterly clemency public docket hearing was 35 cases in 1990. In 1993, the average number of cases considered quarterly was 90. The average number in 2003 was approximately 400 cases per quarter, including commutation applications. In 1994, the Board initiated more restrictive petitioning requirements mandating unsuccessful petitioners to wait for one year before filing a repeat petition, absent compelling new information. Clemency requests may stay at a relatively high level, because inmates serving determinate sentences now have no opportunity for parole and must serve the sentence imposed by the courts, unless the Governor grants them release through his constitutional executive clemency powers.

- *Contact:* Ken Tupy

  IL Prisoner Review Board
  319 East Madison Street, Suite A
  Springfield, IL 62703
  Phone: 217-782-1610
  Fax: 217-524-0012

  ktupy@prb.state.il.us

B. ***Judicial sealing and expungement:*** In Illinois, the only records that can be *expunged* are those in which a pardon specifically authorizes expungement (ordinarily pardons for

innocence); arrests that resulted in acquittal or dismissal; and convictions "set aside on direct review or on collateral attack and the court determines by clear and convincing evidence that the defendant was factually innocent." 20 Ill. Comp. Stat. 2630/5(c), (c-6). Under 2004 legislation, certain misdemeanor and minor non-violent felony convictions are eligible for "sealing" after an eligibility waiting period (three years after completion of sentence in the case of misdemeanor probation, and four in the case of conviction), no further crimes have been committed. 2630/5(h)(2) and (3). Court must notify of eligibility for sealing. 2630/5(h)(6). Procedure for sealing includes notice to DA, and a hearing upon objection. 2630/5(h)(7). Sealed records are still accessible by law enforcement and can be considered in the context of a statutorily required background check. Sealing authority under this statute was extended to two Class 4 non-violent felonies (low-level drug possession and prostitution) by PA 93-1084, signed into law in February 2005. Department of Corrections directed to conduct a study of the impact of sealing, especially on employment and recidivism rates. 2630/5(i).

Effect of expungement and sealing: With certain exceptions, an expunged or sealed record "may not be considered by any private or public entity in employment matters, certification, licensing, revocation of certification or licensure, or registration." 2630/12(a). Exceptions are law enforcement, prosecutors, Department of Corrections. *Id.* Employers may not ask if an applicant has had records expunged or sealed, and applications for employment "must contain specific language which states that the applicant is not obligated to disclose sealed or expunged records of conviction or arrest." *Id.* Sealed and expunged records must be retained by the state police, and may be disseminated only to law enforcement, or "as otherwise specifically required or authorized by a federal or State law, rule, or regulation that requires inquiry into and release of criminal records." 2630/13(a).

Judicial Certificate of Discharge: Upon discharge from incarceration or parole or probation, "or at any time thereafter," the committing court may enter an order "certifying" that the sentence has been satisfactorily completed, "when the court believes it would assist in the rehabilitation of the person and be consistent with the public welfare." 730 Ill. Comp. Stat. 5/5-5-5(e). Such order may be entered upon the motion of the defendant or the State or upon the court's own motion. Id. Upon entry of the order, the court "shall issue to the person in whose favor the order has been entered a certificate stating that his behavior after conviction has warranted the issuance of the order." 5/5-5-5(f).

Deferred Adjudication for First Offenders: Under 720 Ill. Comp. Stat. 570/410 (formerly "section 1410"), the court may defer adjudication for first-time drug offenders, and place them on 24-months probation with various conditions of reporting and treatment. Upon successful completion of probation, the person is discharged and the proceedings dismissed. "[D]ischarge and dismissal under this Section is not a conviction for purposes of this Act or for purposes of disqualifications or disabilities imposed by law upon conviction of a crime," though it may be used in subsequent criminal proceedings. Shall be treated as a class 4 felony for purposes of sealing under 20 Ill. Comp. Stat. 2630/5(h). Other deferred adjudication provisions for marijuana in

720 Ill. Comp. Stat. 550/10 (formerly "section 710").

C. Administrative Restoration:

- *Certificate of Relief from Disabilities* and *Certificate of Good Conduct,* 730 Ill. Comp. Stat. 5/5-5.5-5 *et seq.* Eligibility for either form of certificate limited to persons with no more than two non-violent felony convictions (but not prostitution or any other sex-related offenses). Persons convicted outside the state and federal offenders are also eligible. The purpose of the CRD is to facilitate licensing in 27 specified areas. Like the New York CRD, on which it was modeled, it creates an enforceable "presumption of rehabilitation" that must be given effect by a licensing board. The purpose of the CGC is simply to evidence an offender's rehabilitation, and it appears to have no independent legal effect.
    - ***Certificate of Relief from Disabilities:*** Effective January 1, 2004, sentencing court (for someone who did not receive a prison sentence) or the Prisoner Review Board (for someone who did) may issue a Certificate of Relief from Disabilities (CRD) to eligible offenders with no more than two felony convictions, either at the time of sentencing or upon satisfactory completion of sentence, when it is "consistent with the rehabilitation of the eligible offender" and with "the public interest." 5/5-5.5-15, -20. A CRD does not prevent any court or administrative body from considering the conviction, nor does it preclude its use for impeachment. 5/5-5.5-10. Court may issue order at time of sentence, or at any time thereafter. Court may request investigation by probation or court services, and may hold hearing. PRB may issue certificate at time of release or at any time thereafter, and may subsequently enlarge any relief granted. Action of PRB must be unanimous by 3-member board. 5/5-5.5-20(e).
    - *CRD Effect on licensing*: The CRD authorized by 5/5-5.5-15 is given legal effect in 730 Ill. Comp. Stat. 5/5-5-5(Loss and Restoration of Civil Rights). Under 5/5-5-5(h) a person who has been awarded a CRD may not be denied a license in 27 specified fields solely on account of having been convicted, or by reason of finding a lack of "good moral character" when that finding is based on a previous conviction. 5/5-5-5(i). The licensing board must find that there is a "direct relationship" between the previous conviction and the license being sought or that issuing the license would involve "an unreasonable risk to property or to the safety or welfare of specific individuals or the general public." 5/5-5-5(h). This section provides that in making the "direct relationship" determination, a licensing board must consider the extent of an offender's rehabilitation, and the CRD creates a "presumption of rehabilitation." More specifically, the licensing board "shall consider" the following factors:

        (1) the public policy of this State, as expressed in Article 5.5 of this Chapter, to encourage the licensure and employment of persons previously convicted of one or more criminal offenses;

(2) the specific duties and responsibilities necessarily related to the license being sought;
(3) the bearing, if any, the criminal offenses or offenses for which the person was previously convicted will have on his or her fitness or ability to perform one or more such duties and responsibilities;
(4) the time which has elapsed since the occurrence of the criminal offense or offenses;
(5) the age of the person at the time of occurrence of the criminal offense or offenses;
(6) the seriousness of the offense or offenses;
(7) any information produced by the person or produced on his or her behalf in regard to his or her rehabilitation and good conduct, including a certificate of relief from disabilities issued to the applicant, which certificate shall create a presumption of rehabilitation in regard to the offense or offenses specified in the certificate; and
(8) the legitimate interest of the licensing agency in protecting property, and the safety and welfare of specific individuals or the general public.

At the same time, the fact that an individual has received a CRD does not preclude a licensing board from relying on the conviction "as the basis for the exercise of its discretionary power" to suspend or deny the license. 5/5-5.5-10.

The Department of Professional Regulation is required to report to the Governor and General Assembly each year the number of people with criminal records who applied for licenses, both with certificate of relief from disabilities and without, and the numbers of licenses granted and rejected. 5/5-5.5-50. In lifting occupational bars, the law gives first felony offenders access to licenses in fields which current legislation presumes denial of licensure, including those related to animal welfare, athletic training, cosmetology, boxing, interior design, land surveying, marriage and family therapy, professional counseling, real estate, and roofing. Certificate is not to be deemed a pardon. 5/5-5.5-45.

- ***Certificate of Good Conduct***: Prisoner Review Board may issue Certificate of Good Conduct (CGC) to eligible offenders after a waiting period of one to three years depending on most serious offense, when offender "has demonstrated that he or she has been a law-abiding citizen and is fully rehabilitated." 5/5-5.5-25(a), -30(c). The waiting period is measured from payment of fine or release from custody, whichever is later. A CGC does not prevent any court or administrative body from considering the conviction, nor does it preclude its use for impeachment. 5/5-5.5-25(b) and -30(c). The purpose of the CGC is to evidence rehabilitation for employment and other purposes, and it appears to have no independent legal effect. (Unlike the New York CGC, it does not create an enforceable "presumption of rehabilitation" in the same way that the CRD does.)

Comment: In December 2005 the Prisoner Review Board submitted regulations for implementing the certificate program to the legislature's Judicial Committee

on Administrative Rules. As of January 2007, final regulations had not been issued. According to a report from the Safer Foundation, which has been instrumental in the development of the certificate program, as of June 2006 the PRB had issued 38 CRDs, and the courts three. Safer Foundation, "Certificates of Relief from Disabilities Implementation and Tracking" (November 2006).

- Firearms: Firearm privileges lost upon a felony conviction may be restored by the Department of State Police. 720 Ill. Comp. Stat. 5/24-1.1(a). The State Police will grant relief if: (1) the applicant has not been convicted of a "forcible felony" within the preceding 20 years or 20 years have passed since release from imprisonment for that offense; (2) he is not likely to act in a manner dangerous to public safety; and (3) restoration of firearm privileges would not be "contrary to the public interest." 430 Ill. Comp. Stat. 65/10(c).

III. Nondiscrimination in occupational licensing and employment:

In general, Illinois limits consideration of conviction in connection with occupational licensing only for certain employments, and only where a person has received a certificate of rehabilitation. *See* Part IC, *supra*, for Certificates of Rehabilitation, 730 Ill. Comp. Stat. 5/5.5.5. In addition, the Illinois Human Rights Act prohibits "discrimination" in employment based on criminal history only where records have been ordered expunged, sealed or impounded. 775 Ill. Comp. Stat. 5/2-103. A claim of racial discrimination has also been sustained under this law where a criminal conviction was the articulated basis for a refusal to hire. *See Bd. of Trs. v. Knight*, 516 N.E.2d 991 (Ill. App. Ct. 1987)(no business necessity justified denial of employment as university police position to person convicted of single misdemeanor weapons charge; mitigating circumstances existed including time passed since conviction and record of responsible employment). Moreover, this provision allows the consideration of such records where "authorized by law," and thus background check laws and laws barring those convicted of offenses from employment trump the protections of this act. Finally, this act specifically allows employers to obtain and use "other information which indicates that a person actually engaged in the conduct for which he or she was arrested." 775 Ill. Comp. Stat. 5/2-103.

Several licensing schemes incorporate a "direct relationship" test. *See* 225 Ill. Comp. Stat. 450/20.01(Public Accounting Act)("The Department may refuse to issue or renew, or may revoke, suspend, or reprimand any license or licensee . . . [for] (4) being convicted or found guilty, regardless of adjudication, of a crime in any jurisdiction which directly relates to the practice of public accounting"); 225 Ill. Comp. Stat. 335/9.1 (roofer's license)(The Department may refuse to issue or revoke license for "conviction of any crime under the laws of any U.S. jurisdiction which is a felony or which is a misdemeanor, an essential element of which is dishonesty, or of any crime which directly relates to the practice of the profession"). The latter formulation is also used for acupuncturists, 225 Ill. Comp. Stat. 2/110(a)(2), collection agencies, 225 Ill. Comp. Stat. 425/9, and radon detection, 420 Ill. Comp. Stat. 44/45.

Waivers under the Illinois Health Care Background Check Act, 225 Ill. Comp. Stat. 46/40. The law governing the hiring of health care workers who are not subject to other licensing requirements requires criminal background checks, and while it disqualifies individuals from employment upon conviction of a long list of crimes, it permits a waiver by the agency that oversees the type of facility applicant is interested in working, and requires action on the waiver application within 30 days. The statute sets forth nine mitigating circumstances (*e.g.*, the age of the person when the crime was committed, the circumstances surrounding the crime, the length of time that has passed since the crime, the person's work history and references) for the agencies to consider in granting a waiver, and each agency sets it own procedures for granting waivers. At least two of the agencies have adopted a two-tiered procedure for reviewing waiver applications. *See* Linda Mills, Illinois Prisoner Reentry: Building a Second Chance Agenda, Annie E. Casey Foundation 141-145 (July 2004). Agency staff are authorized to grant waivers that apply to the less serious offenses listed in the act, and the agency director reviews applications involving the most serious violent offenses (including murder). Neither the state law nor agency rules set forth any offense that bars a waiver. However, a waiver does not guarantee employment; it only *allows* the employment of an individual with a waiver by any of the facilities regulated by the agency that issued the waiver. *Id.* Two agencies released their records of actions taken on waiver applications in connection with a request made by Linda Mills for her study of prisoner reentry issues for the Annie E. Casey Foundation, *supra.* The Department of Human Services granted 77% of waiver requests received over an eight year period between 1995 and 2003, including at least one waiver to an individual convicted of murder. Of the 289 waivers granted by DHS over that period, only one person was later charged with abuse of a patient – and that person had only a conviction for retail theft. The Department of Public Health received 6,581 waiver requests from 1996 through 2003. Of those, 875 had no disqualifying convictions (this is due, according to the DPH to name matches that are not actual person matches). Of the 5,706 with actual convictions, 4,130 (72.4%) were granted waivers. Of those, 97 (2.3%) waivers were later revoked, with 38 of the revocations due to a subsequent finding of patient abuse, neglect or theft, and 59 due to a subsequent disqualifying conviction. DPH also has been generous with its waivers of the most serious, recent or violent offenses that need director approval. Over the 21-month period from December 2002 and August 2004, 134 director waivers were sought (approximately 16% of all waiver request during this period), and of those requests, 86 (64.2%) were granted.

Chicago Reentry Initiative: In May 2004, Mayor Richard Daley created the Mayoral Policy Caucus on Prisoner Reentry, bringing together government and community leaders to address the challenges facing 20,000 people each year who return to Chicago after being released from prison. In January 2006, the Caucus issued a major report calling for broad ranging reforms of City policy. With regard to city hiring, the report recommended that the Mayor "Adopt internal guidelines for the City of Chicago's personnel policies regarding criminal background checks, and advocate for fair employment standards." At the same time that the report was released, Mayor Daley announced several major "reentry" initiatives, including reform of the City's hiring policies as recommended by the Caucus. The Mayor's press release described a new

hiring policy requiring the City to "balance the nature and severity of the crime with other factors, such as the passage of time and evidence of rehabilitation . . . . Put more simply, this change means that City hiring will be fairer and more common sense." The Mayor added, "Implementing this new policy won't be easy, but it's the right thing to do . . . We cannot ask private employers to consider hiring former prisoners unless the City practices what it preaches." Implementing the Mayor's new hiring policy, the City Department of Human Resources has issued guidelines imposing standards on all city agencies regulating hiring decisions related to people with criminal records. For the first time, the City of Chicago now requires all agencies to take into account the age of an individual's criminal record, the seriousness of the offense, evidence of rehabilitation, and other mitigating factors before making their hiring decisions.

The Report of the Reentry Policy Caucus and the Mayor's press release can be found at: http://egov.cityofchicago.org/city/webportal/portalContentItemAction.do?contentOID=536936517&contenTypeName=COC_EDITORIAL&topChannelName=Dept&blockName=Mayors+Office%2FI+Want+To&context=dept&channelId=0&programId=0&entityName=Mayors+Office&deptMainCategoryOID=

Additional Contacts:
Walter Boyd, Protestants for the Common Good, phone: 312-223-9544.
Patricia Watkins, Executive Director, TARGET Area DevCorp, godslady@msn.com
Linda Mills, LMillsEsq@comcast.net
Jerry Nora, Cook County District Attorney's Office, jerrynora@aol.com
Paula Wolff, Chicago Metropolis 2020, paula.wolfff@ccm2020.org

FEBRUARY 1, 2007

INDIANA

I. Automatic Restoration of Rights:

The Indiana Constitution authorizes the legislature to pass laws disenfranchising, and "rendering ineligible," any person convicted of an "infamous crime." Ind. Const. art. 2, § 8. Pursuant to this authority, Indiana law provides that a person who has been imprisoned following conviction of a "crime" may not vote until release from incarceration or other lawful detention. Ind. Code § 3-7-13-4. The terms "infamous crime" and "crime" have been interpreted to refer only to felonies. *See Taylor v. State Election Bd.*, 616 N.E.2d 380 (Ind. Ct. App. 1993)(criminal recklessness is felony offense punishable by imprisonment for term of years, and thus qualifies as an "infamous crime" for which disenfranchisement is permitted). *See also Wilson v. Montgomery County Election Board,* 642 N.E. 2d 258 (Ind. Ct. App. 1994)(federal offense that could result in imprisonment for more than one year was "infamous crime" resulting in disenfranchisement).

A person "under a sentence imposed for an offense" is disqualified from jury service; right to serve as a juror automatically restored upon completion of sentence, including any period of parole. § 33-28-4-8(b).

A person convicted of a felony is disqualified from holding or being a candidate for elected office. § 3-8-1-5(b)(3). A person convicted of misdemeanor violations of laws against bribery, conflict of interest, and official misconduct is ineligible at direction of sentencing court to hold office of profit or trust for a period not to exceed 10 years. § 35-50-5-1.1(a). Disabilities affecting the right to hold office, and firearms rights, are only removed by pardon.

II. Discretionary Restoration Mechanisms:

A. Executive pardon:

- *Authority*: The constitution gives pardon power to governor, "subject to such regulations as may be provided by law." It also authorizes the legislature to create a "council composed of officers of state, without whose advice and consent the Governor may not grant pardons." Ind. Const. art. 5, § 17. In 1980, the legislature abolished the Commission on Clemency, and gave the Parole Board authority to review applications and make advisory recommendations to the governor. *See* Ind. Code §§ 11-9-2-1 to 11-9-2-3. While there is a statutory requirement that all applications for pardon be filed with the Board, § 11-9-2-1, there is also a specific disclaimer of any intent to limit the constitutional power of the Governor. § 11-9-2-3.* The

* The statutory requirement that all applications for clemency be filed with the Parole Board has evidently not been interpreted in practice as a limitation on the governor's power to pardon without consulting the board. *See* "Frequency of Grants" section in Part IIA.

constitution requires the governor to report to the legislature his pardons at next scheduled meeting. Ind. Const. art. 5, § 17.

- *Administration:* Parole Board consists of five members appointed by governor to four-year terms. No more than three from same party. Ind. Code § 11-9-1-1(a). Full-time salaried employees.
- *Eligibility:* Recent governors have required a 5-year waiting period and evidence of rehabilitation. A person convicted under the laws of another state or by the federal government is ineligible for a pardon.
- *Effect:* The Indiana Supreme Court has held that pardon essentially wipes out guilt, and automatically becomes grounds for judicial expungement. *Kelley v. State*, 185 N.E. 453 (Ind. 1933). *See also State v. Bergman*, 558 N.E.2d 1111 (Ind. Ct. App. 1990). A pardon removes firearm disabilities, except for crimes against the person, only if 15 years have passed since the time of the offense and application. Ind. Code § 35-47-2-20(a). In addition, a pardon may be issued that is conditional upon a determination by the Superintendent of State Police that the person is "likely to handle handguns in compliance with the law." § 11-9-2-4. If that determination is made in conjunction with such a conditional pardon, the firearms disability is removed. §§ 11-9-2-4, 35-47-2-20(b).
- *Process*: The governor is recent years has relied upon the Parole Board for all pardon investigations and generally accepts its recommendations. Applications are filed in the first instance with the Parole Board. By statute Board must 1) notify victim, sentencing court, and prosecuting attorney; 2) conduct an investigation; and 3) conduct a hearing at which the petitioner and other interested parties are given an opportunity to present their position. Ind. Code § 11-9-2-2(b). Whenever the Parole Board is conducting an inquiry, investigation, hearing, or review, it may delegate that function to one or more members of the Board. § 11-9-1-3(a). If one or more member acts on behalf of the Board, he or she may exercise all the powers of the Board except the power to render a final decision. § 11-9-1-3(b). Upon completion of the inquiry, the member acting on behalf of the Board files the complete record of the proceedings together with his or her findings, conclusions, and recommended decision. Based upon the record and the findings, conclusions, and recommendations, the Board renders a final decision. *Id.* In making its recommendation to the governor, the board *must* consider: "1) the nature and circumstances of the crime for which the offender is committed, and the offender's participation in that crime; 2) the offender's prior criminal record; 3) the offender's conduct and attitude during commitment; and 4) the best interests of society." Ind. Admin. Code tit. 220 r. 1.1-4-4(d). Additionally, in making its recommendation to the governor, the board *may* consider other issues relating to the offender and his rehabilitation. tit. 220 r. 1.1-4-4(e). Process takes six to eight months to complete.

- *Frequency of Grants*: In the five-year period between 1997 and 2002, 241 people applied for pardon, and 87 were granted. In 2003, 25 pardons were granted; in 2004, 17 pardons. A high percentage of those who apply are granted. In 2004, two death sentences were commuted to life without parole, one on the recommendation of the Parole Board and one by the Governor without consulting the Board. Few commutations granted since 1989, since courts have sentence modification authority and prison administrators have generous good time authority. Source: Indiana Parole Board.
- Contact: Earl Coleman, Parole Board, 317-232-5789.
  ebcoleman@coa.doc.state.in.us

B. Judicial expungement of adult felony convictions: Available only after pardon (*see* discussion above). *See also* administrative sealing discussion below.

Ind. Code §§ 12-23-6-1, 12-23-7-1, and 12-23-8-1 authorizes treatment instead of prosecution or imprisonment for drug abusers and alcoholics charged with or convicted of felonies under certain circumstances. (Conviction evidently remains on the record.) § 33-39-11-7 authorizes a prosecutor to defer prosecution of misdemeanants, with conditions.

C. Administrative

- *Limited sealing*: Fifteen years after discharge from probation, imprisonment, or parole (whichever is later), a felony offender may petition the state police department to limit access to his criminal history to criminal justice agencies. Ind. Code § 35-38-5-5. Records remain available in a a variety of situations, including if a person has applied for law enforcement employment, is running for office, or has volunteered services to social services agency involving contact with children. § 10-13-3-27(a). In addition, records remain available to federally chartered or insured banking institutions, and to officials of state and local government for purposes of employment or licensing.

III. Nondiscrimination in Licensing and Employment:

Except for serious drug offenses, "a license or certificate of registration that an individual is required by law to hold to engage in a business, profession, or occupation may not be denied, revoked, or suspended because the applicant or holder has been convicted of a crime." Ind. Code §25-1-1.1-1. The acts resulting in conviction "may, however, be considered as to whether the applicant or holder should be entrusted to serve the public in a specific capacity." *Id.* The purpose of this provision, which forbids agencies to use felony or misdemeanor convictions as the sole basis for denial of a license application, is to require that the nature of the acts underlying a prior conviction be explored and that these acts be related to both a

specific statutory requirement and to the occupation or profession for which a license is sought. *Ind. Bd. Registration and Ed. for Health Facility Adm'rs v. Cummings,* 387 N.E.2d 491 (Ind. Ct. App. 1979). Drug offenses are excepted from this requirement, *see* § 25-1-1.1-2, and certain serious drug offenses are grounds for mandatory revocation or denial. *See* § 25-1-1.1-3. Under Rule 13 of the Indiana Rules for Admission to the Bar and Discipline of Attorneys, persons convicted of a felony are ineligible to sit for the bar. No provisions on public or private employment.

APRIL 19, 2007

IOWA

I. Automatic Restoration of Rights:

- Under the Iowa Constitution, persons convicted of an "infamous crime" (any crime punishable by imprisonment in the penitentiary, which includes aggravated misdemeanors and felonies) are ineligible to vote or hold public office. Iowa Const. art II, § 5; *see also* Iowa Code § 48A.30(d). The constitution makes no provision for restoration except through the personal action of the governor, through the pardon power. *See* Iowa Op. Atty. Gen. 493, 495 (March 11, 1976)(General Assembly may not by statute reinstate the rights of an elector convicted of an "infamous crime"). On July 4, 2005, Governor Tom Vilsack issued an executive order restoring the vote and to hold public office to offenders who have completed their court-imposed sentences, and announced that he would continue this automatic restoration policy on an on-going basis.* Article I of Executive Order No. 42 (July 4, 2005) restores the right to vote and hold office to all persons who are "completely discharged from criminal sentence, including any accompanying term of probation, parole or supervised release." Article IV provides that the order does not relieve any offenders of unpaid fines, restitution, or other financial obligations stemming from the offense, suggesting that restoration of the vote does not depend upon satisfaction of financial obligations. See http://www.governor.iowa.gov/administration/citizenship-faq.php
- Felony offenders are not rendered ineligible for jury service, but may be challenged for cause. Iowa R. Civ. Proc. 1.915(6)(a), Iowa R. Crim. Proc. 2.18(5).

II. Discretionary Restoration Mechanisms:

A. Executive pardon:

- *Authority*: The Governor has the authority, except in cases of treason or impeachment, to grant reprieves, commutations, and pardons, after conviction…,"subject to such regulations as may be provided by law." Iowa Const. art. IV, § 16; Iowa Code §§ 914.1 - 914.7. A person may make application for pardon either to the Board of Parole or to the Governor directly. § 914.2. Every two years,

* *See* http://www.governor.state.ia.us/legal/index.html. According to news accounts of the Governor's action, it appears that the order restored the right to vote to some 80,000 persons currently unable to vote in Iowa. Going forward, a list of some 600 eligible persons will be submitted to the Governor's office each month by the Department of Corrections. The governor's order was issued pursuant to his constitutional pardon power, and will have to be repeated on a regular basis as additional persons become eligible. *See* Kate Zernicke, "Iowa Governor Will Give Felons the Right to Vote," N.Y. Times, June 18, 2005, http://www.nytimes.com/2005/06/18/national/18iowa.html?ex=1119844800&en=b4071bd8512219c0&ei=5070&emc=eta1. The District Attorney for Muscatine County brought a legal action challenging the Governor's authority to restore rights on a blanket basis, without consulting with the Board of Parole and notifying victims in each case as provided in chapters 914 and 915 of the Iowa Code, but this suit was dismissed without opinion. *See* http://desmoinesregister.com/apps/pbcs.dll/article?AID=/20051029/NEWS01/510290326/1002.

the Governor must report to the legislature on pardons issued, "and the reasons therefor." Iowa Const. art. IV, § 16. Pardon power includes power to restore rights of citizenship. *See Dean v. Haubrich*, 83 N.W.2d 451, 453-56 (Iowa 1957).

- *Administration:* The Board of Parole is authorized to periodically review applications and make recommendations to the Governor for all applications by persons convicted of criminal offenses. § 914.3(1);. Upon request of the governor, the board may "take charge of all correspondence in reference to an application filed with the governor" and provide the governor with advice and recommendation concerning "any person for whom the board has not previously issued a recommendation." § 914.3(2). The Governor is required to respond to recommendations of the Board within 90 days; he must "state whether the commendation will be granted and shall specifically set out the reasons for such action." § 914.4. However, the Governor's power to pardon and restore rights of citizenship "shall not be impaired." Iowa Code § 914.1. *See State v. Duff*, 122 N.W. 829 (Iowa, 1909)(statute authorizing board to parole prisoners does not confer power upon the board to reprieve or pardon and hence does not violate the constitutional provision granting such power to the Governor).

  The Attorney General of Iowa has opined that the predecessor statute to § 914.3 does not require the Governor to present a case to and obtain a recommendation from the Board of Parole before granting a pardon. *See* 1940 Op. Att'y Gen. 125, reversing 1934 Op.Att'y Gen. 372. This opinion has been challenged in the context of the governor's blanket restoration of voting rights to all persons who have completed their court-imposed sentences. *State ex rel. Gary R. Allison v. Vilsack*, No. EQCV 018165 (June 30, 2005)(*see note * supra*).

- *Eligibility:*
  - *Applications for restoration of civil rights* may be made at any time following the conviction. Iowa Code § 914.2. It is not necessary for a person to have completed parole, probation, or paid all fines (though Board will consider progress toward satisfying court-imposed obligations in making recommendation to Governor). *See* Restoration of Citizenship Application, www.governor.state.ia.us/requests/App_Citizenship.pdf (application form and instructions). Federal and out-of-state offenders may obtain a restoration of civil rights from the Governor, but not a pardon.
  - *Firearms restoration* must be applied for separately, and requires a waiting period of five years from the date of discharge of sentence. All fines and restitution must be paid. *See* Executive Clemency Application, www.governor.state.ia.us/requests/App_Clemency. pdf (application form and instructions). Persons convicted of forcible felonies are ineligible to have their firearms rights restored. Iowa Code § 914.7.
  - *Pardon:* Application may be submitted "at any time following the conviction," Iowa Code § 914.2, though it is the general policy of the Governor's office to require at least ten years to pass from the date that a person is discharged from the sentence of that person's most recent conviction before granting a pardon. *See* Executive Clemency Application, *supra*. Evidence of rehabilitation and good character must be demonstrated, and

applicant is invited to submit as many letters of recommendation as possible. Review appears to be a paper review, since no in-person hearing specified.

- *Effect*: Restoration of rights restores right to vote and hold public office. Pardon relieves of all legal disabilities (including public employment). *See Slater v. Olson*, 299 N.W. 879 (Iowa 1941)(invalidating a statute barring convicted persons who had been pardoned from civil service positions, on ground that it encroached upon the governor's constitutional powers). Pardon restores firearms privileges, Iowa Code § 724.27, except for persons convicted of forcible felonies or firearms offenses. § 914.7.
- *Process:*
  - *Role of Board*: Board "shall recommend to the governor the reprieve, pardon, commutation of sentence, remission of fines or forfeitures, or restoration of the rights of citizenship for persons who have by their conduct given satisfactory evidence that they will become or continue to be law-abiding citizens." Iowa Code § 914.3(1); *see also* Iowa Admin. Code §§ 205-14.3 to 205-14.4. For violent crimes, notice of application for commutation or pardon must be given registered victims. § 915.19. See paragraph above on governor's obligation to respond to Board recommendations and give his reasons.
  - *Restoration of Citizenship*: Streamlined statutory process for restoration of citizenship by governor. Persons sentenced to prison must initiate application under § 914.2, and Board asks warden or superintendent of prison for report on prison conduct and recommendation "as to the propriety of restoration." Iowa Code § 914.5(3). For those sentenced to probation, upon discharge the sentencing judge "shall forward to the Governor a recommendation for or against restoration of citizenship rights." § 907.9(4). Board investigates each case and makes recommendation to Governor. Abbreviated process takes from four to six months. A list of the persons whose rights have been restored must be delivered to the state registrar of votes at least once each month. § 914.6.
  - *Pardon*: Application may be filed with Board of Parole or directly with Governor. Each application is forwarded to the Department of Public Safety for a full review of criminal and traffic violations as well as a credit history. Forms at www.governor.state.ia.us. According to law, these materials will be reviewed by the Board of Parole, and a recommendation will be submitted to the Governor's Office. Governor may ask judge and prosecutor for facts or recommendation. Upon receipt of recommendation from Parole Board, Governor must act on it within 90 days, stating whether or not the recommendation will be granted. (Governor may interview applicant personally.) Governor must give reasons for decision in either case. If the governor does not grant the recommendation, the recommendation shall be returned to the board of parole and may be re-filed with the governor at any time. Iowa Code § 914.4.
- *Frequency of Grants:* During the period 1998-2003, 3067 people applied for restoration of rights, of which 79% (2245) were recommended favorably. *See* Iowa Board of Parole 2004 Annual Report, *available at* http://www/bop.state.ia.us/annual.asp. During this five-year period, 2158

restorations were granted, or about 80% of those recommended by the Parole Board. In 2004, Governor Vilsack issued over 600 restoration grants. During this same 1998-2003 period, 238 pardon applications were filed, of which 52 were granted. Generally, the Board receives between 30 and 60 pardon applications each year, and grants are fairly evenly distributed throughout governor's tenure. During 2003, 15 "special citizenship" (firearms) applications were granted, 15 were denied. Source: Iowa Governor's Office.

Contact:

Sonya Streit
Associate General Counsel
Office of the Governor
1007 E. Grand
Des Moines, Iowa 50319
(515) 281-0141
(515) 281-6611 (fax)
sonya.streit@iowa.gov

B. Judicial sealing or expungement of adult felony convictions:

Deferred Adjudication: For some first-time felony offenders, the court may defer judgment and place the defendant on probation. Iowa Code § 907.3. If defendant is discharged from probation, no conviction occurred in strict legal sense because no adjudication of guilt was made. *State v. Farmer*, 234 N.W.2d 89 (Iowa 1975). Upon successful completion of probation, "the court shall forward to the governor a recommendation for or against restoration of citizenship rights to that person." In addition, a person who has been discharged from probation "shall no longer be held to answer for the person's offense" and "the court's criminal record with reference to the deferred judgment shall be expunged." However, "the record maintained by the state court administrator as required by section 907.4 shall not be expunged. The court's record shall not be expunged in any other circumstances." *See also* Op. Iowa Att'y.Gen. (Sept. 10, 1975)("expungement" refers only to that part of the court's criminal record "with reference to the deferred judgment" and there is no authority for expunging the docketing or indexing of the case, the defendant's name, the charge filed or the plea.

For judgments other than those deferred, upon successful completion of sentence court may recommend for restoration of citizenship. § 907.9(4).

C. Administrative certificate: N/A

III. Nondiscrimination in Licensing and Employment:

Iowa has no general law regulating consideration of conviction in employment or licensure. It does apply a direct relationship test in connection with some licenses. *See, e.g.,* Iowa Code § 147.3 (health related professions licensing; "A board may consider the

past felony record of an applicant only if the felony conviction relates directly to the practice of the profession").

APRIL 4, 2007

KANSAS:

I. Automatic Restoration of Rights:

A. Civil Rights: A person convicted of a felony loses the right to vote, to hold office, and to serve on a jury. Kan. Stat. Ann. § 21-4615(1)(Supp. 2004). (Until 1996, only persons sentenced to a term of imprisonment lost their civil rights.) These rights are automatically restored upon completion of the authorized sentence. § 21-4615(2). Upon satisfaction of conditional release or parole (or sooner if the sentence expires sooner), a state offender receives from the parole board a "certificate of discharge," which restores his civil rights. § 22-3722.

B. Firearms: A conviction of a "person felony" (namely common law felonies), or a drug violation, results in a loss of firearm privileges if a firearm was carried at the time of the offense. § 21-4204(a)(2) (Supp. 2004). Non-person felony convictions result in time-limited restrictions, either five or ten years after completion of sentence, depending on the type of offense and whether a firearm was possessed at the time of the commission of the offense. § 21-4204(a)(3)-(4).

II. Discretionary Restoration Mechanisms:

A. Executive pardon:

- *Authority*: The pardon power is vested in the Governor, subject to regulations and restrictions by the legislature. Kan. Const. art. I, § 7. The Governor is required to seek the advice of the Kansas Parole Board before acting, though he is not bound to follow it. *See* Kan. Stat. Ann. § 22-3701(4). Governor must report to the legislature on each pardon application granted during the preceding year, but is not required to give his reasons. § 22-3703.
- *Administration*: Parole Board composed of three members appointed by the Governor to four-year terms, with the advice and consent of the Senate; no more than two from same party. Kan. Stat. Ann. § 22-3707(a). Full-time salaried employees; chairperson is designated by the Governor. § 22-3708; § 22-3709. Subject to dismissal by the Governor for "disability, inefficiency, neglect of duty, or malfeasance in office." § 22-3707(b).
- *Eligibility*: No eligibility restrictions, except that only Kansas state convictions are eligible to be pardoned or commuted. Kan. Stat. Ann. § 22-3701.
- *Effect:* In general a pardon removes disabilities imposed under state law, but does not erase or expunge conviction. In particular, it does not lift bar to service as law enforcement officer. *Cf.* Kan. Att'y Gen. Op. No. 85-165

(1985) (Texas pardon, construed under Texas law, does not lift bar under Kansas law to service as law enforcement officer).

- *Process:* An applicant for pardon must publish a copy of the application in a newspaper of general circulation in the county of conviction at least 30 days before pardon is granted or pardon is void. Kan. Stat. Ann. § 22-3701(2)-(3). Applicant also required to send copy of application to: (a) the prosecuting attorney and the judge of the court in which the defendant was convicted; and (b) any victim of the person's crime or the victim's family. § 22-3701(3). "All applications for pardon or commutation of sentence shall be referred to the board." § 22-3701(4). The board "shall examine each case and submit a report, together with such information as the board may have concerning the applicant, to the governor within 120 days after referral to the board." § 22-3701(4). The governor "shall not grant or deny any such application until the governor has received the report of the board or until 120 days after the referral to the board, whichever time is the shorter." *Id.* Parole Board may seek personal interview with applicant in particular case, but is not required to do so. *See* Kan. Admin. Regs. § 45-900-1(c).
- *Frequency of Grants*: Pardons very rare. Expungement the preferred method of dealing with disabilities associated with conviction. Source: Kansas Parole Board.
- *Contact*: Parole Board - Norma Jackson – 785-296-4524, normaj@kdoc.dc.state.ks.us

Pardon Attorney in Governor's office –

Office of the Governor
Capitol, 300 SW 10th Ave., Ste. 212S
Topeka, KS 66612-1590
Voice 1-877-KSWORKS (1-877-579-6757)
Local 785-296-3232

B. Judicial sealing or expungement of adult felony convictions:

- *Authority and eligibility*: A procedure for expunging state felony convictions and arrest records is set out in section 21-4619 of the Kansas Statutes Annotated. A convicted person may petition the court after a waiting period of three to five years after discharge from probation or parole, depending on the offense. Kan. Stat. Ann. § 21-4619(a)-(b). Some serious offenses (murder, rape, sex offenses) are excluded from the procedure altogether. § 21-4619(c). A person must be informed at each stage of the criminal process about the possibility of obtaining expungement. § 21-4619(g).
- *Process and criteria:* Petition for expungement is filed in jurisdiction of conviction, and is made part of the original criminal docket. Court notifies prosecutor, and may inquire into petitioner's background and shall have access to any reports or records relating to the petitioner that are on file with

the secretary of corrections or the Kansas parole board. Kan. Stat. Ann. § 21-4619(d). Any person who may have relevant information about the petitioner may testify at the hearing. *Id.* At the hearing on the petition, the court is required to order the petitioner's arrest record, conviction or diversion expunged if the court finds that:(1) The petitioner has not been convicted of a felony in the past two years and no proceeding involving any such crime is presently pending or being instituted against the petitioner;(2) the circumstances and behavior of the petitioner warrant the expungement; and (3) the expungement is consistent with the public welfare. § 21-4619(e). Parole (in another jurisdiction) is not a "pending proceeding" for expungement purposes. *State v. Gamble*, 891 P.2d 472, 474 (Kan. Ct. App. 1995).

- *Effect*: After expungement, person shall be treated "as not having been convicted," and an order of expungement "erases" the conviction, except that it may be brought up in subsequent prosecutions as a predicate offense for sentencing purposes. Kan. Stat. Ann. § 21-4619(f). Also, the conviction must be disclosed in connection with certain licensing and public employment applications (health, security, gaming, commercial driver or guide, investment adviser, law enforcement). *Id.* Other than the specified contexts, a person may respond that he has not been convicted in response to questions on applications for a license or employment or benefit. § 21-4619(h). An expungement does not remove state or federal firearms restrictions. *Id.*
- *Nonconviction records*: May be expunged on petition to court under Kan. Stat. Ann.§ 22-2410(a) where no conviction results from arrest (including where charges dismissed), subject to certain court-ordered grounds for disclosure in connection with certain peace-keeping or gambling employment. § 22-2410(e). "Subject to any disclosures required under subsection (e), in any application for employment, license or other civil right or privilege, or any appearance as a witness, a person whose arrest records have been expunged as provided in this section may state that such person has never been arrested. See also Kan. Stat. Ann.§ -4516 (similar authority for expungement under city ordinances).

C. Administrative certificate: N/A

III. Nondiscrimination in Licensing and Employment:

Section 22-4710(a) of the Kansas Statutes Annotated makes it a misdemeanor for an employer to inquire into an applicant's criminal record without the applicant's consent, though employer may require an applicant to sign a release allowing inquiry. Kan. Stat. Ann. § 22-4710(a) through (c). Under 1996 law, an employer may not be held liable for a decision to employ or contract based upon a person's criminal history, "provided the information that led to the employment or contracting decision reasonably bears upon the independent contractor's,

applicant's or employee's trustworthiness, or the safety or well-being of the employer's employees or customers." § 22-4710(f).

MARCH 9, 2007

KENTUCKY

I. Automatic Restoration of Rights:

Vote: Persons convicted of felony lose the right to vote, and it is restored only by personal action of the governor. See Ky. Const. § 145(1)("Persons convicted in any court of competent jurisdiction of treason, or felony, or bribery in an election, or of such high misdemeanor as the General Assembly may declare shall operate as an exclusion from the right of suffrage, but persons hereby excluded may be restored to their civil rights by executive pardon.") In addition, people who are "in confinement under the judgment of a court for some penal offense" at the time of the election, whether convicted of felony or misdemeanor, are not allowed to vote. § 145(2). The legislature has chosen not to extend disenfranchisement to those convicted of "high misdemeanors," except those "in confinement under the judgment of a court" at the time of election. *See* Ky. Rev. Stat. Ann. § 27A.070 (court shall send notice of a felony conviction to the state board of elections when conviction is final).

Office, jury: A person convicted of a felony "or of such high misdemeanor as may be prescribed by law" loses the right to hold office, unless pardoned. § 150. A person who has "been previously convicted of a felony and has not been pardoned or received a restoration of civil rights by the Governor or other authorized person of the jurisdiction in which the person was convicted" is disqualified from jury service. Ky. Rev. Stat. Ann. § 29A.080(2)(e).

Firearms: Person convicted after 1975 prohibited from possessing a handgun, and a person convicted after 1994 prohibited from possessing any firearm, unless pardoned. Ky. Rev. Stat. Ann. § 527.040(1).

II. Discretionary Restoration Mechanisms:

A. Executive pardon:

- *Authority*: The power to pardon is vested in the governor, who may grant either a full pardon or a restoration of citizenship (known as a "partial pardon"). Ky. Const. § 77, § 150. For pardons, Governor must file with the legislature a statement of reasons with each pardon grant, which must be available to the public. Ky. Const. § 77. Governor may ask Kentucky Parole Board to investigate and make recommendations on pardon cases, but he is not bound by its advice. Ky. Rev. Stat. Ann. § 439.450("On request of the governor the board shall investigate and report to him with respect to any case of pardon").

- *Administration*: Parole Board composed of seven full-time and two part-time members appointed by the Governor to four-year terms, chosen from slate of nominees submitted by Commission on Correction and Community Service. § 439.420(1). No more than five of the same party. Full-time members are salaried employees. Governor appoints chair. § 439.450(2).

- *Eligibility*: For restoration of rights, expiration of sentence or discharge, with no pending charges. For pardon, governor requires seven-year waiting period. Federal and out-of-state offenders are eligible only for a partial pardon (restoration of citizenship). *See Arnett v. Stumbo*, 153 S.W.2d 889 (1941).

- *Effect*: Restoration of citizenship restores right to vote and eligibility for jury service. Pardon relieves additional legal disabilities. Pardon document may limit rights being restored. *See Anderson v. Com.*, 107 S.W. 2d 193 (Ky. 2003)(Governor's order restoring a convicted person's civil rights did not restore felon's "right" or eligibility to serve as a juror, where order specifically limited the restoration to felon's rights to vote and to hold office).

- *Process*: Pardon application made to Parole Board, which forwards eligible applications to Governor. Then sent to prosecutor for recommendation (if no response within 30 days, assumes no objection). Applicant at that point asked to submit three letters of reference. Simplified process for restoration of rights: In 2001, legislature directed Department of Corrections to implement "simplified" process for restoration of civil rights, including informing all eligible offenders of their right to apply, generating a monthly list of all eligible offenders who have asked for their rights back, conducting investigations, giving notice to prosecutor in county of conviction and county of residence, and forwarding to Governor's office on a monthly basis a list of all eligible offenders for consideration for partial pardon. Ky. Rev. Stat. Ann. § 196.045. In 2004, Governor Ernie Fletcher issued an executive order requiring 'character tests' for restoration applicants. The order mandated submission of a formal letter from each applicant explaining why their rights should be reinstated, along with three letters of reference.

- *Frequency of grants (Restoration of Rights)*: Governor Fletcher has been criticized for his parsimonious restoration policy. *See* "Fewer felons seeing voting rights restored under Fletcher," http://www.kentucky.com/mld/kentucky/news/breaking_news/13067695.htm (Governor's policy criticized as disproportionately disenfranchising African-Americans as Department of Corrections presented data to a legislative committee documenting that only 25% of applications for restoration of rights have been approved in 2005, down from 52% in 2004

and 86% in 2003). A recent study reported that in 2002-2003, 1266 people applied for restoration of voting rights and 1241 (97%) were approved. Two years later, in 2004-2005, after issuance of Governor Fletcher's order, 941 people applied and only 464 (49%) were approved. For the second half of 2005, only 104 applications (25%) were approved. *See* Elizabeth A. Wahler, *Losing the Right to Vote: Perceptions of Permanent Disenfranchisement and the Civil Rights Restoration Application Process in the State of Kentucky*, The Sentencing Project, April 2006. http://www.sentencingproject.org/pdfs/ky-losingtherighttovote.pdf. *See also* Marc Mauer & Tushar Kansal, "Barred For Life: Voting Rights Restoration in Permanent Disenfranchisement States," Sentencing Project (Feb. 2005) at 14, available at http://www.sentencingproject.org/pdfs/barredforlife.pdf.

- *Frequency of grants (Full pardon)* As of May 2006, Governor Fletcher had issued no pardons through the established pardon process. Source: Kentucky Governor's Office. However, in August of 2005 Governor Fletcher caused a sensation by issuing blanket pardons to nine of his aides who were being investigated by a grand jury for merit system personnel violations, but had not been convicted. *See* Mark R. Chellgren, "Kentucky Governor Issues Pardons in Hiring Probe," Washington Post, August 29, 2005, http://www.washingtonpost.com/wp-dyn/content/article/2005/08/29/AR2005082901344.html.

- *Contact*: Mike Alexander, Deputy General Counsel, Office of the Governor, State Capitol, 700 Capitol Avenue, Frankfurt Kentucky, 40601. 502-564-2611, malexander@ky.gov.

B. Judicial Expungement or Sealing of Adult Felony Convictions:

- *Misdemeanor Expungement*: Under Kentucky law passed in 1992, judges, upon request, must expunge misdemeanor convictions five years after completion of the person's sentence if the applicant has no other criminal violations within that time. *See* Ky. Rev. Stat. Ann. § 431.078. Under § 431.078(1), "any person who has been convicted of a misdemeanor or a violation, or a series of misdemeanors or violations arising from a single incident, may petition the court in which he was convicted for expungement of his misdemeanor or violation record." A person must be informed of this "right" at the time of adjudication. *Id.* The only felony convictions eligible for expungement are Class D drug possession convictions. Upon filing a petition, court must notify prosecutor and any identified victim. § 431.078(3). If a person has no prior felony convictions, no other convictions of any time during the five year period, and no criminal matters pending against him, the court "shall" seal the record. § 431.078(4). "Upon the entry of an order to seal the records, and payment to the circuit clerk of twenty-five dollars ($25), the proceedings in the case shall be deemed never to have

occurred; all index references shall be deleted; the persons and the court may properly reply that no record exists with respect to the persons upon any inquiry in the matter; and the person whose record is expunged shall not have to disclose the fact of the record or any matter relating thereto on an application for employment, credit, or other type of application." § 431.078(5). Section retroactive to offenses committed prior to July 14, 1992. § 431.078(8).

Nonconviction records: Under 1996 law, judges have discretion to expunge records of misdemeanor or felony cases that result in dismissals or acquittals. Ky. Rev. Stat. Ann. § 431.076. In spousal abuse cases judges must expunge if the charges are dismissed or end in acquittal. § 510.300. *See also* Ky. Rev. Stat. Ann. § 431-017 (segregation of records).

Comment: Investigative article from Louisville Courier-Journal reports that 12,000 expungements were granted in Kentucky in two-year period prior to May 2005. *See* Jason Riley & Kay Stewart, "Confusing laws allow abuse and inequality: Filing errors also leave some sealed cases open," Courier-J. (Louisville), May 15, 2005, *available at* http://www.courier-journal.com/apps/pbcs.dll/article?AID=/20050515/NEWS01/505150409. Courier-Journal article also documents confusion among judges as to whether they have discretion to deny expungement under these statutes. Uncertainty expressed about court authority to expunge records in diversion cases. When a case is expunged, several agencies—including Metro Corrections, the commonwealth's attorney's office, metro police and sometimes the state police and the FBI—are ordered to seal their records. They are supposed to certify to the court within 60 days that they have done so. The FBI, which runs the National Crime Information Center, is not bound by the state order but routinely erases the requested records. *See also* "Jefferson works to improve expungement process," http://www.wkyt.com/Global/story.asp?S=3499230 (in 2004 there were 6500 applications for expungement filed in Jefferson County alone, 2100 of which were granted).

- *Pretrial Diversion*: Ky. Rev. Stat. Ann. § 533.250(1)(a): Pretrial diversion available to a person charged with a Class D felony offense who has had no prior felony convictions within a ten-year period, or who has not been under felony sentence within the ten year period immediately preceding the commission of the offense. Must plead guilty, but upon successful completion of probationary period the charges are listed as "dismissed-diverted" and "shall not constitute a criminal conviction." § 533.258. The defendant shall not be required to list this disposition on any application for employment, licensure, or otherwise unless required to do so by federal law. *Id.*

C. Administrative: N/A

III. Nondiscrimination in Licensing and Employment:

Public Employment and Licensing: *See* Ky. Rev. Stat. Ann. §§ 335B.020-.070. Under § 335B.020(1), "no person shall be disqualified from public employment, or from . . . any occupation for which a license is required, solely because of a prior conviction of a crime, unless the crime for which convicted is [a felony or misdemeanor punishable by imprisonment] or otherwise directly relates to the position of employment sought or the occupation for which the license is sought." In determining if a conviction "directly relates" to the position of public employment sought or the occupation for which the license is sought, "the hiring or licensing authority shall consider:

> (a) The nature and seriousness of the crime for which the individual was convicted;
> (b) The relationship of the crime to the purposes of regulating the position of public employment sought or the occupation for which the license is sought;
> (c) The relationship of the crime to the ability, capacity, and fitness required to perform the duties and discharge the responsibilities of the position of employment or occupation." § 335B.020(2).

Also, under Ky. Rev. Stat. Ann. § 335B.020(3), "Nothing in KRS 335B.020 to 335B.070 shall be construed so as to limit the power of the hiring or licensing authority to determine that an individual shall be entitled to public employment or a license regardless of that individual's conviction if the hiring or licensing authority determines that the individual has been successfully rehabilitated."

See Op. Att'y Gen. 80-388 (1980): Conviction of a felony is not an absolute bar to an occupational license. Ky. Rev. Stat. Ann. Ch. 335B supersedes all other statutes and regulations as to licensing convicted persons. The licensing board should consider if an applicant has been rehabilitated.

APRIL 26, 2007

LOUISIANA

I. Automatic Restoration of Rights:

- Right to vote "may be suspended" while a person is "under an order of imprisonment for conviction of a felony." La. Const. art. I, § 10. Disenfranchisement applies to people on parole and also to those whose prison sentence suspended. *See Rosamund v. Alexander,* 846 So. 2d 829 (La. App. 3d Cir. 2003). "Full rights of citizenship shall be restored upon termination of state and federal supervision following conviction for any offense." *Id.* § 20. This provision restores only the "basic rights" of citizenship (voting, holding office), not privileges (liquor license). Right to run for elective office is restored 15 years after completion of sentence even if not pardoned. *Id.* § 10 (C). Under La. Code Crim. Proc. Ann. art. 401(A)(5), the right to serve on a jury is not restored unless the person is pardoned. *See also State v. Baxter*, 357 So. 2d 271 (La. 1978) (includes federal convictions). *See* Helen Ginger Berrigan, *Executive Clemency, First-Offender Pardons, Automatic Restoration of Rights*, 62 La. L. Rev. 49 (2001).

- First offender pardon - A first offender (defined in La. Rev. Stat. Ann. § 15:572(C) as a person "convicted within this state of a felony but never previously convicted of a felony" under federal law or the law of any state or country) "shall be pardoned automatically upon completion of his sentence without a recommendation of the Board of Pardons and without action by the governor." La. Const. art. IV, § 5(E)(1); La. Rev. Stat. Ann. § 15:572(B)(1). Entitlement to first offender pardon is guaranteed by the constitution and may not be infringed by statute. Op. La. Att'y Gen. No. 04-0080 (2005). It does not depend upon having paid court costs. *Id.*

  - *Eligibility:* Applies to state convictions on or after January 1, 1975. Since 1999 amendment to Constitution, first offender pardon available only to persons convicted of "non-violent crime, or convicted of aggravated battery, second degree battery, aggravated assault, mingling harmful substances, aggravated criminal damage to property, purse snatching, extortion, or illegal use of weapons or dangerous instrumentalities". La. Const. art. IV, § 5(E)(1) as amended by Acts 1999, No. 1398, § 1, approved Oct. 23, 1999, eff. Nov. 25, 1999. All others must apply for full pardon.

  - *Effect:* First offender pardon restores "all rights of citizenship and franchise," La. Rev. Stat. Ann. § 15:572(D), but does not restore privileges such as liquor license. *See State v. Adams*, 355 So. 2d 917 (La. 1978). Unlike a gubernatorial pardon, does not preclude use in subsequent prosecution, or use to disqualify for occupational licensing. § 15:572(E).

- Firearms disability (applicable to any person convicted of a crime of violence or a drug offense) ends ten years after completion of sentence so long as no other felony conviction occurs during that period. La. Rev. Stat. Ann. § 14:95.1(C)(1). A Governor's pardon will restore firearm privileges prior to the ten years, but a first offender pardon will not. *State v. Wiggins*, 432 So. 2d 234 (La. 1983).

II. Discretionary Restoration Mechanisms:

A. Executive pardon:

- *Authority*: "Upon favorable recommendation of the Board of Pardons," the Governor may pardon "those convicted of offenses against the state." La. Const. art. IV, § 5(E)(1); La. Rev. Stat. Ann. § 15:572(A).

- *Administration*: Board consists of five appointees of the Governor confirmed by Senate, whose terms run concurrent with Governor's, and one of which "may" be chosen from a victims group. *See* http://www.doc.louisiana.gov/Pardon/boardofpardons.htm (providing general information on the Board of Pardons). Governor chooses Chair. La. Const. art. IV, § 5(E)(2); La. Rev. Stat. Ann. 15:572.1.

- *Eligibility*: Applicant for pardon must have completed sentence, including court costs. La. Rev. Stat. Ann. § 15:572(A); *see* Op. La. Att'y Gen. No. 04-0080 (2005). The Rules of the Louisiana Board are posted at http://www.doc.louisiana.gov/Pardon/rules97.htm. The Louisiana Supreme Court held in 2006 that a pardon issued by the governor of the state of Louisiana was sufficient to restore the right to hold a municipal or state office to one convicted of a federal felony offense. *Malone v. Shyne,* 937 So 2d 343 (La. 2006). *See also* 1978-79 Op. Att'y Gen. 103 (No. 79-787)(1980).*

- *Effect*: Where convicted person receives full executive pardon by governor upon recommendation of Board of Pardons ("Gold Seal" Pardon), he is restored to "status of innocence." *State v. Riser*, 30,201 (La. App. 2 Cir. 12/12/97). Cannot be used to enhance punishment for subsequent crime, but may be used t0o impeach. (Automatic first offender

* In holding that the phrase "offenses against the state" in art. IV, § 5 includes federal offenses, the court referred to "the historical practice of Louisiana governors to issue pardons to federal felons. See *La. Atty. Gen. Op.* 103, 97-878 (3/13/80), which recites the fact that Louisiana governors issued 87 pardons to persons convicted of federal felonies in the 15 years preceding 1980." 937 So. 2d at 351. Prior to the *Shyne* decision, the Board of Pardons had announced in 1996 and again in 2005 that it would no longer accept applications from federal offenders. *See* http://www.tuscaloosanews.com/apps/pbcs.dll/article?AID=/20050811/APN/508110979&cachetime=3&template=dateline.

pardon does not preclude use in subsequent prosecution, or use to disqualify for occupational licensing.)

- *Process*: *See* La. Rev. Stat. Ann. § 15:572.4. The Board meets at regularly scheduled dates, see Rule 1(A) of Board Rules at http://www.doc.louisiana.gov/Pardon/rules97.htm. All applications must be made on official form, posted at http://www.doc.louisiana.gov/Pardon/APPLICATION.pdf. "Before considering the application for pardon of any person, the board shall give written notice of the date and time at which the application will be heard and considered, at least thirty days prior to the hearing," to the district attorney, the victim (if any), and any other person who has indicted an interest. § 15:572.4(B). In addition, applicant must notify DA and victims of his application, and place public notice in newspaper on three separate days in a 30-day period. Information relating to pardon request must be made available to the public. § 15:572.4(C). The district attorney, injured victim, spouse or next of kin, and any other persons who desire to do so shall be given a reasonable opportunity to attend the hearing, and both the DA and victim must be given an opportunity to respond to the application, either telephonically or in person. § 15:572.4(B)(2) and (3). *See also* Rule 6(C) of the Board Rules. No more than three persons may speak in favor of application, and no more than three against. All actions of the Board require the favorable vote of at least four members of the Board. *See* Rule 1(C).

  In recent years the legislature has erected more and more procedural barriers to pardon, generally permitting greater public scrutiny of process, and making formal provision for input by officials and victims. Because favorable Board recommendation is necessary for Governor to act, recent amendments create obstacles to pardon. *See generally* Berrigan article, *supra.*

- *Frequency of Grants*: In addition to First Offender Pardons, Board hears 20-25 cases of pardon and commutation every two months, denies 3/4 of them. Case decisions listed at http://www.doc.louisiana.gov/Pardon/DECISION/Decisions.htm. While Governor Foster pardoned a number of persons at the end of his term, Governor Blanco has pardoned only one person since taking office, a community activist convicted in 1964 of attempting to integrate segregated swimming pools, who later became a prison chaplain. Source: Louisiana Attorney General's Office; Michelle Milhollon, "Blanco to Pardon Activist Woman Arrested in '63 for Integration Attempt," The Advocate, January 15, 2005 (A 1).

- *Contact*: Chip Coulter
  Office of the Attorney General

225-326-6405
coulterc@ag.state.la.us

Judicial sealing or expungement of adult felony convictions: La. Rev. Stat. Ann. § 44:9 provides for expungement of both misdemeanor and felony charges and convictions. "Expungement" means removal of a record from public access but does not include destruction of the record except in limited circumstances described below. "An expunged record is confidential, but remains available for use by law enforcement agencies, criminal justice agencies," and various health-related licensing boards. La. Rev. Stat. Ann. § 44:9(F)-(G).

- *Misdemeanor arrests*: Under 44:9(A) the record of misdemeanor arrests (ex. DWI) may be expunged by the court if 1) The time limitation for the institution of prosecution on the offense has expired, and no prosecution has been instituted; or 2) prosecution has been instituted, and such proceedings have been finally disposed of by dismissal, sustaining of a motion to quash, or acquittal. Records expunged under this section must be "destroyed" and "no notations or references have been retained in the agency's central repository which will or might lead to the inference that any record ever was on file with any agency or law enforcement office."
- *Felony arrests:* Under 44:9(B) felony arrests may be expunged if the district attorney declines to prosecute, or the prosecution has been instituted, and such proceedings have been finally disposed of by acquittal, dismissal, or sustaining a motion to quash; and "the record of arrest and prosecution for the offense is without substantial probative value as a prior act for any subsequent prosecution." Arresting agency may keep a copy of the record for investigative purposes.
- *Felony and misdemeanor convictions:* Under §§ 44:9(E)(1) and (3), convictions (except sex offenses) dismissed pursuant to deferred sentencing options provided under Articles 893 and 894 may be expunged upon successful completion of probation. Court may also order destruction of misdemeanor records, ex. for DWI and sex offenses, but destruction of felony records prohibited.

Deferred Adjudication: See La. Rev. Stat. Ann., Code of Criminal Procedure, Art. 893: "When it appears that the best interest of the public and of the defendant will be served," court may place non-violent offenders (up to two felony offenses) on probation, at the successful conclusion of which charges are dismissed. Expungement may then be sought under 44:9(A) or (B). Offense may still be used as predicate offense. Sex offenses involving children and serious drug trafficking offenses excepted.

B. Administrative Restoration: The right to possess a firearm may be restored after completion of sentence by the chief law enforcement officer of the parish in which offender resides. La. Rev. Stat. Ann. § 14:95.1(c)(2).

LA Bureau of Criminal Identification may purge records of individuals over 60 who have not been arrested for 15 years. La. Rev. Stat. Ann. § 15:586.

III. Nondiscrimination in Licensing and Employment: N/A

La. Rev. Stat. Ann. § 37:2950: A person may not be disqualified, or held ineligible to practice or engage in any licensed trade, occupation, or profession "solely because of" a prior criminal record unless conviction involves a felony, and where such felony conviction "directly relates to the position of employment sought, or to the specific occupation, trade or profession for which the license, permit or certificate is sought." Any decision denying employment or license based "in whole or in part on conviction of any crime" shall explicitly state in writing the reasons for the decision. Any complaints concerning violations of this Section shall be adjudicated in accordance with generally applicable procedures for administrative and judicial review. A number of regulatory and employing agencies are exempted, including law enforcement, medical and nursing licensing boards, state bar, education, state racing and athletic commissions, architects, embalmers and funeral directors, and state board of elementary and secondary education. Public employment is generally covered, except for law enforcement agencies and the office of alcohol and tobacco control of the Department of Revenue.

JULY 2005

MAINE

I. Automatic Restoration of Rights:

Right to vote and other civil rights are not lost even upon incarceration.
A firearm permit may be obtained five years after final discharge from sentence.
Me. Rev. Stat. Ann. tit. 15, § 393(2).

II. Discretionary Restoration Mechanisms:

A. Executive pardon:

- *Authority*: Governor has authority to pardon except in cases of impeachment, subject to regulation "relative to the manner of applying." Me. Const. art. V, pt. 1, § 11. Governor is assisted by non-statutory Pardons Advisory Board, composed of three lawyers he appoints. http://www.maine.gov/sos/cec/rcn/boards/pardons.htm (1977 amendment to constitution eliminated requirement that Governor obtain advice of Executive Council. *See In re Pardoning Power of Governor & Council*, 27 A. 463 (Me. 1892).

- *Administration*: Parole Board is authorized ("when requested by the Governor") to investigate and hold hearings in pardon cases, and to make recommendations to the Governor in pardon cases. Me. Rev. Stat. Ann. tit. 34-A, § 5210(4). All information gathered by the Parole Board is confidential. *Id.*

- *Eligibility*: As a matter of policy, five years from completion of sentence.

- *Effect:* Lifts automatic barriers, evidences rehabilitation. Because Maine has no expungement law, criminal record is not "wiped clean"; instead, information concerning the pardoned conviction is considered "non-conviction" data and is available under the conditions or circumstances set forth in Me. Rev. Stat. Ann. tit. 16, §§ 611-622. Pardoned person may, ten years after final discharge, apply to State Bureau of Identification to have all references to the pardoned crime deleted from the Federal Bureau of Investigation's identification record. tit. 15, § 2167. *See also* tit. 34-A, § 11225(4) (lifetime sex offender registration may be avoided by pardon).

- *Process:* Secretary of State receives application, forwards to the Department of Corrections (DOC) for review and background checks; Parole Board then reviews applications and information gathered by DOC to determine whether a hearing will be granted. Notice must be given to the DA four weeks prior to the hearing. Me. Rev. Stat. Ann. tit. 15, § 2161. If hearing is granted, applicant must post notice in the newspaper. Some applicants will be granted an opportunity to

appear at public hearing before Board and Governor's counsel at quarterly meeting of Board.

- *Frequency of Grants*: Current governor regards pardons as exceptional, primarily useful for "working people," for whom pardons make a significant difference in their life (employment, deportation). Nurses, teachers. In 19 month period between January 1, 2003 and August 1, 2004, 262 applications for pardon were received, 89 people were granted hearings, and 11 were granted pardons. Source: Office of the Secretary of State.

- *Contact:* Pardon Clerk, Office of the Secretary of State, 101 State House Station, Augusta, Maine 04333. Telephone (207) 624-7650 or Timothy Poulin, Director of Corporations, Office of the Secretary of State, 207-624-7734 or Tim.Poulin@maine.gov

B. Judicial sealing or expungement of adult felony convictions: N/A

C. Administrative Restoration: Commissioner of Public Safety has the authority, five years from the date of discharge from all sentences, to grant a permit to carry a "black powder weapon."

III. Nondiscrimination in Licensing and Employment:

In determining eligibility for the granting of any occupational license, registration or permit issued by the State, the appropriate State licensing agency may take into consideration criminal history record information from Maine or elsewhere relating to certain convictions which have not been set aside or for which a full and free pardon has not been granted, but the existence of such information shall not operate as an automatic bar to being licensed, registered or permitted to practice any profession, trade or occupation. Me. Rev. Stat. Ann. tit. 5, § 5301(1). Section 5301(2) further limits convictions that can be considered. Section 5303 provides that licensing authorities may consider only recent convictions (within the last three or 10 years, depending on type of license sought, with longer period for health case and law enforcement licenses). No standard for public or private employment.

APRIL 25, 2007

MARYLAND

I. Automatic Restoration of Rights:

Civil rights: The Maryland Constitution authorizes the General Assembly to disqualify persons from voting who are convicted of "infamous or other serious crime." Md. Const. art. I, § 4. As of July 1, 2007, disenfranchisement limited to persons convicted of a "felony and . . . awaiting or actually serving a court-ordered sentence of imprisonment, including any term of parole or probation, imposed for the conviction." Md. Code Ann., Election Law, § 3-102(b)(1).* Once restored to the franchise, convicted persons also regain the right to hold office.

Jury: Persons not qualified if convicted of a crime punishable by imprisonment exceeding 6 months, and sentenced to more than 6 months imprisonment. Md. Const. art. I, § 12; Md. Code Ann., Courts and Judicial Proceedings, § 8-103(b)(4). Restored through pardon. § 8-103(c).

Firearms: Maryland prohibits persons convicted of a "disqualifying crime," which includes any felony and "a violation classified as a misdemeanor in the State that carries a statutory penalty of more than 2 years," from possessing a "regulated firearm." Md. Code Ann. §§ 5-101(g), 5-133(b)(1), (b)(2). Relief only through pardon.

Employment: An examination of the Maryland code and regulations by the Homeless Persons Representation Project ('Ex-Offenders and Employment: A Review of Maryland's Public Policy and a Look at Other States," December 2001, rev. June 2002)(http://www.altrue.net/altruesite/files/hprp/publications/abell%20final.pdf), documents a number of situations in which people with convictions are barred by law from certain employments and occupations. For example, persons convicted of certain crimes are barred from employment in schools (crimes of violence); respite care or personal care (moral turpitude or theft); and dependent care

* Prior to enactment of the 2007 Voting Registration Protection Act, only first offenders could regain the vote after completion of sentence. Recidivists were required to wait three years after completion of sentence, and people convicted of two or more crimes of violence were permanently disenfranchised unless pardoned. Persons convicted of bribery, attempted bribery, or buying or selling votes, whether felony or misdemeanor, were permanently disenfranchised and disqualified from holding office, unless pardoned. Passage of the 2007 Act also obviated the confusion historically surrounding the constitutional term "infamous or other serious crime," which has been held to include some misdemeanors that were regarded as crimes of moral turpitude under the common law, such as perjury. The most recent list of disqualifying offenses issued by the Office of the Attorney General, dated July 2004, was 21 pages long and included as "infamous crimes" a large number of offenses that appear at least potentially to be misdemeanors. *See also Theiss v. State Admin. Bd. Of Elec,* 387 F. Supp. 1038, 1040 n. 3 (D. Md. 1974)(1973 "laundry list" includes shoplifting, "child abuse," and "various offenses relative to prostitution).

(conviction record indicating behavior "potentially harmful"). Persons with felony and misdemeanor convictions are barred from positions as uniformed correctional officer if crime involved violence. Conviction of any crime involving incarceration is disqualifying for a ten-year period following release. A comprehensive catalogue of collateral consequences for Maryland offenders is contained in the study produced by the University of Maryland School of Law Reentry of Ex-Offenders Clinic, "A Report on Collateral Consequences of Criminal Convictions in Maryland" (October, 2004).

II. Discretionary Restoration Mechanisms:

A. Pardon:

- *Authority*: The pardon power is vested in the Governor, except in cases of impeachment. Md. Const. art. II, § 20. Constitution requires Governor to publish notice in one or more newspapers of earliest date he will grant pardon, and to report to the legislature each grant and reasons therefore. *Id.*
- *Administration*: The Maryland Parole Commission is responsible for investigating and advising about pardon applications if requested by the Governor, but its advice is not binding. Md. Code Ann., [Correctional Services] § 7-206(3)(ii). Parole Commission consists of 10 members appointed to six-year terms by the Secretary of Public Safety and Correctional Services. § 7-202. Full-time salaried employees, subject to removal only for cause by the Secretary (with concurrence of Governor). Id.
- *Eligibility*: Md. Regs. Code tit. 12, § 08.01.16(C) provides that "Proof of successful completion of any parole or probation, or both, which may have been imposed, plus a reasonable length of satisfactory adjustment in the community beyond the maximum expiration date of sentence, is preferred for a favorable pardon recommendation." Under informal Parole Commission rules, applicants with felony convictions must have 10 crime-free years to be eligible (or seven in Parole Commission discretion); misdemeanants must have five crime-free years. Twenty-year wait for crime of violence and for controlled substances violations (or 15 if waiver granted). *See* Parole Commission "Frequently Asked Questions" about pardon, Question #6 at http://www.dpscs.state.md.us/aboutdpscs/FAQmpc.shtml. The factors that the Board considers in connection with a petitioner's request for a pardon are the nature and circumstances of the crime, the effect of a pardon on the victim and community, the sentence given, other anti-social behavior of the petitioner, subsequent rehabilitation of the petitioner, the age and health of the petitioner, and the reason the pardon is needed. *Id.*, Question #7. According to the Parole Commission, a person convicted under federal law or the law of another state is ineligible for a gubernatorial pardon.
- *Eligibility II*: A pardon may be available where an individual as been charged with a crime but not convicted: "The decision to pardon certain individuals has arisen when an individual is charged and a nolle prosequi is entered or the

charge is stetted. This has proven especially helpful for individuals who wish to obtain security clearance (and, thus, maintain their jobs) under the new Homeland Security/TSA rules that govern airport employees (apparently, a nolle prosequi under those guidelines is tantamount to a 'conviction')." In such cases there is no eligibility period. E-mail from Chrysovalantis "Chrys" P. Kefalas, Deputy Counsel, Governor's Office, June 10, 2005.

- *Effect*: Pardon lifts all disabilities and penalties imposed because of the conviction. Firearms privileges must be separately restored in pardon document.
- *Process*: Applications for pardon are submitted to the Maryland Parole Commission. The Commission determines if the applicant is eligible according to Maryland guidelines. If eligible, the Commission directs the Division of Parole and Probation to conduct an Executive Clemency investigation on the petitioner. Md. Regs. Code tit. 12, § 08.01.16(B). Once that investigation is completed, the case returns to the Commission for its review and recommendation. The application, the Division of Parole and Probation investigation report, and the Commission's recommendation are then submitted to the Governor's Legal Counsel for review. The Governor may choose to accept, modify, or reject the Commission's recommendation. For purposes of effectuating a pardon, the Governor must issue a written executive order under the great seal. In addition, the Maryland constitution requires the Governor to "give notice, in one or more newspapers, of the application made for pardon, and of the day on, or after which, his decision will be given." Md. Const. art. II, § 20.
- *Standards:* The Commission considers the following factors in connection with a petitioner's request for a pardon: (1) the nature and circumstances of the crime; (2) effect of a pardon on the victim and community; (3) the sentence given; (4) the other anti-social behavior of the petitioner; (5) the subsequent rehabilitation of the petitioner; (6) the age and health of the petitioner; and (6) the reason the pardon is needed. According to a press release issued in 2003, Governor's Legal Counsel considers: (1) nature and circumstances of offense; (2) effect that a pardon would have on community, victim, and public safety; (3) petitioner's criminal history; and (4) the reason clemency is requested. See http://www.gov.state.md.us/pressreleases/2003/082903_clemency.html.
- *Frequency of Grants*: Current governor Robert L. Ehrlich, Jr. inherited 350 pending pardon applications when he took office in January 2003. Between August 2003 and March 2006 Governor Ehrlich granted 150 pardons and denied 135 applications, and continued a number of others. (Also, he granted fifteen commutations and two medical paroles during that period.) Governor Ehrlich considers pardon applications on a regular basis, reviewing about 20 cases each month, and issues pardons every two or three months. Source: Office of the Governor.
- *Contacts:*

David R. Blumberg, Chair, Maryland Parole Commission
dblumberg@dpscs.state.md.us;
Chrysovalantis "Chrys" P. Kefalas, Deputy Counsel, Governor's Office
ckefalas@GOV.STATE.MD.US

B. Judicial sealing or expungement of adult felony convictions:

- *Probation before Judgment("PBJ")*: Subject to the provisions of the Maryland sentencing guidelines, court may defer judgment and place a defendant on probation subject to reasonable conditions, if (i) the court finds that the best interests of the defendant and the public welfare would be served; and (ii) if the defendant gives written consent after determination of guilt or acceptance of a nolo contendere plea. Md. Code Ann., Crim. Proc. § 6-220(b)(1). Terms of probation may include payment of fine or restitution, or participation in treatment program. If probation successfully completed, court shall discharge the defendant from probation without judgment of conviction, and such discharge "is not a conviction for the purpose of any disqualification or disability imposed by law because of conviction of a crime," § 6-220(g). Person discharged from probation may petition court for expungement of police and court records relating to the charges after a three-year waiting period, as long as the petitioner has no subsequent offense that involved possible sense of imprisonment. §§ 10-105(a), (c)(2)(ii). A PBJ sentence, if expunged, may not be used to enhance subsequent sentence. *See U.S. v. Bagheri*, 999 F. 2d 80 (4th Cir. 1993). See "Effect" below.

- *Motion for Modification*: Under Md. Rule 4-345, court has revisory power over a sentence for five years from the date the sentence originally was imposed, and may upon motion reduce a sentence to probation before judgment, so as to make a defendant eligible for expungement under Md. Code Ann., Crim. Proc. § 10-105(a)(3).

- *Expungement:* In addition to expungement of the record of a case in which probation before judgment has been entered (see above), non-violent first offenders who have been pardoned may also petition for expungement, ten years after the pardon was issued. Md. Code Ann., Crim. Proc. § 10-105(a)(8). Non-conviction records (acquittals, nolle prosequis, dismissed charges, PBJ) may be expunged by the court upon petition after a three-year waiting period. § 10-105(a) and (c). Expungement shall be granted upon determination of eligibility. § 10-105(e)(2). The State's attorney is a party to the proceeding, and an expungement order may be appealed. § 10-105(g). Police records of arrests not leading to charges may be expunged under § 10-103(b)(2).

- *Effect:* A record that has been expunged may be opened only upon court order, with notice to person concerned and a hearing, or upon ex parte application by the states attorney and a showing of good cause (including that the record is needed by law enforcement). Md. Code Ann., Crim. Proc § 10-108(a) through (c). Violation a misdemeanor violation. § 10-108(d). A person may not be required

APRIL 29, 2007

MASSACHUSETTS

I. Automatic Restoration of Rights:

Civil Rights: "Persons who are incarcerated in a correctional facility due to a felony conviction" may not vote. Mass. Const. art. III (as amended in 2000). A person sentenced to imprisonment for a federal or state felony forfeits any public office he currently holds. Mass. Gen. Laws ch. 279, § 30. Otherwise, conviction presumably does not affect the right to run for and hold future public office. A person who has been convicted of a felony within the past seven years or who is in the custody of a correctional institution is disqualified from jury service. ch. 234A, § 4(7).
Jury service: Disqualification if convicted of a felony within the past seven years, or in the custody of a correctional institution (including misdemeanants). ch. 234A, § 4(8). The right to serve on a jury is automatically restored seven years after completion of sentence for felony offenders, upon release for misdemeanants. However, a felony may still be challenged on voir dire.

Firearms: A person who has been convicted of a felony, or of a violation of any drug law, may not obtain a license to carry a handgun. Mass. Gen. Laws ch. 140, § 131. A person convicted of a felony or drug law violation may apply for the Firearm Identification Card necessary to possess a rifle or shotgun, five years after conviction or release from confinement, whichever is later. Mass. Gen. Laws ch. 140, § 129B.

II. Discretionary Restoration Mechanisms:

A. Executive pardon:

- *Authority*: The pardon power, except in cases of impeachment, is vested in the Governor, who may grant a pardon only with the advice and consent of the Governor's Council. Mass. Const. pt. 2, ch. II, sec. I, art. VIII. Massachusetts Governor's Council, also known as the Executive Council, is composed of eight individuals elected from districts statewide, and the Lt. Governor who serves ex officio. If the offense is a felony, "the general court shall have power to prescribe the terms and conditions upon which a pardon may be granted." *Id.* Public reporting: "The governor shall, at the end of each calendar year, transmit to the general court [legislature] a list of pardons granted with the advice and consent of the council during such calendar year, together with action of the advisory board of pardons concerning each such pardon, and together with a list of any revocations of pardons made under this section." Mass. Gen. Laws ch. 127, § 152. No requirement to give reasons.

- *Administration:* Every petition must be filed with Parole Board, acting as the Advisory Board of Pardons, which makes recommendation to Governor and Council. Mass. Gen. Laws ch. 127, § 152. Advisory Board sends all favorable recommendations to Governor, who may accept them only if Council approves. Advisory Board functions as "gatekeeper," and effectively also has a veto over pardon cases insofar as it does not send him ones it disapproves. Id. Parole Board composed of seven members appointed by the Governor to five-year terms. Full-time salaried employees. Governor chooses chairman. ch. 27, § 4.

- *Eligibility*: 15 years after conviction or release from prison for felonies, 10 years for misdemeanors. Governor's Executive Clemency Guidelines (April 22, 2003) at 2 (available from the Massachusetts Parole Board/Advisory Board of Pardons). Federal and out-of-state offenders are ineligible for a gubernatorial pardon.

- *Effect*: Pardon "eradicates" a conviction. Guidelines, supra, at 1(F). The Governor, upon granting a pardon, orders the records of a state conviction sealed; thereafter, the existence of the conviction is removed for most purposes. Mass. Gen. Laws ch. 127, § 152. "Such sealed records shall not disqualify a person in any examination, appointment or application for employment or other benefit, public or private, including, but not limited to, licenses, credit or housing, nor shall such sealed record be admissible in evidence or used in any way in any court proceeding or hearing before any board, commission or other agency except in imposing sentence in subsequent criminal proceedings" and when a person has subsequently been charged with certain crimes against the person. *Id.* An applicant may deny the existence of the conviction on an application for employment, or in any other circumstance, and licensing authorities are prohibited from disqualifying the application based on his record. "The attorney general and the person so pardoned may enforce the provisions of this paragraph by an action commenced in the superior court department of the trial court." *Id.*

- *Process:* Hearing, decision by majority, public record. Mass. Regs. Code tit. 120, § 902.02-.12. Guidelines, supra, at 8, say Governor will consider where recommendation is unanimous, and may return to Board where by majority only. If Governor disagrees with favorable recommendation of Advisory Board, he may give his reasons and explain what petitioner can do to maximize his chances next time. Favorable and unfavorable recommendations sent to Governor, along with statement of reasons in each case. *Id.* at 9. Under Mass. Gen. Laws ch. 127, § 152, once petition is filed with Parole Board it becomes a public record.

Parole Board must process in accordance with procedures set out in Mass. Gen. Laws ch. 127, § 154, which include referral to concerned officials (Attorney General, District Attorney, sentencing court) for recommendation, and notice to victim. Mass. Regs. Code tit. 120, § 902.05. Notification to victim required by tit. 120, § 400.04. If application has merit under statute and Governor's Executive Clemency Guidelines, hearing will be scheduled. tit. 120, § 902.06. (Proposed

denials also go to Governor.) Procedures same as in parole hearing. tit. 120, § 902.08, and may be conducted by a panel of Advisory Board (or one member). Panel report to full Board, which in turn sends its recommendations to Governor and Governor's Council. Majority gives reasons, as does any dissenting minority.

Board must make recommendation to Governor within 10 weeks of original submission, unless hearing is held, and in no case more than six months. Mass. Gen. Laws ch. 127, § 154. Sensitive parts of recommendation may be kept confidential, but "in all cases a statement containing the facts of the crime or crimes for which a pardon or commutation is sought, the sentence or sentences received, together with all conclusions and recommendations shall be made public when the report is submitted." *Id.* Then second layer of control in Council. If no action taken within a year, application deemed denied. Mass. Regs. Code tit. 120, § 902.12(2). *See* Guidelines, supra, at 9.

- *Representation*: Payment for assistance in obtaining a pardon prohibited, except for proper legal services. Mass. Gen. Laws ch. 127, § 166. Representatives must register with state secretary, stating that only services are legal, and detailing those services. § 167. Violation is a criminal offense. § 168.

- *Standards for consideration*: Mass. Regs. Code tit. 120, § 902.01: The Advisory Board of Pardons considers favorably where a petitioner establishes, by clear and convincing evidence: "(a) a specific compelling need for such pardon relief; (b) a substantial period of good citizenship subsequent to the criminal offense for which such pardon relief is requested, and (c) that the ends of justice will be served by the granting of such pardon relief."
  "The said board shall not review the proceedings of the trial court, and shall not consider any questions regarding the correctness, regularity or legality of such proceedings, but shall confine itself solely to matters which properly bear upon the propriety of the extension of clemency to the petitioner." Mass. Gen. Laws ch. 127, § 154. Governor's Executive Clemency Guidelines, *supra* at 3, describes pardon as "rare and extraordinary" and "not . . . a routine post-conviction remedy." "Rather, the grant of executive clemency is primary intended to remove barriers that are often associated with a criminal record or sentence, thereby facilitating the reintegration of the petitioner into the community of the law-abiding." *Id.* Applicant must demonstrate rehabilitation and good citizenship. Must also demonstrate a "verified, compelling, and specific need" for a pardon; if there are other legal remedies, won't meet "compelling" standard.

- *Revocation*: Governor may revoke if misstatement of fact in application, or if it was procured by fraud or misrepresentation. Mass. Gen. Laws ch. 127, § 152.

- *Frequency of Grants*: About 100 pardon applications are filed annually, all go forward with Board recommendation for or against. In recent years, few pardons granted: Governor Cellucci granted 20, Governor Swift granted seven. Governor Romney has granted no pardons in three years. Source: Massachusetts Parole

Board. The trend toward fewer grants started in the 1990s. *See* Jason B. Grosky, "Critics: Pardons Are Too Political," Eagle-Tribune (October 13, 2002), http://www.eagletribune.com/news/stories/20021013/LN_001.htm: "Through the 1970s, Democratic governors oversaw the handing out of 1,527 pardons, including a high of 477 pardons in 1970 under Gov. Francis W. Sargent. Through the 1990s, Republican governors pardoned just 90 people, a 95 percent drop from two decades earlier. . . Stricter guidelines written into effect by Gov. William F. Weld in 1992 also led to pardon numbers dropping . . . . No longer could people get pardoned to erase a 'black mark' from a criminal record. Now, they must show a 'compelling need' for a pardon -- whether it's for employment considerations or the right to carry a gun."

Contact:

Massachusetts Parole Board/Advisory Board of Pardons
P.O. Box 4547
Salem, MA 01970
Tel: (978) 740-6488
Fax: (617) 242-8200
www.mass.gov/eops/parole.htm
Nicole.Racki@state.ma.us
John.Talbot@state.ma.us

B. Judicial sealing of adult felony convictions: A state felony offender is entitled to have his record of conviction sealed by the department of probation 15 years after completion of sentence, provided he has no subsequent conviction; a misdemeanant is entitled to have his conviction sealed after 10 years, provided he has no subsequent conviction. Mass. Gen. Laws ch. 276, § 100A.

Effect of sealing: "Such sealed records shall not operate to disqualify a person in any examination, appointment or application for public service in the service of the commonwealth or of any political subdivision thereof; nor shall such sealed records be admissible in evidence or used in any way in any court proceedings or hearings before any boards or commissions, except in imposing sentence in subsequent criminal proceedings." Mass. Gen. Laws ch. 276, § 100A. Sealing does not expunge record, however, and it remains available to law enforcement authorities and may be taken into account for the purposes of state firearm disabilities. *Rzeznik v. Chief of Police*, 373 N.E.2d 1128 (Mass. 1978). Purpose of the statute is rehabilitative, to ensure privacy after a period of time, not to defeat law enforcement interests. The records of conviction of public officials and employees may not be sealed. ch. 276, § 100A.

Applications for employment shall include the following statement: "'An applicant for employment with a sealed record on file with the commissioner of probation may answer "no record" with respect to an inquiry herein relative to prior arrests, criminal court appearances or convictions. An applicant for employment with a sealed record on file with the commissioner of probation may answer "no record" to an inquiry herein

relative to prior arrests or criminal court appearances. In addition, any applicant for employment may answer "no record" with respect to any inquiry relative to prior arrests, court appearances and adjudications in all cases of delinquency or as a child in need of services which did not result in a complaint transferred to the superior court for criminal prosecution.' The attorney general may enforce the provisions of this paragraph by a suit in equity commenced in the superior court." Mass. Gen. Laws ch. 276, § 100A.

Non-conviction records: Records that do not result in conviction may be sealed if the defendant is found not guilty, or a no bill has been returned by the grand jury, or a finding of no probable cause has been made by the court. Mass. Gen. Laws ch. 276, § 100C.* Sealing is also available by court order where a case is nol prossed or dismissed (except in cases in which an order of probation has been terminated) if "it appears to the court that substantial justice would best be served." *See Comm. v. Gavin G*, 772 N.E. 2d 1067 (Mass. 2002) *citing Commonwealth v. Doe,* 648 N.E. 2d 1255 (1995)(court may order immediate sealing only if it appears that substantial justice would best be served, and the interests of confidentiality and avoiding harm have specific application to the defendant; otherwise, a defendant denied request for immediate sealing may still request sealing after requisite waiting period specified in § 100A). Sealed non-conviction records shall not operate to disqualify a person in any examination, appointment or application for public employment in the service of the commonwealth or of any political subdivision thereof. An application for employment used by an employer which seeks information concerning prior arrests or convictions of the applicant shall include the following statement: "An applicant for employment with a sealed record on file with the commissioner of probation may answer 'no record' with respect to an inquiry herein relative to prior arrests or criminal court appearances."

Effect of pardon: Conviction automatically sealed by pardon. Mass. Gen. Laws ch. 127, § 152 (see *supra*).

III. Nondiscrimination in Licensing and Employment:

Rather than limiting consideration of conviction in employment and licensing decisions, Massachusetts limits the availability of conviction-related information through the Criminal Offender Record Information System (CORI). Mass. Gen. Laws ch. 6, §§ 168, 172. Employers can obtain information through a "public access record check" only if 1) an individual has been convicted of a crime punishable by a term of five years in prison; or 2) the offender is incarcerated, or has been recently released (one year for misdemeanants, two for felony offenders, three for persons ineligible for parole). Otherwise must apply for "special certification" from the Criminal History Systems Board to receive an offender's complete record, which will be granted only Board

* The automatic sealing provisions of § 100C were held unconstitutional in *Globe Newspaper Co. v. Pokaski*, 868 F.2d 497, 506-07)(1st Cir., 1989)(sealed records must be made available to media unless there has been an individualized finding that sealing necessary to effectuate compelling governmental interest). In *Comm. v. Doe*, 420 Mass. 142 (Mass. 1995), the Massachusetts Supreme Court extended the holding of the *Pokaski* case to judicial sealing of closed criminal cases.

determines by a two-thirds vote that "the public interest in disseminating such information to these parties clearly outweighs the interest in security and privacy." § 172(c). There are exceptions for those who work with vulnerable populations such as health care patients, the elderly and children, and others who are required by statute to conduct a background check on all employees and applicants for employment. § 172C through I.**

Employers limited in what they may ask: Massachusetts' general fair employment practices law makes it unlawful for any covered employer, public or private, to request any information from an employee or applicant for employment about: (1) an arrest without conviction; (2) a first conviction for misdemeanors such as simple assault or minor traffic violations; and (3) any conviction of a misdemeanor that occurred five or more years before the application date. Mass. Gen. Laws ch. 151B, § 4(9) ("any conviction of a misdemeanor where the date of such conviction or the completion of any period of incarceration resulting therefrom, whichever date is later, occurred five or more years prior to the date of such application for employment or such request for information, unless such person has been convicted of any offense within five years immediately preceding the date of such application for employment or such request for information").

Where felony convictions are concerned, licensing authorities are prohibited from disqualifying the applicant based on the record of conviction alone only if the conviction has been pardoned. Mass. Gen. Laws ch. 127, § 152.

While Massachusetts' comprehensive nondiscrimination law applies only to misdemeanors and pardoned felony convictions, it does apply a "direct relationship" test to consideration of felony convictions in some specific licensing schemes. *See, e.g.,* Mass. Gen. Laws ch. 112 § 52D ("The board . . . may [discipline] any dentist convicted . . . of a felony related to the practice of dentistry"); ch.112, § 61 (board may discipline holder of medical license for "a criminal offense which is reasonably related to the practice of the profession"); ch. 112, § 189 (real estate appraisers may be disciplined based upon conviction of "a crime which is substantially related to the qualifications, functions, and duties of a person developing appraisals and communicating appraisals to others, or convicted of any felony).

The City of Boston and several other Massachusetts jurisdictions have adopted even more stringent policies for their vendors and other private contractors, requiring them to determine whether particular positions are sufficiently sensitive to warrant a backgrounds check, and obligating them to give reasons to people who are turned down for employment because of their conviction record. Of special significance, Boston's City Council ordinance, effective July 1, 2006, applies not only to hiring in city jobs, but also

** The CORI system has been criticized recently because of the increasing number of exceptions carved out for employers, landlords, and other private users. *See* Boston Foundation, *CORI: Balancing Individual Rights and Public Access, available at* http://www.tbf.org/uploadedFiles/CORI%20Report.pdf. ("CORI Report").

to the hiring decisions of an estimated 50,000 private vendors who do business with the City. The successful campaign to reform Boston's hiring policy was backed by broad community coalition called the Massachusetts Alliance to Reform CORI (MARC). According to the ordinance, the City of Boston and its vendors cannot conduct a criminal background check as part of their hiring process until the job applicant is found to be "otherwise qualified" for the position. This critical protection ensures that everyone is first considered for employment based on their actual skills and experience before the employer takes into account the presence or absence of a criminal record. The ordinance also requires that the final employment decision, which includes information about the individual's criminal record, also considers the age and seriousness of the crime and the "occurrences in the life of the Applicant since the crime(s)." In addition, the Boston ordinance creates important appeals rights for those denied employment based on a criminal record and the right to present information related to the "accuracy and/or relevancy" of the criminal record. See www.nelp.org

State Employment Bars: Sweeping bar on employment of people with convictions in state and state-funded human service jobs, issued by Governor Weld in 1996, disqualified certain offenders for life, and others for periods of 10 and 5 years. Modified by Governor Swift in 2001, and further limited by *Cronin v. O'Leary*, 13 Mass. L. Rptr. 405, no reported in N.E. 2d, 2001 WL 919969 (2001)(striking down lifetime bar on due process grounds).

MARCH 10, 2007

MICHIGAN

I. Automatic Restoration of Rights:

Civil rights: A person who has been convicted and sentenced "for a crime for which the penalty imposed is confinement in jail or prison" is disqualified from voting "while confined." Mich. Comp. Laws § 168.758b. *See also* Mich. Const. art. 2, § 2A. Disqualification while confined applies to misdemeanants. *See U.S. v. Wegrzyn*, 305 F. 3d 593 (6th Cir. 2002). A person on probation or parole is not considered "confined."

A person convicted of a felony is permanently disqualified from jury service unless conviction is pardoned or expunged. Mich. Comp. Laws § 600.1307a(1)(e).* Some disqualifications from office expire after a certain period, *see, e.g.,* Mich. Const. art. 4, § 7 (person convicted of breach of public trust within last 20 years ineligible for either house of legislature), and some are permanent, see, e.g., Mich. Comp. Laws § 750.118 (public officer who accepts a bribe is forever disqualified from public office).

Firearms: Under Mich. Comp. Laws § 750.224f(4), firearms disability is removed three years after completion of all the terms of the sentence, including probation or parole, except that persons convicted of a "specified felony" ((involving the use of force and distribution of controlled substances) remain subject to the disability until 1) five years after the completion of the sentence and 2) their firearm privileges have been restored pursuant to the procedure set forth in Mich. Comp. Laws § 28.424 (see below).

II. Discretionary Restoration Mechanisms:

A. Executive pardon:

- *Authority*: The pardon power, except in cases of impeachment, is vested in the Governor, "subject to procedures and regulations prescribed by law." He is required to inform the legislature annually of each pardon granted, "stating

* In 2002 conviction was made a permanent bar to jury service; previously a person was ineligible only while "under sentence for a felony at the time of jury selection." See Mich. Comp. Laws § 600.1307a(1)(e)(2002), amended by P.A. 2002, No. 739. Court rules provided that a convicted person could be challenged for cause based on his conviction. Mich. Ct. R. 2.511(D)(2), 6.412(D). *See United States v. Driscoll*, 970 F.2d 1472 (6th Cir. 1992), *cert. denied*, 506 U.S. 1083 (1993) (upholding challenge for cause under Mich. Ct. R. 2.511(D)(2)). *But see Froede v. Holland Ladder & Mfg. Co.*, 523 N.W.2d 849, 851-52 (Mich. Ct. App. 1994) (disagreeing with Sixth Circuit's conclusion in *Driscoll* that right to serve on a jury is not automatically restored upon completion of sentence); *People v. LeGrone*, 517 N.W.2d 270, 272 n.1 (Mich. Ct. App. 1994), *appeal denied*, 527 N.W.2d 520 (Mich. 1994) (raising question whether Mich. Comp. Laws § 600.1307a(1)(e) takes precedence over Mich. Ct. R. 2.511).

reasons therefor." Mich. Const. art. 5, § 14. Governor required to obtain recommendation of Parole Board prior to deciding case, but is not bound by it. *See* Mich. Comp. Laws §§ 791.243, 791.244. *See also Rich v. Chamberlain*, 62 N.W. 584 (Mich. 1895) (statute providing that a board of pardons will investigate petitions for pardons and report to the governor with such recommendations as they deemed fit, and that the governor, on receipt of such report, might, as he deemed fit, grant or refuse the pardon, did not violate constitution). Governor must report to legislature annually of each pardon grant and the reasons for it. Mich. Const. art. 5, § 14.

- *Administration*: Parole Board composed of ten members appointed by the Director of the Department of Corrections, and subject to removal by him. Mich. Comp. Laws § 791.231a.
- *Eligibility:* No eligibility requirements. A person convicted under federal law or the law of another state is ineligible for a gubernatorial pardon.
- *Effect*: In *People v. Van Heck*, 651 N.W.2d 174, 178-79 (Mich. App. 2002), court analogized Michigan pardon to Connecticut's: Michigan pardon """reaches both the punishment prescribed for the offense and the guilt of the offender. It releases the punishment and blots out of existence the guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offense."""" (quoting *People v. Stickle*, 121 N.W. 497, 499 (Mich. 1909) (quoting *People ex rel. Forsyth v. Court of Sessions of Monroe County*, 36 N.E. 386, 388 (N.Y. 1894))).
- *Process:* Mich. Comp. Laws § 791.243 provides that all applications for executive clemency must be filed with the Parole Board. § 791.244 describes the procedure for investigating pardon applications, setting time limits on each stage. The Parole Board must initiate a review within 60 days of receiving an application for clemency, and shall make a full investigation and determination on whether or not to proceed to a public hearing within 270 days of receipt. When petitions come in they are reviewed by members of board; if interest by one member goes to full board, where six votes will take you to next step: input from prosecutor and other officials. Not later than 90 days after making a decision to proceed with consideration of a recommendation for clemency, board must conduct a public hearing, which is necessary before a formal recommendation of executive clemency is made.

  At least 30 days before conducting the public hearing, provide written notice of the public hearing by mail to the attorney general, the sentencing trial judge, and the prosecuting attorney, or their successors in office, and each victim who requests notice pursuant to the crime victim's rights act. One member of the parole board may conduct the hearing, and the public shall be represented by the attorney general or a member of the attorney general's staff. If the parole board recommends executive clemency, it shall make all data in its files available to the governor. Except for medical records protected by the doctor-patient privilege of confidentiality, the files of the parole board in cases

under this section shall be matters of public record. The recommendation of the Board is a matter of public record.

According to the Board,

> "When an application for pardon is received it is reviewed by each of the 10 Parole Board members and a vote of "interest" or "no interest" to proceed is made. If there is no interest the process takes a week or two. If there is an interest to proceed by a majority of the board, a public hearing is scheduled. Field Operations Administration staff do a limited investigation, including running a [criminal records] check. Appropriate parties (sentencing judge, prosecutor and Attorney General) are notified and the public hearing is conducted by a member of the Parole Board and a representative of the Michigan Attorney General. After the public hearing is held, the Parole Board re-convenes to vote the case. After all 10 members have voted, the recommendation of the majority is sent to the governor's office. In the instance where a public hearing is held the process would typically take two or three months from receipt of the application to a recommendation to the governor."

- Frequency of Grants: In modern times, pardon grants in Michigan have been rare: since 1969, only 33 pardon applications have been approved by the various governors. The current governor has granted none since she took office in January 2003.* The Board has held no pardon hearings in the past two years, and no case has been recommended favorably. Notwithstanding this record, people continue to apply: in 2003, 44 pardon applications were received; in 2004, 82 applications; and through July, 2005, 71 applications. Source: Michigan Parole Board.
- Contact: David Klinehardt, Parole Board at 517-373-6391 KLEINHDR@michigan.gov

B. Judicial sealing or expungement of adult felony convictions:

First offender set-aside – A first offender convicted under Michigan law may seek a court order setting aside his conviction five years after either imposition of sentence or completion of any term of imprisonment imposed, whichever is later. Mich. Comp. Laws § 780.621. This relief is available only to persons convicted of a single offense, the maximum punishment for which was less than life imprisonment, except for traffic offenses and certain sex offenses. Mich. Comp. Laws § 780.621(1)-(2). *See People v. Blachura*, 440 N.W.2d 1 (Mich. Ct. App. 1989)(person convicted of five counts of perjury ineligible since each count deemed a separate conviction). Set-aside discretionary with court, which must consider the "circumstances and behavior of the applicant" and whether "setting aside the conviction is consistent with the public welfare." § 780.621(9). Upon entry of an order, individual "shall be considered not to have been previously

* Governor Granholm commuted five sentences in her first three years in office, all in medical cases.

convicted." § 780.622(1). *See* Op. Mich. Att'y Gen., No. 7133 (2003) (person convicted of a felony whose conviction has been set aside by order of a Michigan court may not be denied a concealed pistol license).

Effect: Record becomes "non-public," but remains accessible to law enforcement and judicial branch for a variety of purposes, including professional licensure by the judicial branch, and enhancement of a sentence in subsequent prosecution. § 780.623(2). Sex offenders must continue to register even if conviction set aside. *Id.* This statute is commonly referred to as the "general expungement statute," though the effect of a set-aside under Michigan law is not considered to be not as broad as in some other states. *See, e.g., People v. Van Heck*, 651 N.W.2d 174, 178-79 (Mich. Ct. App. 2002) (contrasting Michigan set-aside and Connecticut pardon: latter wipes out all legal disabilities, "erases" conviction, while Michigan conviction that has been set-aside remains available for a variety of purposes). Procedure applicable to set-aside set forth in full, including notification to prosecuting attorney and, if assaultive crime, to victim, in §§ 780.621-624.

Probation before Judgment: § 333.7411 –Discharge and dismissal under this section shall be without adjudication of guilt and, except as provided in subsection (2)(b), is not a conviction for purposes of this section or for purposes of disqualifications or disabilities imposed by law upon conviction of a crime, including the additional penalties imposed for second or subsequent convictions under section 7413. Nonpublic records kept by law enforcement.

C. Administrative certificate

Firearms: Under § 28.424 firearm privileges may be restored by the concealed weapons licensing board for the county of the convicted person's residence five years after the completion of the sentence if the board finds by clear and convincing evidence that "the person's record and reputation are such that the person is not likely to act in a manner dangerous to the safety of other persons." Mich. Comp. Laws § 28.424(3)(c).

III. Nondiscrimination in Licensing and Employment:

Regulation of Licensing: Under Mich. Comp. Laws § 338.42, a judgment of guilt in a criminal prosecution "shall not be used, in and of itself, by a licensing board or agency as proof of a person's lack of good moral character," but it may be used as evidence in the determination. If so used, "the person shall be notified and shall be permitted to rebut the evidence by showing that at the current time he or she has the ability to, and is likely to, serve the public in a fair, honest, and open manner, that he or she is rehabilitated, or that the substance of the former offense is not reasonably related to the occupation or profession for which he or she seeks to be licensed." This 1974 statute was intended "to encourage and contribute to the rehabilitation of former offenders and to assist them in the assumption of the

responsibilities of citizenship; to proscribe the use of the term 'good moral character' or similar term as a requirement for an occupational or professional license or when used as a requirement to establish or operate an organization or facility regulated by this state; and to provide administrative and judicial procedures to contest licensing board or agency rulings thereon." Mich. Comp. Laws Ch. 338, prec. § 338.41 (Occupational License for Former Offenders, P.A.1974, No. 381).

.

Certain records "shall not be used, examined, or requested by a licensing board or agency in a determination of good moral character when used as a requirement to establish or operate an organization or facility regulated by this state, or pursuant to occupational or professional licensure: (a) Records of an arrest not followed by a conviction; (b) Records of a conviction which has been reversed or vacated, including the arrest records relevant to that conviction; (c) Records of an arrest or conviction for a misdemeanor or a felony unrelated to the person's likelihood to serve the public in a fair, honest, and open manner; (d) Records of an arrest or conviction for a misdemeanor for the conviction of which a person may not be incarcerated in a jail or prison." § 338.43(1). *See* Miriam J. Aukerman, *Barriers to Reentry: Legal Strategies to Reduce Recidivism and Promote the Success of Ex-offenders*, 2 Mich. Crim. L. Ann. J. 4 (2003). A criminal record "shall not be furnished to a licensing board or agency except by the principal department, and shall be furnished only after the director of the principal department or a person designated by the director has determined that the information to be provided to the board or agency meets the criteria set forth in this section." § 338.43(2).

Each licensing board or agency is required to promulgate rules prescribing "the offenses or categories of offenses which the department considers indicate a person is not likely to serve the public as a licensee in a fair, honest, and open manner." § 338.44. The statute provides for a statement of reasons in the event of denial on grounds of good moral character, including a complete record of the evidence upon which the determination was based, and has a right to administrative "rehearing if he or she has relevant evidence not previously considered, regarding his or her qualifications." § 338.45. Judicial review is also provided: "If, in the opinion of the circuit court, the record does not disclose a lack of good moral character, as defined in this act, the court shall so state and shall order the board to issue the license . . . " § 338.46.

Employers prohibited from "making record of" misdemeanor arrests not leading to conviction, Mich. Comp. Laws § 37.2205a(1), but they are not prohibited from considering arrest in connection with termination of employment. *See Aho v. Mich. Dep't of Corrs.*, 688 N.W.2d 104 (2004).

MARCH 5, 2007

MINNESOTA

I. Automatic Restoration of Rights:

Civil rights: Person convicted of "treason or felony" may not vote "unless restored to civil rights." Minn. Const. art. VII, § 1. By statute, civil rights (including right to sit on jury) restored upon discharge from sentence. Minn. Stat. § 609.165, subd. 1 ("When a person has been deprived of civil rights by reason of conviction of a crime and is thereafter discharged, such discharge shall restore the person to all civil rights and to full citizenship, with full right to vote and hold office, the same as if such conviction had not taken place, and the order of discharge shall so provide."). Two exceptions: firearms privileges following a crime of violence, § 609.165, subd. 1a, and forfeiture of and disqualification from public office under § 609.42, subd. 2 (permanent disqualification from public office following a conviction of bribery).

Firearms: Person deprived of firearms rights under § 609.165, subd. 1a by virtue of conviction of a crime of violence may petition a court for restoration, and "the court may grant the relief sought if the person shows good cause to do so and the person has been released from physical confinement." Minn. Stat. § 609.165, subd. 1d.*

II. Discretionary Restoration Mechanisms:

A. Executive pardon:

- *Authority*: "The governor, the attorney general and the chief justice of the supreme court constitute a board of pardons. Its powers and duties shall be defined and regulated by law. The governor in conjunction with the board of pardons has power to grant reprieves and pardons after conviction for an offense against the state except in cases of impeachment." Minn. Const. art. V, § 7; Minn. Stat. § 638.01-.08. "The Board has the power to grant an absolute or conditional pardon," to people currently in prison. § 638.02, subd. 1. The

* Until 2003, the right to possess firearms was automatically restored to persons convicted of a crime of violence (with the exception of persons convicted of domestic assault involving the use of a firearm) 10 years after restoration of rights or expiration of sentence, whichever occurs first, provided the person had not been convicted of another crime of violence in that 10 year period. § 624.713, subd. 1(b) (2002). The Minnesota Citizen's Personal Protection Act, Senate File 842, modified the ban against possession of firearms to a lifetime ban for all persons who were discharged from sentence of court supervision on or after August 1, 1993, unless and until privileges are restored by a court. This law was voided as unconstitutional under Article 4, Section 17 of the Minnesota Constitution because it embraces more than one subject matter. *Unity Church of St. Paul v. Minnesota*, No. A04-1302, 2005 WL 832118 (Minn.App. Apr. 12, 2005).

Board also has the power to grant a "pardon extraordinary," to people who have completed their sentences. § 638.02, subd. 2. The Director of Corrections, or her designee, is the Secretary of the Board and conducts investigations and makes recommendations to the Board. § 638.07. Board required to report to legislature by February 15 each year. § 638.075.

- *Eligibility:* For pardon extraordinary, ten crime-free years from final discharge for crimes of violence, as defined under Minn. Stat. §624.712, subd.5, five crime-free years for non-violent offenses. Minn. Stat § 638.02, subd. 2. The Board may set aside this waiting period by "expressly provid[ing] otherwise in writing by unanimous vote." *Id.* (*But see* Minn. R. 6600.0600, providing that application for pardon extraordinary is premature if filed less than 18 months after discharge from sentence.) Federal felony offenders and persons convicted under the law of another state are not eligible for a state pardon. *See* Minn. Const. art. V, § 7; Minn. Stat. § 638.01.

- *Standard*: For pardon extraordinary, must be found to be of "good character and reputation." Minn. Stat. § 638.02, subd. 2(2).

- *Effect*: Ordinary "absolute" pardon relieves all legal disabilities. Minn. Stat. § 638.02, subd. 1; State v. Meyer, 37 N.W.2d 3 (Minn. 1949). A "pardon extraordinary" is an additional statutory remedy that "has the effect of setting aside and nullifying the conviction and of purging the person of it, and the person shall never after that be required to disclose the conviction at any time or place other than in a judicial proceeding or as part of the licensing process for peace officers." § 638.02, subd. 2(2). However, a pardon extraordinary does not seal or expunge the record.** After a pardon extraordinary is granted, a copy of the pardon is filed with the district court in the county of conviction; and the court is directed to issue an order "setting aside" the conviction, and to include a copy of the pardon in the court file. § 638.02, subd. 3.

- *Process:* For general pardons and commutations, Secretary of Board screens applications, makes recommendations to the Board. Application forms must be obtained as directed from the Secretary's Office by mail after eligibility requirements have been reviewed. Applications deemed by the Secretary to be "undeserving" may be excluded from consideration, with a report to the Board summarizing the application and grounds asserted and the basis for the exclusion. Minn. R. 6600.0500. Once a pardon has been denied, reconsideration is possible only with the consent of two members of the Board. Minn. Stat. § 638.06. Individuals re-imprisoned for violation of parole or other supervision are barred from application for 12 months following their return.

** In 1992, language in § 638.02 that provided for "sealing" of records after pardon was repealed, so that even though the conviction is "nullified" the record is not expunged or sealed. Rather, the fact of the pardon is added to the record. Where there is a request from a member of the public for public criminal records, only the fact of the pardon is disseminated. When there is a background check for private data (authorized by the subject), both the conviction and the pardon are disseminated.

Minn. R. 6600.1000. For pardons extraordinary, except for less serious offenders discharged more than five years before, applicant must attend hearing at which application is considered. Minn. R.6600.0900. Judge and DA are asked their views, and victims notified. Decision of Board usually announced at the conclusion of the hearing. *See* Minn. R. 6600.0200-.1100 *available at* http://www.revisor.leg.state.mn.us/arule/6600.html

> "Every pardon or commutation of sentence shall be in writing and shall have no force or effect unless granted by a unanimous vote of the board duly convened." Minn. Stat. § 638.02, subd. 1. "The board of pardons shall hold meetings at least twice each year and shall hold a meeting whenever it takes formal action on an application for a pardon or commutation of sentence. All board meetings shall be open to the public."

- *Frequency of Grants*: In 2003, 10 pardons granted out of a total of 17 applicants – six denied, one did not appear for hearing. Three found ineligible. (101 applications sent out, only 20 sent back.) (Thirteen applications for commutation considered, but since applicants didn't raise any new issues not considered by courts, all were denied a hearing.) Source: Minnesota Board of Pardons, *Annual Report to the Legislature: 2003Activity*, (2004), *available at* http://www.doc.state.mn.us/publications/legislativereports/pdf/2004/BOP%202003%20report.pdf?

- *Contact*: Randolph Hartnett, Secretary of the Board
  (612) 643-2560;
  rhartnett@co.doc.state.mn.us

B. Judicial sealing or expungement of adult felony convictions:

Expungement: There are two legal bases for the expungement of a petitioner's criminal records: (1) a party may petition for expungement pursuant to statute in three specified situations (minor drug possession cases, juveniles prosecuted as adults, criminal proceedings resolved in favor of the petitioner), *see* Minn. Stat. § 609A.02, subd. 3; and (2) a party may move for expungement pursuant to the court's inherent expungement power. *See State v. C.A.*, 304 N.W.2d 353 (Minn. Ct. App. 1981). *See also State v. Schultz*, 676 N.W. 2d 337 (Minn. Ct. App. 2004); *State v. T.M.B.*, 590 N.W.2d 809 (Minn. Ct. App. 1999). Trial court's inherent expungement power authority requires a balancing by the court of the interests of the public and public safety versus the disadvantage to the petitioner of the record remaining open. § 609A.03, subd. 5. Expungement appropriate where the petitioner's constitutional rights may be seriously infringed by retention of his records, or, where constitutional rights are not involved, when the court finds expungement will yield a benefit to the petitioner commensurate with the disadvantages to the public from the elimination of the record and the burden on the court in issuing, enforcing and monitoring an expungement order. In *State v. Schultz, supra*, court found that benefit to defendant in obtaining better employment or

housing by expunging his felony assault conviction records outweighed the burden to the public of eliminating the access of a prospective employer or landlord to defendant's criminal history. However, unless the aggrieved party's constitutional rights are infringed, expungement orders do not extend to non-judicial records maintained by the executive branch. According to press accounts, more than 100 applications for expungement are filed in Hennepin County alone. *See* Nick Coleman, "This Diva Changed her Tune and her Life," Minneapolis Star Tribune, September 17, 2005, http://www.startribune.com/stories/462/5619789.html

A pardon extraordinary "nullifies" and "sets aside" the conviction, but it does not expunge or seal the record.

Effect: Expungement seals the record, which remains available for law enforcement purposes, for purposes of evaluating a candidate for a law enforcement position, for purposes of authorized background checks. See 609A.03(b). In addition, "upon request by law enforcement, prosecution, or corrections authorities, an agency or jurisdiction subject to an expungement order shall inform the requester of the existence of a sealed record and of the right to obtain access to it as provided by this paragraph. For purposes of this section, a "criminal justice agency" means courts or a government agency that performs the administration of criminal justice under statutory authority." Id.

Sealing after 15 years: Conviction information will not be publicly disseminated 15 years after discharge of sentence. Minn. Stat. § 13.87, subd. 1.

Deferred sentencing: A felony conviction will be "deemed to be" a gross misdemeanor or misdemeanor if 1) the sentence imposed was no greater than that authorized for a misdemeanor; or 2) the imposition of the prison sentence is stayed, the defendant is placed on probation, and the defendant is thereafter discharged without a prison sentence. Minn. Stat. § 609.13, subd. 1. The purpose and effect of this statute is to avoid imposition of most legal disabilities that accompany a felony conviction, including those in administrative licensing proceedings. *See id.*, advisory committee cmt., quoted in *Matter of Woollett*, 540 N.W. 2d 829, 831 (Minn. 1995)("It is believed desirable not to impose the consequences of a felony if the judge decides that the punishment to be imposed will be no more than that provided for misdemeanors or gross misdemeanors.") However, the conviction will still be counted as a felony for purposes of prosecution as a felon in possession, and for subsequent sentencing. In *Woollett, supra,* the Supreme Court of Minnesota held that a stay of sentencing did not convert a felony conviction for third-degree assault into a misdemeanor for purposes of peace officer licensing, because the Board of police licensing had specific statutory authority to disqualify an individual based on a felony conviction. The court compared the Minnesota statute with the California statute on which it was modeled, and found its coverage less comprehensive. *See* 540 N.W. 2d at 832, n. 3.

See also Minn. Stat. 152.18 (deferred prosecution and expungement for minor drug offenses).

Firearms Restoration: A person convicted of a crime and violence and thus deprived of firearms rights under Minn. Stat. § 609.165, subd. 1a, may petition a court for restoration, and "the court may grant the relief sought if the person shows good cause to do so and the person has been released from physical confinement." § 609.165, subd. 1d.

III. Nondiscrimination in Licensing and Employment:

Minnesota Criminal Rehabilitation Act (1974) provides:

> The legislature declares that it is the policy of the state of Minnesota to encourage and contribute to the rehabilitation of criminal offenders and to assist them in the resumption of the responsibilities of citizenship. The opportunity to secure employment or to pursue, practice, or engage in a meaningful and profitable trade, occupation, vocation, profession or business is essential to rehabilitation and the resumption of the responsibilities of citizenship.

Minn. Stat § 364.01. Public employers and licensing agencies may not disqualify a person "solely or in part" based on conviction unless 1) there is a "direct relationship" between occupation or license and conviction history, measured by the purposes of the occupation's regulation and the relationship of the crime to the individual's fitness to perform the duties of the position; and 2) individual has not shown "sufficient rehabilitation and present fitness to perform" the duties of the public employment or licensed occupation. § 364.03, subd. 1.

Direct Relationship Test: In determining if a conviction directly relates to the position of public employment sought or the occupation for which the license is sought, the hiring or licensing authority shall consider: (a) The nature and seriousness of the crime or crimes for which the individual was convicted; (b) The relationship of the crime or crimes to the purposes of regulating the position of public employment sought or the occupation for which the license is sought; (c) the relationship of the crime or crimes to the ability, capacity, and fitness required to perform the duties and discharge the responsibilities of the position of employment or occupation. § 364.03, subd. 2.

In addition, even where a crime is found to be directly related to the public employment or license sought, person shall not be disqualified if the person can show "competent evidence of sufficient rehabilitation and present fitness to perform the duties of the public employment sought or the occupation for which the license is sought." § 364.03, subd. 3. Rehabilitation may be established by a record of law-abiding conduct for one year after release from confinement, or successful completion of probation or parole. Licensing or hiring authority shall also consider evidence regarding nature and seriousness of crime, mitigating circumstances, age at time of conviction, time elapsed since conviction, other evidence of rehabilitation such as letters of reference.

Records of arrest not leading to conviction, convictions that have been expunged, or misdemeanors for which prison sentence could not be imposed, may not be considered in connection with public employment or licensing decision. § 364.04.

Notification of reasons for denial: "If a hiring or licensing authority denies an individual a position of public employment or disqualifies the individual from pursuing, practicing, or engaging in any occupation for which a license is required, solely or in part because of the individual's prior conviction of a crime, the hiring or licensing authority shall notify the individual in writing of the following: (1) The grounds and reasons for the denial or disqualification; (2) The applicable complaint and grievance procedure; (3) The earliest date the person may reapply for a position of public employment or a license; and (4) That all competent evidence of rehabilitation presented will be considered upon reapplication. § 364.05.

Enforcement through administrative procedure act. § 364.06. *See Commers v. Spartz*, 294 N.W. 2d 321 (Minn. 1980)(county school board required to invoke mechanisms of the Administrative Procedure Act upon an aggrieved party's assertion of alleged violation of Minnesota Criminal Rehabilitation Act). Conviction may be considered as an element in good character inquiry. § 364.07.
Law enforcement and fire protection agencies are specifically excluded from a requirement of compliance with this statute. Minn. Stat. § 364.09. *See Matter of Woollett*, 540 N.W. 2d 829, 834 (Minn. 1995).

Judicial Interpretation of Direct Relationship Test: The Minnesota courts have interpreted the direct relationship test strictly. *See, e.g., In re Shelton*, 408 N.W.2d 594 (Minn. Ct. App. 1987)(embezzlement directly related to fitness to teach; teacher with 20 years of service terminated in spite of efforts to make restitution); *Peterson v. Minneapolis City Council*, 274 N.W.2d 918 (Minn. 1979) (conviction for attempted theft by trick directly related to the operation of a massage parlor).

Exceptions: Since 1974, list of excepted professions and employments has been enlarged gradually. Chapter does not apply to the practice of law, § 364.08; or to "peace officers" and law enforcement agencies, fire protection agencies, private detectives, certain transportation licenses (including school bus drivers, EMT personnel and taxi drivers if convicted of certain serious offenses and discharged from sentence within the past ten years). § 364.09(a). Section does not apply to juvenile corrections employment if crime involved sexual misconduct. Id. Chapter does not apply to school districts or teaching licenses. § 364.09(b). See also § 364(c)("Nothing in this section precludes the Minnesota police and peace officers training board or the state fire marshal from recommending policies set forth in this chapter to the attorney general for adoption in the attorney general's discretion to apply to law enforcement or fire protection agencies.") Chapter also does not apply to a license to practice medicine that has been denied or revoked.

Municipal Directives Implementing Section 364. In November 2006 the City of St. Paul passed an ordinance prohibiting municipal employers from making inquiry about

an applicant's criminal record on an application for employment for positions covered by Section 364. A criminal records check may be made only for certain positions deemed of "sufficient sensitivity and responsibility" to require one, and then only after a conditional offer of employment has been made. The following month, the City of Minneapolis followed suit.***

*** The resolution of the Minneapolis City Council, approved on December 22,2006, requires the City's Department of Human Resources to " periodically review all positions of employment with the City and make a good faith determination as to which specific positions are of such sensitivity and responsibility that a background check is warranted." Even as to those jobs, the City "will not conduct that check until *after* the job applicant is determined to be otherwise qualified for the position sought and has been offered the position conditioned on a background check (a 'conditional employee')." Moreover, the City will not conduct, request or accept any background checks which contain information relating to (i) records of arrests not followed by a valid conviction; (ii) convictions which have been, pursuant to law, annulled or expunged; and (iii) misdemeanor convictions where no jail sentence can be imposed." If the background check uncovers a prior conviction, the conditional employee "shall not be disqualified unless the crime or crimes for which s/he was convicted directly relate to the position of employment sought."

Following and elaborating the provisions of Section 364, the order sets out standards for determining whether a conviction "directly relates" to the position sought, and permits an applicant to make an "in person" showing of "competent evidence of sufficient rehabilitation and present fitness to perform the duties of the public employment sought." Rehabilitation may be shown by a copy of a discharge order and evidence that one year has passed since release from confinement. If the City denies an individual a position of employment, solely or in part because of the individual's prior conviction of a crime, the City shall notify the individual in writing of the reasons for the denial or disqualification, of the applicable complaint and grievance procedure set forth in § 364.06, and of the earliest date the person may reapply for a position with the City.

MARCH 12, 2007

MISSISSIPPI

I. Automatic Restoration of Rights:

Voting: Disenfranchisement occurs only upon conviction of one of the crimes listed in the Mississippi Constitution as disqualifying. *See* Miss. Const. art. 12, § 241 (murder, rape, bribery, theft, arson, obtaining money or goods under false pretenses, perjury, forgery, embezzlement or bigamy). Most statutory offenses involving an unlawful taking of property are disqualifying. *See Cotton v. Fordice*, 157 F.3d 388 (5th Cir. 1998).* Only convictions obtained in Mississippi state courts are disqualifying. *See State ex rel. Mitchell v. McDonald*, 145 So. 508 (Miss. 1933); *Middleton v. Evers,* 515 So. 2d 940 (Miss. 1987); Op. Miss. Atty.Gen. No. 2005-0193 (Wiggins, April 26, 2005).

The Mississippi Attorney General's office advises that only felony convictions are disqualifying. *See McLaughlin v. City of Canton*, 947 F.Supp. 954 (S.D. Miss. 1995)(misdemeanor "false pretenses" conviction does not constitute a conviction for fraud within the constitution, and is thereby not disqualifying; equal protection issues discussed in dicta).**

Right to vote, if lost, may be regained only by pardon, or by two-thirds vote of legislature. Miss. Const. art. 12, § 253.***

Jury and Office: Persons convicted of "infamous crime," defined as offense "punished with death or confinement in penitentiary," ineligible for jury service. See Miss. Code Ann. §§ 13-5-1; 1-3-19. Jury eligibility restored five years after

* Until the Fifth Circuit's 1998 decision in *Cotton v. Fordice*, the constitutional list of crimes was given a narrow literal reading by the state Attorney General. Since that decision, the Attorney General has expanded the list of statutory theft-related crimes that are disqualifying. *See* Op. Miss. Att'y Gen. No. 2001-0278 (Scott, May 11, 2001)(car-jacking); Op. Miss. Atty.Gen. No. 99-0186 (Vowell, April 30, 1999)(timber larceny). Similarly, since 1998 the category of "false pretenses" offenses has also been more expansively interpreted to include statutory offenses. However, the Attorney General has made clear that crimes involving drugs or other controlled substances generally do not "fall under one of the twenty-one (21) crimes listed above and therefore would not be disqualifying," though "we caution that an independent determination would have to be made on each specific crime." *See* Op. Miss. Att'y Gen. No. 2004-0171 (Karrem, April 23, 2004). Other distinctions are explained in Op. Miss. Att'y Gen. Nos. 2000-0454 (Scott, August 18, 2000)(conviction for receiving stolen property or felony shoplifting results in disenfranchisement, but conviction for burglary does not); 2000-0169 (Salazar, April 7, 2000)(forgery does, prescription forgery does not); 2001-0278, *supra* (rape does, sexual battery does not).

** Prior to 1995, the Mississippi Attorney General had historically opined that misdemeanor offenses falling within the constitutional list of crimes were disqualifying. *See, e.g.,* Op. Miss. Att'y Gen Nos. 1992-0153 (March 3, 1992); 1985-744 (Pittman, November 22, 1992).

*** Miss. Code Ann. § 99-19-37(11) establishes administrative procedure restoring vote automatically to any convicted person who served honorably in World War I or World War II, referring to legislative authority in section 253 of the Mississippi constitution.

conviction, provided person is a qualified elector. Miss. Code Ann. § 13-5-1. Right to hold office lost upon convicted of a felony, and restored only by pardon. Miss. Const. art. 4, § 44(2); Miss. Code Ann. § 99-19-35.

Firearms: Persons convicted of felony may not possess firearm unless pardoned, granted federal relief under 18 U.S.C. § 925(c), or granted a "certificate of rehabilitation" by a court (see below).

II. Discretionary Restoration Mechanisms:

A. Executive pardon:

- *Authority*: Under Mississippi constitution, Governor has full clemency authority, subject to rules and regulations prescribed by law. Miss. Const. art. 5, § 124. Mississippi law gives Parole Board "exclusive responsibility" for investigating pardon cases at the Governor's request. Miss. Code Ann. § 47-7-5(3). *See also* § 47-7-31. Board composed of five full-time salaried members appointed by Governor, who also appoints chair. Board must report to Governor and legislature annually. § 47-7-15.
- *Eligibility*: According to the Governor's Office, informal policy requires applicants to wait seven years after completion of sentence. Federal and out-of-state offenders are not eligible for a state pardon.
- *Effect:* Pardon restores civil rights and removes employment disabilities, including gun rights. Legislature cannot restore gun rights. Statutes barring convicted people from jobs in education and health care give specific effect to pardon. *See, e.g.*, Miss. Code Ann. § 37-9-17 (teachers and school administrators); § 37-29-232 (admission to health care professional training program). *See also* § 45-33-47(4) (pardon relieves obligation to register as sex offender).
- *Process:* All pardon applicants must post notice in newspaper in county of conviction 30 days prior to making application to Governor, setting forth the reasons why pardon should be granted. Miss. Const. art. 5, § 124. Facially meritorious cases sent to Parole Board for investigation. Generally requires letters of recommendation from community and family, and statement of unusual circumstances.
- *Frequency of Grants:* Usually 10-20 Governor's pardons issued at end of term. According to the Mississippi Attorney General's office, there are several dozen legislative pardons granted pursuant to Bills of Suffrage each year. Recently there has been increased legislative activity, and 36 bills of suffrage passed in 2004. Source: Mississippi Attorney General's Office. The Sentencing Project reports that 55 bills of suffrage passed while 57 were defeated between 2001 and 2004. *See* Marc Mauer & Tushar Kansal, *Barred for Life: Voting Rights Restoration in Permanent*

Disenfranchisement States, Sentencing Project (Feb. 2005) at 16, *available at* http://www.sentencingproject.org/pdfs/barredforlife.pdf.

- *Contact*: Mississippi Parole Board (601) 354-7716; also Paul Hirst, Governor's Office at (601) 576-2035; Phil Carter, Attorney General's Office, 601-359-3753, pcart@ago.state.ms.us.

B. Judicial sealing or expungement of adult felony convictions:

- *Misdemeanor expungement*: First offender misdemeanor convictions may be expunged. Miss. Code Ann. § 99-19-71.[****]

- *Nonconviction records*: Records of cases in which no charges brought or charges dismissed may also be expunged. §§ 99-15-59, 99-19-26(5).

- *Deferred Adjudication* (but no expungement) authorized in felonies and misdemeanors, except crimes against the person and drug trafficking crimes. Miss. Code Ann. § 99-19-26-1 through 4.

- *Judicial Certificate of Rehabilitation*: Miss. Code Ann. § 97-37-5(1) provides that a felony offender will no longer be subject to prosecution as felon in possession if he has received a certificate of rehabilitation from the court of conviction. Section 97-37-5(3) authorizes court to issue certificate of rehabilitation, "upon a showing to the satisfaction of the court that the applicant has been rehabilitated and has led a useful, productive and law-abiding life since the completion of his sentence and upon the finding of the court that he will not be likely to act in a manner dangerous to public safety." Certificate referred to in Miss. R. Evid. 609(c) as sufficient to rehabilitate testimonial witness, indicating that it may be issued under a common law authority not exclusively created for firearms restoration.

C. Administrative certificate – N/A

III. Nondiscrimination in Licensing and Employment: N/A

Mississippi has no general law regulating consideration of conviction in connection with licensing and employment. It does apply a direct relationship test in connection with some licenses. *See, e.g.*, Miss. Code § 73-67-27(1)(e) (massage therapy license may be denied or revoked if person has conviction or charges "that directly relates to the practice of massage therapy or to the ability to practice massage therapy").

[****] In 2003 the Mississippi legislature amended § 99-19-71 to eliminate a requirement that a misdemeanor conviction must have occurred before the person reached age 23 to qualify for expungement. *See* Laws 2003, Ch. 557, § 4 (approved April 24, 2003). (Note that the caption of this section remains "Expunging of misdemeanor conviction before age 23."

FEBRUARY 17, 2007

MISSOURI

I. Automatic Restoration of Rights:

Civil Rights: Person convicted of any felony offense may not vote while incarcerated or while on parole or probation, but right to vote is automatically restored upon final discharge from sentence. Mo. Rev. Stat. § 115.133(2). Misdemeanants are also disenfranchised while serving a prison sentence. § 115.133(1). Persons convicted *of* "a felony or misdemeanor connected with the right of suffrage" are permanently disenfranchised, unless pardoned. § 115.133(3). *See also* Mo. Rev. Stat. § 561.026. The right to hold office is restored upon completion of sentence (unless the crime was "connected to the exercise of the right of suffrage"). §§ 561.021(2)-(3). A felony offender is permanently disqualified from jury service, unless pardoned. § 561.026(3).

Firearms: A person convicted of any "dangerous felony," an attempt to commit a dangerous felony, or of a crime under the laws of any state or of the United States which, if committed in Missouri, would be a dangerous felony, may not possess a concealable firearm for five years after conviction or release from confinement for such a conviction, whichever is later. Mo. Rev. Stat. § 571.070.1(1). A person who has been convicted of a felony under the laws of any state or the United States may not obtain a permit to acquire a concealable firearm. § 571.090.1(2). Without such a permit, it is illegal to purchase, lease, borrow, exchange, or receive a concealable firearm. § 571.080.1(1). Only a pardon will restore firearms privileges.

II. Discretionary Restoration Mechanisms:

A. Executive pardon:

- *Authority*: The pardon power is vested in the governor, except in cases of treason or impeachment, under rules and regulations prescribed for the manner of applying. Mo. Const. Art. IV, § 7. Pursuant to Mo. Rev. Stat. § 217.800(2), all pardon applications must be referred to the Board of Probation and Parole for investigation and recommendation. Board's advice is not binding on the Governor, however, and his power is not dependent upon a favorable Board recommendation.

- *Administration*: Board of Probation and Parole consists of seven members appointed by the Governor to six-year terms, no more than four from the same party. All full-time salaried employees. Chair appointed by the Governor. Mo. Rev. Stat. § 217.665 (2004 supp.).

- *Eligibility*: Published policy from Board outlines eligibility requirements and thoroughly details investigative procedures applicable to clemency applications. *See* Policy and Procedure Manual of the Board of Probation and Parole, Nos. P2-1.3 through P2-1.6 (as of May 20, 2005, not available on-line, but forthcoming on Board website at www.doc.missouri.gov.). Three years from discharge from sentence, without intervening convictions or charges pending. Those denied must wait three years to reapply. Applicants whose sentences were suspended pursuant to Mo. Rev. Stat. § 610.105 are not eligible to apply for pardon, since they are not regarded as having a conviction (see below). Persons convicted under the law of another state are ineligible for a gubernatorial pardon. Board has not established substantive criteria for pardon.

- *Effect*: According to Board officials, each full pardon document signed by the Governor states that the grant "obliterates" effect of conviction, relieves of all obligations associated with the conviction, restores all rights and relieves legal disqualifications. However, a pardon does not "expunge." See Policy and Procedure Manual of the Board of Probation and Parole, supra, at P2-1.3.

- *Process*: "All applications for pardon, commutation of sentence or reprieve shall be referred to the board for investigation." Mo. Rev. Stat. § 217.800. The board "shall investigate each such case and submit to the governor a report of its investigation, with all other information the board may have relating to the applicant together with any recommendations the board deems proper to make." Published policy from Board outlines eligibility requirements and thoroughly details investigative procedures applicable to clemency applications. *See* Policy and Procedure Manual of the Board of Probation and Parole, supra, at P2-1.4, P2-1.6. Investigating parole officer must make records check in district, conduct interviews with officials and victims if any. Investigating officer's assessment "should cover areas such as social, employment, and financial stability. In addition, testimonials from friends, employers, and general references should be included. It is important to thoroughly assess any history of mental health or substance abuse issues, particularly related to criminality and to determine whether those issues have been successfully resolved. Significant positive achievements should be highlighted. Specific reference should be made to the impact, if any, of the collateral consequences of conviction being claimed and the officer's assessment of the seriousness of that impact." Report should include comments and recommendation of prosecutor, judge, defense attorney, "other community leaders as appropriate."

  No provision for public hearing. Board recommendation communicated in writing to Governor. All Board meetings on clemency matters may be closed to public. Mo. Rev. Stat. § 217.670(5).

- *Commentary:* James G. Lindsay, Comment, *Pardons in Missouri: Procedure and Policy,* 48 UMKC L. Rev. 33 (1979).
- *Frequency of Grants*: From 2001 to 2004, Governor Holden approved 45 clemency applications (including commutations) and denied 840. As of October 2005, Governor Blunt had not approved any clemency requests, and had denied 52. Excluding requests from confined offenders, the Board received 151 pardon applications in 2002, 186 in 2003, 242 in 2004, and 141 during the first eight months of 2005. Source: Board of Probation and Parole.

- Contact:
  Linda Welch, Administrative Assistant
  Board of Probation and Parole
  1511 Christy Drive
  Jefferson City, MO 65101
  (573) 751-8488, 573-526-6551
  FAX (573) 751-8501
  Linda.Welch@doc.mo.gov

B. Judicial sealing or expungement of adult felony convictions:

Expungement: Only first time alcohol-related misdemeanor offenses may be expunged, after ten-year waiting period. § 577.054.

Sealing for nonconviction records and probationary sentences: Mo. Rev. Stat. § 610.105 authorizes automatic sealing of records in all cases disposed of favorably to the defendant (nolle prossed, acquitted, dismissed), or where sentence suspended, upon conclusion of case. Upon successful completion of probation, record becomes a "non-conviction record," and need not be reported as a conviction. § 610.110. *See Yale v. City of Independence* (Sup.1993) 846 S.W.2d 193 (1993)(legislative purpose of sentencing alternative of "suspended imposition of sentence" is to allow defendant to avoid stigma of lifetime conviction and punitive collateral consequences, which is evidenced by statutes that close records of case if imposition of sentence is suspended; offenders worthy of lenient treatment have chance to clear their records by demonstrating value to society through probation.) Law enforcement retains access, as well as health and senior services facilities, home care providers, for licensing decisions. § 610.120.

C. Administrative Restoration: N/A

III. Nondiscrimination in Licensing and Employment:

General Limitations on Collateral Consequences in licensure and public employment: Mo. Rev. Stat. § 561.016 generally adopts approach of the Model Penal Code in limiting the collateral consequences of a conviction to those imposed by the constitution or statute, or embodied in the judgment of the court: "No person shall suffer any legal disqualification or disability because of a finding of guilt or conviction of a crime or the sentence on his conviction, unless the disqualification or disability involves the deprivation of a right or privilege which is: (1) Necessarily incident to execution of the sentence of the court; or (2) Provided by the constitution or the code; or (3) Provided by the statute other than the code, when the conviction is of a crime defined by such statute; or (4) Provided by the judgment, order or regulation of a court, agency or official exercising a jurisdiction conferred by law, or by the statute defining such jurisdiction, when the commission of the crime or the conviction or the sentence is reasonably related to the competency of the individual to exercise the right or privilege of which he is deprived. . . ."* This provision applies to public employment. *See, e.g., Hardy v. Fire Standards Comm'n of St. Louis County*, 992 S.W. 2d 330 (App. E.D. 1999)(county rules denying employment as a firefighter to any person convicted of a felony or misdemeanor involving moral turpitude conflicted with statute limiting the disqualifications of convicted felons to those where the crimes convicted of reasonably relate to the felon's competency to do the job at issue, and thus, rules were void unless they could be enforced in such a way as to be in compliance with the statute); *Mager v. City of St. Louis*, 699 S.W. 2d 68 (App. E.D. 1985) (Prohibition in municipal ordinance against employment of convicted felons by liquor licensees was contrary to limitations in § 561.016 insofar as it sought to disqualify convicted felons from employment by liquor licensees when their crimes, convictions, or sentences were not reasonably related to their competency to be employed by those licensees). Statute is intended to remove much of stigma of conviction, and increase the legitimate discretion of licensing boards by eliminating arbitrary or inflexible barriers imposed by criminal conviction. *See Chandler v. Allen,* 108 S.W.3d 756 (App. W.D. 2003)(sex offender properly dismissed from job in deli on public safety grounds). See also limitations in licensing code, discussed below.

Licensing boards and other state agencies shall not deny a professional or occupational license "primarily upon the basis that a felony or misdemeanor conviction of the applicant precludes the applicant from demonstrating good moral

* Comments to 1973 Code, included in 1999 Code, explains that "reasonable relationship" test is the "most important provision" in the section: "The present law sometimes contains blanket restrictions against employment in certain regulated areas of persons convicted of crimes. Sometimes conviction is relevant to the public safety interests underlying the regulation, but often it is not. By eliminating irrational barriers to employment, we assist offenders in reintegrating themselves into the community. Thus, instead of providing that no liquor license shall be issued to any [convicted] person . . . the Code provides a reasonable rule which would authorize a licensing agency to refuse to grant a license to an applicant whose criminal record and other circumstances indicate that he would endanger the particular group or industry protected by the agency's licensing power." Commentary goes on to opine that "there should be very few of these statutes containing special penalties if the Code is enacted and the present disqualification and disability statutes are repealed and replaced by the Code provisions."

character, where the conviction resulted in the applicant's incarceration and the applicant has been released by pardon, parole or otherwise from such incarceration, or resulted in the applicant being placed on probation and there is no evidence the applicant has violated the conditions of his probation." Mo. Rev. Stat. § 314.200. Board may consider a conviction as "some evidence of an absence of good moral character, but shall also consider the nature of the crime committed in relation to the license which the applicant seeks, the date of the conviction, the conduct of the applicant since the date of the conviction and other evidence as to the applicant's character." Enacted in 1981 – no annotations.

MARCH 10, 2007

MONTANA

I. Automatic Restoration of Rights:

A convicted person is ineligible to vote only if "serving a sentence for a felony in a penal institution." Mont. Const. art. IV, § 2. Right to vote regained upon release from incarceration. A felony offender may not hold public office until final discharge from state supervision. *Id.* art. IV, § 4. Under Mont. Code Ann. § 46-18-801(1), a conviction does not result in loss of civil rights except as provided in the Montana Constitution, or as specifically enumerated by the sentencing judge "as a necessary condition of the sentence directed toward the objectives of rehabilitation and the protection of society." Full rights – including firearms rights -- are automatically restored "by termination of state supervision for any offense against the state." Mont. Const. art. II, § 28. *Accord* Mont. Code Ann. § 46-18-801(2) ("Except as provided in the Montana Constitution, if a person has been deprived of a civil or constitutional right by reason of conviction for an offense and the person's sentence has expired or the person has been pardoned, the person is restored to all civil rights and full citizenship, the same as if the conviction had not occurred.").

Constitution does not provide for disqualification from jury service, but a statute does. *See* Mont. Code Ann. § 3-15-303(2) (person who has been "convicted of malfeasance in office or any felony or other high crime" is not competent to sit as juror). Not clear what effect this has statute in light of § 46-18-801(2).*

Firearms rights lost only if offense involved use of firearm, Mont. Code Ann. § 46-18-221(1). Ineligible for concealed weapon permit if convicted of offense carrying punishment of one or more year in prison, or if convicted of certain violent or sex offenses without regard to length of prison term. § 45-8-321(1)(c). If lost, firearms rights restored automatically upon termination of supervision. *See* Mont. Const. art. II, § 28; Mont. Code Ann. § 46-18-801(2).

II. Discretionary Restoration Mechanisms:

A. Executive pardon:

- *Authority*: The pardon power is vested in the Governor, but legislature may control process. Mont. Const. art. VI, § 12. Governor may issue pardon only upon recommendation of Board of Pardons and Parole, except in capital cases, though he is not bound to accept the Board's favorable

* According to the 1996 survey of the Office of the Pardon Attorney, the "Montana Attorney General advised that under a similarly worded previous version of § 46-18-801 the right to sit on jury was restored only by a pardon." Civil Disabilities of Convicted Felons: A State-by-State Survey 86 (Office of the Pardon Attorney, Dep't of Justice, 1996), available at http://www.usdoj.gov/pardon/forms/state_survey.pdf.

recommendations. Mont. Code Ann. §§ 46-23-104(1), 46-23-301(3). Non-capital cases in which Board recommends denial are not sent to Governor. Governor must report to the legislature each pardon and reasons for it. § 46-23-316.

- *Administration*: Board has three regular members and four "auxiliary" members who are required to attend meetings that regular members cannot. Mont. Code Ann. §§ 2-15-2302(2), 2-12-2303(3). All are appointed by the Governor, and serve effectively as volunteers. A majority of the Board constitutes a quorum and all decisions are by majority vote. Rules set forth at Mont. Admin. R. 20-25-901 to 904. History of Board (including merging of pardon and parole function in 1955) at http://www.discoveringmontana.com/bopp/history.asp
- *Eligibility*: No eligibility requirements, except that federal and out-of-state offenders ineligible. Misdemeanants may apply. Board may not postpone consideration of an application for executive clemency on grounds that the applicant has not exhausted the appeal and sentence review processes. 37 Mont. Op. Att'y Gen. 183 (1977).
- *Effect:* Removes "all legal consequences" of conviction, Mont. Code Ann. § 46-23-301, and licensing bars, e.g., § 37-60-303 (private investigators and patrol officers). *See also* Mont. Admin. R. 20-25-901A(1) ("Pardon is a declaration of record that an individual is to be relieved of all legal consequences of a prior conviction."). Pardon is grounds for judicial expungement.
- *Process: See generally* Mont. Code Ann. §§ 46-23-301 to 46-23-307, 46-23-315,46-23-316 (governing executive clemency process), and Mont. Admin. R. 20-25-901 to 20-25-904. Board may hold a hearing in meritorious cases where all sides are heard and a record made, though it is required to hold hearings only in capital cases. Hearing must be publicized at least once a week for two weeks. Mont. Code Ann. §§ 46-23-303, 46-23-304. Favorable recommendations forwarded to the Governor, § 46-23-307; if a majority of Board recommends denial in non-capital case, the case may not be sent to the Governor. § 46-23-301(3). Records of the Board's acts and decisions public. § 46-23-108.

  NB: *Board regulations do not appear to contemplate applications for clemency by persons no longer under sentence, but according to Board director hearing requirement does apply to pardon applicants. Published standards appear to apply only to commutation cases.*
- *Report*: Mont. Code Ann. § 46-23-316. Governor's report to legislature: The governor shall "report to the legislature each case of remission of fine or forfeiture, respite, commutation, or pardon granted since the last previous report, stating the name of the convict, the crime of which he was convicted, the sentence and its date, the date of remission, commutation, pardon, or respite, with the reason for granting the same, and the objection, if any, of any of the members of the board made thereto."

- *Frequency of Grants*: Statistical data on annual clemency actions published at http://www.discoveringmontana.com/bopp/statistical_data.asp. In 2002, three pardons granted and 16 denied; in 2003, five granted and 21 denied; in 2004 (through November) four granted and 16 denied. Only one grant from 1999-2001. Approximately 1/3 of applications are from misdemeanants. Source: Montana Board of Pardons and Parole.
- *Contact:* Craig Thomas, Executive Director, Montana Board of Pardons and Parole
  300 Maryland Ave.
  Deer Lodge, MT 59722
  Phone: 406.846.1404
  Fax:406.846.3512 – crthomas@mt.gov

B. Judicial sealing or expungement of adult felony convictions:

First Offender Expungement: Mont. Code Ann. § 46-18-201(deferred imposition of sentence for first felony offenders and misdemeanants). Court may defer imposition of sentence from one to three years during which offender will be on probation. Following termination of the relevant time period, § 46-18-204 authorizes court to permit defendant to withdraw a plea of guilty or nolo contendere or to strike the verdict of guilty from the record and order that the charge or charges against the defendant be dismissed. "After the charge is dismissed, all records and data relating to the charge are confidential criminal justice information, as defined in 44-5-103, and public access to the information may only be obtained by district court order upon good cause shown." *Id.* If the sentence is dismissed then it should not be considered in determining whether the defendant is a persistent felony offender. *State v. Gladue*, 209 M 235, 679 P2d 1256, 41 St. Rep. 669 (1984). Unavailable if mandatory sentence applies, except in certain situations. *See* § 46-18-222. (Prior to 1989, requirement was that records be "expunged, which was understood to require that all documentation and physical or automated entries concerning the expunged offense be physically destroyed or obliterated. 42 Mont. Op. Att'y Gen. 384 (1988).)

Firearms: Loss of firearm right may be restored by applying to the district court in the county in which the convicted person resides for a permit to purchase and possess one or more firearms, and the court may grant such relief if the person can "show good cause for the possession of each firearm sought to be purchased and possessed." Mont. Code Ann. § 45-8-314(2)(a).

C. Administrative certificate: N/A

III. Nondiscrimination in Licensing and Employment:

Criminal convictions shall not operate as an automatic bar to being licensed to enter any occupation in the state of Montana. No licensing authority shall refuse to license a person solely on the basis of a previous criminal conviction. However, a license may be denied "where a license applicant has been convicted of a criminal offense and such criminal offense relates to the public health, welfare, and safety as it applies to the occupation for which the license is sought," and where the licensing authority finds, after investigation, that the applicant "has not been sufficiently rehabilitated to warrant the public trust." Mont Code Ann. § 37-1-203; *see Ulrich v. State ex rel. Bd. of Funeral Serv.*, 961 P.2d 126 (Mont. 1998)(before revoking a mortician's license, the Board of Funeral Service was required to determine whether conviction related to and affected the public health, safety, and welfare as it applied to the practice of mortuary science and whether the mortician had been sufficiently rehabilitated) (distinguishing *Erickson v. State ex rel. Bd. of Med. Exam'rs*, 938 P.2d 625 (1997)). Nothing on public or private employment. Montana Human Rights Commission takes position that pre-employment inquiries regarding arrests raise suspicion of intent to unlawfully discriminate unless related to bona fide lawful affirmative action plan or inquiry is required for record-keeping purposes. Mont. Admin. R. 24.9.1406(2)(h).

MARCH 10, 2007

NEBRASKA

I. Automatic Restoration of Rights:

Vote: Neb. Rev. Stat. § 29-112 provides that civil rights are lost upon conviction of a felony. The right to vote is restored automatically two years after completion of sentence, including any period of parole. *Id.* Out-of-state offenders lose the right to vote and other civil rights in Nebraska only if they have been imprisoned for an offense that would be punishable by imprisonment under Nebraska law. § 29-113. Right to vote restored to out-of-state offenders on same terms as Nebraska offenders. *Id. See also* § 29-2264 (vote restored to probationers two years after discharge).*

Other civil rights are restored only by a "warrant of discharge" issued by the Board of Pardons. Neb. Rev. Stat. § 29-112. Section 29-112.01 provides that such warrant "shall be issued by such board upon receiving from the sentencing court a certificate showing satisfaction of the judgment and sentence entered against such person." *See also* § 83-1,118(5) ("Upon completion of the lawful requirements of the sentence, the department shall provide the parolee or committed offender with a written notice regarding his or her civil rights. The notice shall inform the parolee or committed offender that voting rights are restored two years after completion of the sentence. The notice shall also include information on restoring other civil rights through the pardon process, including application to and hearing by the Board of Pardons.").

Firearms rights (long guns and hand guns) lost upon conviction of felony. Neb. Rev. Stat. §§ 28-1206(1), (2). Firearms rights may be regained only if Board of Pardons empowers the governor to expressly authorize a pardoned individual to receive, possess, or transport guns in commerce. § 83-1,130(2).

II. Discretionary Restoration Mechanisms:

---

* Prior to March 11, 2005, all felony offenders were required to obtain a pardon before voting. See Neb. Rev. Stat. § 29-211 (2004). *See also Ways v. Shively*, 646 N.W.2d 621 (Neb. 2002). In the *Shively* decision, the Supreme Court of Nebraska construed § 29-112 together with § 83-1118(5) (2002) (a committed prisoner is issued a certificate of discharge upon release from confinement by the Director of Correctional Services, which, according to the *Shively* Court, "shall restore the civil rights of the offender"), and concluded that the legislative delegation in § 83-1118(5) conflicted with the constitutional pardon power of the Board of Pardons. Following the *Shively* decision, § 29-211 was amended to make clear that pardon is the exclusive means of restoring civil rights. It was amended again in 2005 to restore the right to vote automatically to all offenders two years following completion of sentence. *See* Legislative Bill 53 (March 5, 2005), http://srvwww.unicam.state.ne.us/current/final/FINAL_LB53_1.pdf.

A. Executive pardon:

- *Authority*: The authority to grant pardons is vested in the Board of Pardons, which is composed of the Governor, Secretary of State and Attorney General. Neb. Const. art. IV, § 13; Neb. Rev. Stat. § 83-1,126 et seq. Governor acts as chair. The scope of the pardon power is set forth in § 83-170(10). The Board of Pardons is not subject to the Nebraska Administrative Procedures Act, and its constitutional powers cannot be limited or modified by any act of the legislature or of the Nebraska courts. The Board has the power to (1) remit fines and forfeitures, (2) grant respites, (3) grant reprieves, (4) grant pardons, and (5) grant commutations, in all cases of conviction for offenses against the laws of the State of Nebraska, except for treason and cases of impeachment. Board of Parole may advise the Board of Pardon, but its advice is not binding. § 83-194; *see also* 270 Neb. Admin. Code ch. 3, § 009.

- *Eligibility:* 10 years from final discharge, including payment of fine, for felonies, three years for misdemeanors. *See* Instructions for Filing Out Application for Pardon, http://www.pardons.state.ne.us/content/instructionsl ("The usual practice in the granting of pardons is to hear only those felony cases where approximately ten (10) years has elapsed and those misdemeanor cases where approximately three (3) years has elapsed with no further contact with the law. Only unusual circumstances will cause the Board to deviate from this practice."). Misdemeanants also eligible. Persons convicted under federal law or the laws of another state are ineligible for a gubernatorial pardon or a discharge, and thus may not regain their civil rights unless pardoned in the jurisdiction of conviction. Neb. Rev. Stat. § 29-113.

- *Effect:* A pardon restores civil rights lost due to a felony conviction, including the right to be a juror, the right to hold public office, the right to bear arms, and the right to hold certain licenses (Liquor and Public Health and Welfare Licenses). *See* http://www.pardons.state.ne.us/faq.html. A felony offender may regain firearm privileges only if the Board of Pardons empowers the Governor to expressly authorize the individual to receive, possess, or transport in commerce a firearm. Neb. Rev. Stat. § 83-1,130(2). It is not clear whether a person convicted in another state regains state firearms privileges in Nebraska if he receives a pardon from the state of conviction.

- *Process:* Hearing on the record, majority vote. See Neb. Rev. Stat. § 83-1,128 for powers of Board. Board holds open hearings quarterly. Neb. Bd. Pardons Guidelines § 003.01, *available at* http://www.pardons.state.ne.us/content/app_guidelines.html. General policy that Board will not grant pardon without a hearing, held pursuant to Nebraska Public Meetings Act. *Id.* § 004.02. Two-step process: Board first meets publicly to decide whether to grant a full hearing; second stage is full public hearing. *See* http://www.pardons.state.ne.us/agenda.html. Board has subpoena power, and perjury before the Board subject to criminal penalties. Neb. Rev. Stat. § 83-1,128. Hearing must be informal, but complete record

kept. § 83-1,129(3). Victim must be notified. Neb. Bd. Pardons Guidelines § 004.04. The Board's decision will be by majority vote. The Board may, after a pardon has been granted for a felony offense, empower the Governor to expressly authorize such person to receive, possess or transport in commerce, a firearm. Neb. Rev. Stat. § 83-1,130(2). No provision for giving reasons. Application form at: http://www.pardons.state.ne.us/pardons.html.

- *Frequency of Grants*: Applications have risen dramatically since 9/11- In 2004, 145 cases heard, 69 granted; in 2003, 120 cases heard, 69 granted. Pattern of granting about half applications has held for past few years (in 2001, 38 of 64; in 2002, 56 of 84). Since 1993, 815 persons have applied for a pardon, of which 42% (343) have been granted one. About 1/3 of applications are from misdemeanants. Presumably these numbers will go down now that the legislation has been passed restoring the right to vote automatically. Source: Nebraska Pardon Board.

- *Contact*: http://www.pardons.state.ne.us/. Sonya Fauver, Nebraska Pardon Board – 402-479-5726. SFauver@dcs.state.ne.us

B. Judicial sealing or expungement of adult felony convictions:

- *Set-aside for probationers*: Neb. Rev. Stat. §§ 29-2264(4)(a) and (b) permit an offender sentenced to probation, or to pay a fine only, to petition the sentencing court to set aside the conviction, which has the effect of "nullifying" the conviction and removing "all civil disabilities and disqualifications imposed as a result of the conviction." *See also* § 29-2264(1) (order on completion of probation "shall include information on restoring other civil rights through the pardon process, including application to and hearing by the Board of Pardons"). This procedure was upheld against constitutional challenge by the Nebraska Supreme Court in *State v. Spady,* 645 N.W.2d 539 (Neb. 2002). Apparently, a set-aside under § 2264(4) does not result in sealing or expungement of the record. Nor does it result in restoration of civil rights, which is exclusive purview of Pardon Board. *See id.*; *see also* http://www.pardons.state.ne.us/faq.html.
- *Nonconviction records*: Criminal history information that has not resulted in a prosecution after a period of one year may not be disseminated except to law enforcement agencies; arrest records resulting from law enforcement "error" may be "expunged" by a court "upon proof by clear and convincing evidence." Neb. Rev. Stat. § 29-3523.

III. Nondiscrimination in Licensing and Employment: N/A

Nebraska has no general law regulating consideration of conviction in employment or licensure. It does apply a direct relationship test in connection with franchise licenses. *See* Neb. Rev. Stat. § 87-404 (franchise termination protections inapplicable when "the

alleged grounds are (a) the conviction . . . of an indictable offense directly related to the business").

MARCH 12, 2007

NEVADA

I. Automatic Restoration of Rights:

Persons convicted of "treason or felony in any state" lose the right to vote, hold office, and sit on jury. Nev. Const. art. 2, § 1; *id.* art. 15, § 3; Nev. Rev. Stat. § 6.010. Automatic restoration of right to vote and sit on civil jury to first offenders convicted of less serious non-violent offenses upon completion of sentence. § 213.155(1) (parole); § 213.157(1) (completion of sentence); § 176A.850(3) (probation). Fine or restitution may be forgiven if indigent. Offenders must wait four years to hold office and six years to sit on criminal jury. Persons with more than one conviction, and persons convicted of Class A and violent Class B offenses must either petition the Board of Pardons Commissioners for a pardon, or seek restoration of civil rights in the court in which they were convicted. § 213.090(2). Board does not accept applications from federal or out-of-state offenders. Firearms rights may be restored only by pardon. § 202.360(1)(a).

II. Discretionary Restoration Mechanisms:

A. Executive pardon:

- *Authority:* Nevada Constitution gives certain short-term clemency powers to the Governor (reprieves, suspensions). Nev. Const. art. 5, § 13. However the full clemency power is entrusted to a panel consisting of "the governor, justices of the supreme court, and attorney general, or a major part of them." *Id.* art. 5, § 14. Legislature has constituted this group as the Board of Pardons Commissioners. Nev. Rev. Stat. § 213.010(1). A majority of the Board can grant a pardon, but the Governor must be among the majority. Nev. Const. art 5, § 14. The legislature has specified Board operating procedures (see below) but it may not modify or restrict Board's powers. *King v. Board of Regents*, 200 P.2d 221 (Nev.1948). The Board is required to meet at least twice a year. Nev. Rev. Stat. § 213.010(2). Governor must report to the legislature at the beginning of each session every clemency action (no reasons necessary). Nev. Const. art 5,§ 13.
- *Administration:* The Chairman of the State Board of Parole Commissioners appoints a person to serve as secretary of the Board of Pardons Commissioners. Nev. Rev. Stat. § 213.017.
- *Eligibility:* According to Board staff, no formal eligibility criteria, though generally not considered favorably for "a significant period of time" after final discharge, during which time the applicant is expected to demonstrate "complete and total rehabilitation." Board accepts applications only from state offenders, and does not accept applications

from misdemeanants except domestic battery convictions, which represent about 5% of its caseload.

- *Effect:* *See* Op. Nev. Att'y Gen. (Nov 18, 2003), http://pardons.state.nv.us/PardonInformalOpinion.pdf: full and unconditional pardon removes all disabilities, including licensing barriers, but does not "erase conviction" or remove stigma of conviction. *See also* 1983 Op. Nev. Att'y Gen. 46. For sex offender, does not obviate need to register. http://pardons.state.nv.us/effect.htm. Pardon relieves firearms restrictions in state law (unless otherwise provided in the pardon document itself), and a pardoned conviction cannot serve as a predicate felony for federal firearms prosecution. *See* Op. Nev. Att'y Gen. (Nov. 18, 2003), *supra.*

  With regard to occupational licensing, *see* http://pardons.state.nv.us/effect.htm: "where a statute limits rights based on the underlying conduct and not the pardoned offense itself, a pardon would not remove or erase the disability of past conduct. If there is a requirement that the license applicant has not been convicted of a felony, the pardon would permit licensing. However, if the licensing standard is good moral character, the pardon does not erase the moral guilt associated with the commission of a criminal offense and the fact giving rise to that conviction may be considered in determining whether that person is of 'good moral character.'"

- *Process:* Public hearing in all cases where pardon is to be granted required by statute. Required procedures set forth in Nev. Rev. Stat. § 213.020 et seq. and in Nev. Admin. Code ch. 213, § 020 et seq. Application form at -- http://pardons.state.nv.us/communitycaseap3_04.pdf. Internet link to statutes at http://www.leg.state.nv.us/law1.cfm. Board meets twice a year, and all applications must be submitted at least 60 days before the meeting. Tough screening, only about 25% get to stage of extensive investigation by P&P, and in turn only about half of these are eventually recommended to Board. Applicant must give notice to county attorney and court of conviction, department of corrections, 30 days before filing. Nev. Rev. Stat. § 213.020. County attorney gives notice to victims. Applications generally presented to the Board only after recommendation of department of corrections and/or Secretary of the Board. *See* Nev. Admin. Code ch. 213, § 090. Hearing is informal, though Board may require applicant's presence. Ch. 213, § 190. Board also must give victim 15 days notice of hearing. Nev. Rev. Stat. §213.010(3). Decision by majority, which must include Governor. Proceedings subject to Nevada Administrative Procedure Act, so that minutes of meetings are public, including how each member voted.

- *Frequency of Grants*: Approximately 300 applications each year from "community cases," 12 granted in 2004. Source: Nevada Board of Pardons Commissioners.

- *Comment:* In 2003 Nevada legislature sought to limit authority of Pardons Commissioners by imposing on pardon application process the same waiting periods and eligibility requirements that apply to automatic restoration of rights under Nev. Rev. Stat. § 213.157. *See* § 213.090; http://www.leg.state.nv.us/72nd/bills/AB/AB55_EN.html. This statute limits Pardons Board's restoration authority to non-serious first offenders, and requires others to return to sentencing court for restoration. November 18, 2003 AG opinion, *supra*, questions legislative authority to limit pardon power, but attempts to strike compromise by stating that pardon document will specify which rights are being restored. Not clear what result if no such specifications – *i.e.,* what effect will be given effort in § 213.090 to limit effect of a pardon.

- *Certificates of Good Conduct:* Pardons Board by regulation may also issue "Certificates of Good Conduct" pursuant to Nev. Admin. Code § 213.130. According to 2003 AG opinion, such a certificate may issue: 1) to remove a legal disability incurred through conviction; 2) to furnish evidence of good moral character where it is required by law; or 3) upon proof of the person's performance of outstanding public services or if there is unusual and compelling evidence of his rehabilitation." This authority derives from regulation not Constitution, and thus may be regulated by legislature. *See* Op. Nev. Att'y Gen. (Nov. 18, 2003), *supra*. A five-year eligibility waiting period following release from custody or suspension of sentence or payment of fine. Out-of-state convictions are also eligible after a five-year residence in the state. Nev. Admin. Code § 213.140. The certificate avoids federal firearms bar, but only a pardon can removes state firearms disability. Certificate may relieve other disabilities such as those in licensing and employment laws, but each one must be listed. But license may still be denied based on conduct, and requirement of sex offender registration is not avoided.

  The Board has not issued a certificate of good conduct in many years, based upon its conclusion that certificates are in effect indistinguishable from pardons. Recently Board staff has been looking into the possibility of reviving the program.

- *Contact:* David Smith, dmsmith@dps.state.nv.us, Nevada Parole and Pardons Board; Monica Howk, Nevada Board of Pardons Commissioners , 775-684-2456.

B. <u>Judicial sealing or expungement of adult felony convictions:</u>

- *Restoration of Rights*: Pursuant to Nev. Rev. Stat. § 213.090(2), recidivists and serious or violent offenders may also go to court to regain civil rights (Nevada Attorney General rejects this statute as a limitation on constitutional pardon power. *See* Op. Nev. Att'y Gen. (Nov. 18, 2003), *supra*.

- *Sealing*: Nev. Rev. Stat. § 179.245. After an eligibility waiting period that varies depending on the seriousness of the offense (seven to 15 years after the date of conviction or release from actual custody, whichever is later, three years for misdemeanors), a person may petition the court in which he was convicted to seal all records related to the conviction. *Id.*. This relief is unavailable to sex offenders, § 179.245(5), and also to anyone who has been arrested during the eligibility waiting period. § 179.245(4).

- *Non-conviction records* may also be sealed at any time after completion of case. § 179.255.

- *Effect of sealing*: If the court seals the records, "all proceedings recounted in the record are deemed never to have occurred" (with exceptions related to law enforcement and subsequent offenses), and the person "may properly answer accordingly to any inquiry concerning the arrest, conviction, or acquittal and the events and proceedings related to the arrest, conviction, or acquittal." § 179.285. Having the conviction sealed sets aside conviction and may restore state firearm rights. *Cf. U.S. v. Laskie*, 258 F.3d 1047 (9th Cir. 2001) (probationary sentence "honorably discharged" and "set aside" under former § 179.225, cannot serve as a predicate felony for federal firearms prosecution); *see Dep't of Motor Vehicles and Pub. Safety v. Frangul*, 867 P.2d 397 (Nev. 1994) (sealing statute was enacted to remove ex-convicts' criminal records from public scrutiny and to allow convicted persons to lawfully advise prospective employers that they have had no criminal arrests and convictions with respect to the sealed events).

- *Sealing for Successful Probationers*: Nev. Rev. Stat § 176A.850 provides for automatic restoration of civil rights of persons who are "honorably discharged" from probation and have no serious prior record, and authorizes them to petition the court immediately for sealing under § 179.245 (above) if they are otherwise eligible. More limited remedy of sealing substituted in 2001 for broader "set-aside" relief in former § 176.225, construed in *U.S. v. Laskie*, 258 F.3d 1047 (9th Cir. 2001). Civil rights restored immediately are right to vote and to sit on civil jury; right to hold office and sit on criminal jury restored after additional waiting period (see section I, above).

- *Automatic sealing for certain minor offenders*: Probationers with mental illness or retardation three years after honorable discharge, Neb. Rev. Stat. § 176A.265, successful reentry program participants, § 179.259, and persons convicted of drug possession, § 453.3365.

C. Administrative certificate: N/A

III. Nondiscrimination in Licensing and Employment:

Nevada has no general law regulating consideration of conviction in employment or licensure. It does apply a direct relationship test in connection with some licenses. *See, e.g.,* Nev. Rev. Stat. § 625.410(4) (discipline permissible based on "Conviction of . . . any crime an essential element of which is dishonesty or which is directly related to the practice of engineering or land surveying").

JULY 27, 2005

NEW HAMPSHIRE

I. Automatic Restoration of Rights:

Follows Uniform Act on Status of Convicted Persons: The rights to vote and hold office are lost upon conviction of a felony, except that a person may vote if the sentence is suspended (with or without probation) or during any period of parole.. N.H. Rev. Stat. Ann. § 607-A:2(I)(a). The right to seek and hold public office is automatically restored upon final discharge. § 607-A:2(I)(b); *see Commentary: The Disenfranchisement of New Hampshire's Incarcerated Felons*, 42 N.H.B.J. 38 (2001). No disqualification from jury service. Certificates of discharge issued upon completion of the sentence or period of probation or parole that restore "the right to vote and to hold public office." Restoration of rights also available from Governor in the case of federal or out-of-state convictions. § 607-A:5.

Person convicted of "felony against the person or property of another" or a felony drug offense may not own or possess any firearm. N.H. Rev. Stat. Ann. § 159:3.

II. Discretionary Restoration Mechanisms:

A. Executive pardon:

- *Authority*: The pardon power (except in cases of impeachment) is vested in the Governor, "by and with the advice of the [Executive] Council," a core elected body of five that advises the Governor generally in carrying out his duties. N.H. Const. pt. 2, art. 52. The Executive Council is composed of five members, biennially elected from each of five counties of state, "for advising the governor in the executive part of government." N.H. Const. pt. 2, art. 60. According to the Office of the Attorney General, the constitutional requirement of "advice" has traditionally been interpreted to require the governor to obtain a supporting majority vote of the Council before issuing a pardon. Governor may not remit fines or forfeitures in criminal cases, and may not pardon before conviction. *Id.* pt.2, art. 52.
- *Eligibility*: Persons convicted under federal law or the law of another state are ineligible for gubernatorial pardons.
- *Effect:* A pardon "is an act of executive grace completely eliminating all consequences of the conviction, but it does not remove the record of the conviction." *Doe v. State*, 328 A.2d 784 (N.H. 1974).
- *Process: See* N.H. Rev. Stat. Ann. §§ 4:21 to 4:28. "On all petitions to the governor, written notice must be given to the state's counsel, and others as the governor may direct; and the prosecuting officer may be

required to furnish a concise statement of the case as proved at the trial and any other facts bearing on the propriety of granting the petition." § 4:21. In all cases where the petition is for the pardon of a person serving a sentence in the state prison, the commissioner of corrections shall make a report upon the petition before it is referred to the council."§ 4:22. No hearing is required.

- *Frequency of Grants*: Generally between 12 and 20 petitions are filed each year. Standards of review unstated. Two pardons have been granted since 1996: One in 1996 to a woman who murdered her husband (she remains on parole) and one in 2003 to a National Guardsman headed for Iraq who wanted firearms restoration. Source: Office of the Attorney General of New Hampshire.
- *Contact:* Robert S. Carey, Assistant Attorney General, New Hampshire Department of Justice, (603) 271-3671, robert.carey@doj.nh.gov; Audrey Blodgett, Office of the Attorney General, 603/271-3658, Audrey.blodgett@doj.nh.gov

B. Judicial sealing or expungement of adult felony convictions:

Annulment: N.H. Rev. Stat. Ann. § 651:5(I): "the record of arrest, conviction and sentence of any person may be annulled by the sentencing court at any time in response to a petition for annulment which is timely brought in accordance with the provisions of this section if in the opinion of the court, after hearing, the annulment will assist in the petitioner's rehabilitation and will be consistent with the public welfare." Waiting periods ranging from one to 10 years. §§ 651:5(III), 651:5(IV). Certain crimes excluded (obstruction of justice, violent crimes, and crimes for which an extended sentence was imposed). § 651:5(V). Recidivists must satisfy waiting period for all crimes, and not have any excludable crime. § 651:5(VI). Waiting periods lengthened in 1994. For rules governing application to annul record of conviction and sentence, see N.H. R. Super. Ct. 108 and N.H. R. Dist. & Mun. Ct. 2.18.

Upon entry of an order of annulment, the person "shall be treated in all respects as if he had never been arrested, convicted, or sentenced," except that, upon conviction of any later crime, the annulled conviction may be taken into account for sentencing purposes and may be counted toward habitual offender status. N.H. Rev. Stat. Ann. § 651:5(X)(a). "In any application for employment, license or other civil right or privilege, or in any appearance as a witness in any proceeding or hearing, a person may be questioned about a previous criminal record only in terms such as 'Have you ever been arrested for or convicted of a crime that has not been annulled by a court?'" § 651:5(X)(c). Records remain available to law enforcement. § 651:5(XI)(b). Otherwise, misdemeanor offense to disclose record of arrest or conviction annulled pursuant to this section. § 651:5(XII).

New Hampshire originally followed the scheme put forward by the National Council on Crime and Delinquency in 1962.

C. Administrative certificate: N/A

III. Nondiscrimination in Licensing and Employment: N/A

See above, N.H. Rev. Stat. Ann. § 651:5(X)(c), which limits questions from employers and licensing boards about annulled convictions.

APRIL 18, 2007

NEW JERSEY

I. Automatic Restoration of Rights:

The rights to vote and serve on a jury are lost to anyone who is serving a sentence for "any indictable offense," which includes all crimes except petty offenses. N.J. Stat. Ann. §§ 2C:51-3(a) and (b), 19:4-1(8)(voting); 2B:20-1(e)(jury).* The right to vote is automatically restored upon completion of the service of sentence, probation, or parole, whichever occurs last. § 19:4-1(8). If loss of the suffrage was imposed by the court as part of the punishment for a criminal violation of election laws, only a pardon restores the vote. §§ 19:4-1(6), (7). The right to sit on a jury is restored only by pardon.

A person holding public office or employment at the time of conviction of a crime involving dishonesty or a third or higher degree crime forfeits his position. N.J. Stat. Ann. § 2C:51-2(a). If offense is one "involving or touching on" his office or employment, he is "forever disqualified" from holding any office or employment. § 2C:51-2(d). This has been interpreted to extend to all government employment, and all serious felonies. *See Cedeno v. Montclair State University,* 750 A. 2d 73 (N.J. 2000); *Pastore v. County of Essex*, 568 A. 2d 81 (N.J. App. Div. 1989), *cert. denied* 584 A. 2d 205 (1990). These disabilities can be removed only by a governor's pardon, or by order of the Governor restoring rights under § 2A:167-5.

People convicted of bribery or misconduct in office are barred from public contracts for 10 years if second-degree crime, for five years if third-degree crime. § 2C:51-2(f). (The Attorney General may waive "as the public need may require." *Id.*)

II. Discretionary Restoration Mechanisms:

A. Executive pardon:

- *Authority*: The power to pardon is vested in the Governor, except in cases of treason and impeachment. N.J. Const. art 5, § 2, cl.1.** The

* Article 2, par 7 of the New Jersey Constitution provides that "The Legislature may pass laws to deprive persons of the right of suffrage who shall be convicted of such crimes as it may designate. Any person so deprived, when pardoned or otherwise restored by law to the right of suffrage, shall again enjoy that right." In 1979, New Jersey abandoned the classification of crimes as felonies, high misdemeanors, misdemeanors, and disorderly persons, and re-defined all non-capital offenses as either "crimes" or disorderly persons offenses. All "crimes" carry with them the right to be indicted by a grand jury and to trial by jury, and thus result in loss of civil rights.

** Under the 1844 Constitution, a court of pardons consisting of the Governor, the Chancellor, and six judges of the court of appeals, had authority to issue pardons. *See In re Court of Pardons*, 129 A. 624 (N.J. Pardons 1925). The power was placed with the Governor alone in the 1947 Constitution.

Constitution allows for the creation of a commission to assist and advise the governor on pardons, but no such single-purpose panel exists. Governor may also act to restore civil and all other rights, except the right to hold office. N.J. Stat. Ann. § 2A:167-5. (Latter statute does not seem to provide a separate process from pardon.) "On or before March 1 of each year, the Governor shall report to the Legislature each reprieve, pardon and commutation granted, stating the name of the convicted person, the crime for which the person was convicted, the sentence imposed, its date, the date of the pardon, reprieve or commutation and the reasons for granting same." § 2A:167-3.1.

- *Process:* The Governor may refer applications for pardon to the New Jersey State Parole Board for investigation and recommendation, N.J. Stat. Ann. § 2A:167-7, but the Board's recommendation is not binding on the Governor. *Zink v. Lear*, 101 A.2d 72 (N.J. Super. Ct. App. Div. 1954). Parole Board composed of 15 members (and three alternatives) appointed by the Governor with the advice and consent of the Senate for six-year terms. All but the alternates serve on a full-time basis. N. J. Stat. Ann. §§ 30:4-123.47(a) – (c). All policies and decisions are by majority vote. § 30:4-23.48(a). No regulations have been promulgated governing clemency applications.
- *Eligibility*: No formal eligibility requirements, except that federal offenders are not eligible for a gubernatorial pardon.
- *Effect*: Restoration of civil rights, presumably relief from all legal disabilities. Query whether it can restore right to hold office in light of reservation in N.J. Stat. Ann. § 2A:167-5. *In re L.B.*, 848 A.2d 899 (N.J. Super. Ct. Law Div. 2004) (pardon creates eligibility for expungement for ineligible offense).
- *Frequency of Grants*: Several hundred applications each year, but recent governors have granted pardons only at end of term – Gov. Whitman granted "about a dozen." Source: New Jersey Department of Criminal Justice.
- *Contact*: Susan Meier, NJ Dept of Criminal Justice, 609-984-2806. meiers@njdcj.org.

B. Judicial sealing or expungement of adult felony convictions:

First offender expungement: A person convicted of certain offenses under New Jersey law may seek expungement of his criminal record, provided he has no prior or subsequent felony conviction, N.J. Stat. Ann. § 2C:52-2(a), and has not previously had a criminal conviction expunged, or has ever been granted dismissal of criminal charges following completion of a supervisory treatment or diversion program. §§ 2C:52-14(e), 2C:52-14(f). Most serious and violent offenses, and drug offenses (ex. marijuana) are ineligible, as well as offenses by

public officials. §§ 2C:52-2(b), 2C:52-2(c). *See also In re L.B.*, 848 A.2d 899 (N.J. Super. Ct. Law Div. 2004) (pardon creates eligibility for expungement for otherwise ineligible offense). A special expungement procedure is provided for drug offenders whose conviction occurred prior to age 21. § 2C:52-5.

Non-conviction records: Arrest and other non-conviction data may also be expunged. § 2C:52-6.

- *Eligibility*: For "indictable" (felony) offenses, 10 years after conviction, payment of fine, or satisfactory completion of probation or parole, whichever is later. For misdemeanors, eligibility period is five years.
- *Process*: court may consider subsequent misdemeanor offenses if they are a continuation of type of unlawful conduct involved in conviction for which expungement sought.
- *Effect*: If expungement is granted, "the arrest, conviction and any proceedings related thereto shall be deemed not to have occurred, and the [person] may answer any questions related to their occurrence accordingly," with certain exceptions, such as when applying for a job in the judicial branch or in law enforcement. N.J. Stat. Ann. § 2C:52-27. Expunged events are deemed not to have occurred, and all noticed officers, departments and agencies are required to reply, when asked about records for the individual, that there is no record information. *Id.*

C. Administrative certificate

Certificate of Rehabilitation: N.J. Stat. Ann. § 2A:168A-3 (Rehabilitation of Convicted Offenders Act) provides that an individual who has previously been denied a license because of his conviction may go back to the licensing board with a certificate from the federal or state parole board, or from the responsible chief probation officer. This certificate, certifying that he "has achieved a degree of rehabilitation indicating that his engaging in the proposed employment would not be incompatible with the welfare of society, shall preclude a licensing authority from disqualifying or discriminating against the applicant." Rules require that two years must elapse before reapplication. N.J. Admin Code tit. 10A, § 70-8.2. This certificate does not restore civil rights or firearms privileges. *See United States v. Breckenridge*, 899 F. 2d 540 (6th Cir.), *cert. denied*, 498 U.S. 891 (1990).

As a practical matter, this statute has not proved useful, and no certificate has been sought or granted in the past 15 years. *See Storcella v. State, Dep't of Treasury*, 686 A.2d 789 (N.J. Super. Ct. App. Div. 1997), *cert. denied* 693 A.2d 110 (refusal to license, as agent for state lottery, party who had previously been convicted of gambling, bookmaking and other related criminal misconduct on very premises for which license was sought was not arbitrary, capricious, or unreasonable, though party had previously received gubernatorial pardon for his

criminal convictions; executive director of lottery could reasonably conclude that this prior misconduct adversely reflected upon party's moral character and would directly affect public perception of integrity of lottery). *But see Maietta v. New Jersey Racing Comm'n,* 459 A.2d 295 (N.J. Sup. Ct. 1983) (applicant for groom's license who had previously worked as a groom, who had been convicted five years before of drug offenses in which he was found to be a minor participant, who had not otherwise been engaged in criminal conduct, and who presented overwhelming evidence of rehabilitation, was improperly denied license).

III. Nondiscrimination in Licensing and Employment:

A. Licensing: N.J. Stat, Ann, § 2A:168A-1 (1968 Rehabilitated Convicted Offenders Act): "a person shall not be disqualified or discriminated against by any licensing authority because of any conviction for a crime, unless [the crime involves dishonesty in public service] or unless the conviction relates adversely to the occupation, trade, vocation, profession or business for which the license or certificate is sought." Statute premised on idea that it is "in the public interest to assist the rehabilitation of convicted offenders by removing impediments and restrictions upon their ability to obtain employment or to participate in vocational or educational rehabilitation programs based solely upon the existence of a criminal record." *Id.* In determining whether conviction relates adversely, licensing authority required to examine nature and seriousness of conviction, defendant's age at time of conviction, date of crime, evidence of rehabilitation; license denial or termination must set forth factor evaluation in writing. § 2A:168A-2. *See also* N.J. Stat. Ann. § 45:1-21 (licensing boards may suspend or terminate upon proof of conviction involving moral turpitude or "relating adversely" to activity regulated by board).

"In determining that a conviction for a crime relates adversely to the occupation, trade, vocation, profession or business, the licensing authority shall explain in writing how the following factors, or any other factors, relate to the license or certificate sought: a. The nature and duties of the occupation, trade, vocation, profession or business, a license or certificate for which the person is applying; b. Nature and seriousness of the crime; c. Circumstances under which the crime occurred; d. Date of the crime; e. Age of the person when the crime was committed; f. Whether the crime was an isolated or repeated incident; g. Social conditions which may have contributed to the crime; h. Any evidence of rehabilitation, including good conduct in prison or in the community, counseling or psychiatric treatment received, acquisition of additional academic or vocational schooling, successful participation in correctional work-release programs, or the recommendation of persons who have or have had the applicant under their supervision." N.J. Stat. Ann. § 2A:168A-2. Presentation of evidence of pardon or expungement, or certificate of rehabilitation from state or federal parole board,

"shall preclude a licensing authority from disqualifying or discriminating against the applicant." § 2A:168A-3.

Law enforcement agencies exempt. N.J. Stat. Ann. § 2A:168A-6. *See Matter of C. Schmidt & Sons, Inc.*, 399 A.2d 637 (N.J. 1979)(Rehabilitated Convicted Offender's Act does not apply to elaborate licensing provisions and controls spelled out in the Alcoholic Beverage Control Act, and thus director of alcoholic beverage control did not have to determine if licensees' corporate president's criminal convictions related adversely to business for which license was sought nor to explain in writing how eight factors specified in the RCOA related to license sought before denying licensure). *See also Maietta v. New Jersey Racing Com'n*, 459 A.2d 295 (N.J. 1983) (improper denial of groom's license).

B. Public Employment: New Jersey has a general statute, derived from section 306.1 of the Model Penal Code, that limits the collateral consequences of conviction to those that are necessarily incident to the execution of the court-imposed sentence, that are provided by the constitution or a statute, or that are provided by the judgment, order or regulation of a court or public official exercising a jurisdiction conferred by law "when the commission of the offense or the conviction or the sentence is reasonably related to the competency of the individual to exercise the right or privilege of which he is deprived." N.J. Stat. Ann. § 2C:51-1(a)(1) through (4).
One specific statutory authorization is contained in the so-called "forfeiture statute," which provides that conviction of any crime involving dishonesty or "of a crime of the third degree or above" while employed by the government results in forfeiture of office and employment. N.J. Stat. Ann. §§ 2C:51-2(a)(1), (d). While the scope of the forfeiture statute is not entirely clear, it the courts have generally required that there be at least some nexus between the conduct and the employment. *Compare Moore v. Youth Cor. Inst. at Annandale,* 574 *A.*2d 983 (N.J. 1990)(correctional officer's off-duty harassment of co-worker results in forfeiture) *with State v. Pavlik*, 832 A.2d 940, 943 (A.D.2003)(conviction for assault, criminal mischief, and harassment arising from a domestic dispute did not authorize forfeiture of employment as a laborer in the road maintenance division).
If employment forfeited, disqualification is permanent. § 2C:51-2.1, and applies to all public employment. *See Cedeno v. Montclair State Univ.*, 750 A.2d 73 (N.J. Sup. Ct. 2000) (university purchasing officer previously convicted of bribery); *Pastore v. County of Essex*, 568 A.2d 81 (N.J. Sup. Ct. App. Div. 1989), *cert. denied*, 584 A.2d 205 (1990) (golf course superintendent previously convicted of forgery and misappropriation of public funds). As noted, persons convicted of bribery or misconduct in office are barred from public contracts for 10 years. N.J. Stat. Ann. § 2C:51-2(f).

Conviction for health care claims fraud or insurance fraud: first offense requires suspension for one year, and second offense requires permanent disqualification from licensure "unless the court finds that such license forfeiture would be a serious injustice which overrides the need to deter such conduct by others and in such case

the court shall determine an appropriate period of license suspension which shall be for a period of not less than one year." N.J. Stat. Ann. § 2C:51-5(a).

MARCH 10, 2007

NEW MEXICO:

I. Automatic Restoration of Rights:

Civil Rights: Persons convicted of "a felonious or infamous crime" are ineligible to vote and hold office unless restored to political rights. N.M. Const. art. VII, §§ 1, 2. Right to vote restored automatically upon completion of sentence. N.M. Stat. Ann. § 31-13-1(A). Right to hold office or employment restored only with pardon or restoration of rights by Governor. §31-13-1(C); *see also* Op. N.M. Att'y Gen. No. 70-85 (1970).

Firearms: Firearm restoration is automatic ten years following the conviction, or upon an express restoration of firearm rights in a pardon. N. M. Stat. Ann. § 30-7-16; *see* Op. N.M. Att'y Gen. No. 92-09 (1992). The governor may, in appropriate cases, release a person from the provisions of § 30-7-16 if the conviction is a New Mexico conviction, but not a conviction under the laws of the United States or another state. Firearms rights also restored when sentence deferred and charged dismissed pursuant to § 31-20-9.

II. Discretionary Restoration Mechanisms:

A. Executive pardon:

- *Authority*: Exclusively in Governor. N.M. Const. art. V, § 6 ("Subject to such regulations as may be prescribed by law, the governor shall have power t o grant reprieves and pardons, after conviction for all offenses except treason and in cases of impeachment."); *see also* N.M. Stat. Ann. § 31-13-1(C). Governor's power extends to all state offenses but does not include convictions for violations of municipal ordinances.

- *Administration*: New Mexico Parole Board authorized to investigate requests for pardon, at the request of the Governor. N.M. Stat. Ann. § 31-21-17.

- *Eligibility*: Waiting period from five to ten years following satisfactory discharge of sentence, depending upon the seriousness of the offense. State of New Mexico, Executive Clemency Guidelines (available upon request from the Office of the Governor). The governor will not consider a case where there was successful completion of a deferred sentence, since a dismissal order under N. M. Stat. Ann. § 31-20-9 is intended to restore citizenship rights and the right to bear arms. Governor may issue a certificate of restoration but not pardon to federal offenders, but a person convicted in another state is ordinarily ineligible for relief.

- *Effect*: Restores rights of citizenship; gun rights must be specifically requested and requires an additional year wait.

- *Process*:
  - The Parole Board will examine the request to determine if it meets the criteria for consideration. If it does not, the board will notify the applicant and the governor, and no further action will be taken. If the applicant meets the criteria, the Parole Board, in turn, will call for a field investigation by the Corrections Department.
  - The Parole Board may also request the sentencing judge and/or prosecuting attorney involved in the particular case to provide pertinent input, including a recommendation for or against executive clemency.
  - The Parole Board will review the reports from the Corrections Department and all other material available to them, then submit a summary report with their recommendation to the governor.

- *Criteria and Standards*: (from Executive Clemency Guidelines) "Inasmuch, as a pardon restores citizenship rights, proof of ability to act as a responsible person is a condition for favorable consideration. To assist the recommending authorities in the evaluation process, applicants should include any significant achievements, such as employment and educational accomplishments; provide evidence of good citizenship and details about charitable and civic activities or other contributions made to the community. These guidelines apply to all applicants requesting a pardon. Ordinarily, pardon requests for misdemeanors, DWI, multiple felony convictions, sexual offenses and violent offenses or physical abuse involving minor children will not be granted." In addition to a clear record, "The applicant must be self-supporting and show evidence of support. Due regard will be given to consistent employment history, lack of criminal record since discharge; including municipal, state and federal offenses."

- *Frequency of Grants*: 110 pardons out of 2000 eligible applicants over last 7 years (as of 2002). Source: Governor's Office.

- *Contact*: 505-476-2200 – Justin Miller, Counsel's Office, Governor's Office.

B. <u>Judicial sealing or expungement of adult felony convictions:</u>

- Adult convictions may not be expunged or sealed. Deferred sentencing is available in all cases except those involving a first degree felony, N.M. Stat. Ann. § 31-20-3. Upon expiration of deferment period, charges dismissed and rights restored (including right to bear arms). Court has held that this statute does not erase conviction or expunge record. *See*

State v. Brothers, 59 P.3d 1268 (N.M. Ct. App. 2002), *cert. granted*, 59 P.3d 1262, *cert. quashed*, 73 P.3d 826 (sex offender required to register; even though charges had been dismissed, conviction still existed).

- Limited expungement only for first offender drug possession. N.M. Stat. Ann. § 30-31-28. Otherwise only for juvenile offenses under § 32A-2-26.

C. Administrative certificate: N/A

III. Nondiscrimination in Licensing and Employment:

Criminal Offender Employment Act (1974): N.M. Stat. Ann. §§ 28-2-1 et seq. Goal of Act: "The legislature finds that the public is best protected when criminal offenders or ex-convicts are given the opportunity to secure employment or to engage in a lawful trade, occupation or profession and that barriers to such employment should be removed to make rehabilitation feasible." § 28-2-2. In determining eligibility for public employment or a license, "agency having jurisdiction may take into consideration the conviction, but such conviction shall not operate as an automatic bar to obtaining public employment or license or other authority to practice the trade, business or profession." § 28-2-3(A). Records of arrest not resulting in conviction, and misdemeanor convictions not involving "moral turpitude," may not be considered. § 28-2-3(B). Convicted person may be disqualified based on conviction if: 1) if conviction relates directly to the position sought; 2) or if the board or other agency determines after investigation that the person so convicted has not been sufficiently rehabilitated to warrant the public trust; or 3) if an applicant for a teaching certificate or employment at child-care facility has been convicted of drug trafficking or sex offenses, regardless of rehabilitation. § 28-2-4(A); *see Weiss v. N.M. Bd. of Dentistry*, 798 P.2d 175 (N.M. 1990). Completion of parole or probation or a three-year period following release from incarceration creates a presumption of rehabilitation. § 28-2-4(B). Must state reasons in writing if decision is based on relationship between crime and employment, or on nature of offense in case of teaching or child-care licensure.

Wide variety of offenses (including drugs, fraud) disqualify from caregiver employment except that department of health may waive if employment presents no risk of harm to a care recipient or that the conviction does not directly bear upon the applicant's or caregiver's fitness for the employment. N.M. Stat. Ann. § 29-17-5. Other professions are similarly specific.

MARCH 11, 2007

NEW YORK

I. Automatic Restoration of Rights:

In New York, the right to vote is lost upon conviction of a felony if sentenced to a term of actual imprisonment, and restored upon expiration of sentence of imprisonment, including parole. *See* N.Y. Elec. Law § 5-106(2)("No person who has been convicted of a felony pursuant to the laws of this state, shall have the right to register for or vote at any election unless he shall have been pardoned or restored to the rights of citizenship by the governor, or his maximum sentence of imprisonment has expired, or he has been discharged from parole"); § 5-106(3)(federal convictions); § 5-106(4)(out-of-state convictions). These provisions "shall not apply if the person so convicted is not sentenced to either death or imprisonment, or if the execution of a sentence of imprisonment is suspended." § 5-106(5). The right to vote is automatically restored upon expiration of sentence or discharge from parole.

A person convicted of a felony may not serve on a jury, N.Y. Jud. Law § 510(3), and forfeits public office. N.Y. Pub. Off. Law § 30(1)(e). New York does not disqualify a convicted person from holding future office. *See* Op. Att'y Gen. 83-60(1983). *But see* N.Y. Const. art VI, § 22(h)(judges removed from office disqualified from future judicial office); *In re Alamo v. Strohm*, 544 N.E. 2d 608 (1989) (officeholder who forfeits office is ineligible to stand for election to the remainder of the unexpired term).

Rights lost may be restored either by a Governor's pardon (rarely granted, *see* IIA below), or by a Certificate of Relief from Disabilities or Certificate of Good Conduct (available from sentencing court or Parole Board, see IIC below).

II. Discretionary Restoration Mechanisms:

A. Executive pardon:

- *Authority:* The pardon power is vested in the Governor (except in cases of treason or impeachment). N.Y. Const. art 4, § 4. May be regulated only as to the manner of applying. Governor must report annually on number of pardons and his reasons for granting.
- *Administration*: Board of Parole must advise Governor on clemency cases if requested. N.Y. Exec. Law § 259-c. Absent exceptional or compelling circumstances, a pardon will not be considered if there is an adequate administrative remedy available. Pardon is considered only if there is no other legal remedy in three cases: 1) to set aside a conviction in cases of innocence; 2) to relieve collateral disability ("This is rarely used since relief may generally be obtained by means of a Certificate of Good

a broad public policy of protecting those who have been charged but not convicted, or convicted of minor offenses, from the collateral consequences arising from any criminal record.

Deferred sentencing and diversion options: An offender may plead guilty and have sentencing deferred upon agreement to participate to in-patient drug treatment under Drug Treatment Alternative to Prison (DTAP) program initiated by Kings County District Attorney, and now available in 28 other counties. The program targets drug-addicted defendants arrested for nonviolent felony offenses who have previously been convicted of one or more nonviolent felonies. Qualified defendants enter a felony guilty plea and receive a deferred sentence that allows them to participate in a residential therapeutic community (TC) drug treatment program for a period of 15 to 24 months. Those who successfully complete the program have their charges dismissed, and the record sealed. Those who fail are brought back to court by a special warrant enforcement team and sentenced to prison. See http://www.brooklynda.org/dtap/dtap.htm
Other deferred adjudication or deferred sentencing programs may also be available for minor offenders, and people with mental illness, which may result in dismissal of charges and no record. See, e.g., http://www.brooklynda.org/dtap/TADD.htm.

C. Administrative certificate:

A Certificate of Relief from Disabilities, N.Y. Correct. Law §§ 700-705, or a Certificate of Good Conduct, §§ 703-a, 703-b, may be obtained to restore certain rights, and may be limited to one or more specific rights. Their purpose is to effectuate the public policy of encouraging the licensure and employment of convicted individuals. *See People v. Adams,* 747 N.Y. S. 2d 909 (2002).

A Certificate of Relief from Disabilities (CRD) is available to people with no more than one felony conviction and any number of misdemeanor convictions, either from the sentencing court (for misdemeanor convictions and non-prison state sentences for felony convictions), or from the Board of Parole (for persons sentenced to imprisonment under New York law or who reside in New York but were convicted in another jurisdiction), N.Y. Correct. Law §§ 700(1)(a), 703(1). It may be granted

> to relieve an eligible offender of any forfeiture or disability, or to remove any bar to his employment, automatically imposed by law by reason of his conviction of the crime or of the offense specified therein. Such certificate may be limited to one or more enumerated forfeitures, disabilities or bars, or may relieve the eligible offender of all forfeitures, disabilities and bars. Provided, however, that no such certificate shall apply, or be construed so as to apply, to the

right of such person to retain or to be eligible for public office.

Section 701(1). The court may issue a CRD at the time sentence is pronounced, in which case it may grant relief from forfeitures as well as from disabilities, or at any time thereafter. § 702(1). The Parole Board may issue a CRD at any time after release from prison. § 703(1)(a). A CRD is also available to people with federal convictions who reside in New York at sentencing, or at any time thereafter. If issued prior to expiration of supervision, it is deemed temporary, and may be revoked. § 703(4). Important to obtain at sentencing in order to avoid public housing and employment bars. Court or Board must find that the issuance of a CRD is "consistent with the rehabilitation of the eligible offender," and "consistent with the public interest." §§ 702(2), 703(3).

Certificate of Good Conduct (CDC) is available to people with multiple felony convictions from the Board of Parole, "or any three members thereof by unanimous vote," after a waiting period of one to five years, depending on seriousness of offense(s). N.Y. Correct. Law §§ 703-b(3)(1)–(3). A Certificate of Good Conduct is available to persons convicted outside New York, including federal offenders. § 703-b(2). It is granted only if the person has demonstrated "good conduct" for the requisite period and if (like the CRD) granting relief would be "consistent with the rehabilitation of the eligible offender" and "consistent with the public interest." § 703-b(1). If granted during a period of parole it may be temporary, and may be revoked at any time until the Board's jurisdiction is ended.

Persons convicted in jurisdictions outside New York State must in addition demonstrate a specific disability resulting from New York law that would warrant granting relief in New York. § 703-b(2).

Effect: Certificates issued under either N.Y. Correct. Law § 703 (CRD) or § 703-b (CGC) have essentially the same effect: they relieve an eligible person of "any forfeiture or disability," and "remove any barrier to . . . employment that is automatically imposed by law by reason of conviction of the crime or the offense." §§ 701(1), 703-a. (The CRD statute contains certain exceptions that apparently do not apply to CGCs, as described in the section on "public office," below.) A certificate may be limited to particular disabilities, and the relief may be enlarged by the court or Board of Parole at any time, to include firearms permits. A certificate does not preclude employers or licensing agencies from considering the conduct underlying the conviction as a factor in licensing or other discretionary decisions, but it creates a "presumption of rehabilitation" that must be given some effect in deciding whether there is a disqualifying "direct relationship" between a crime and a job or license. *See* N.Y. Correct. Law § 753 (Part III infra).

Neither type of certificate voids the conviction as if it were a pardon. N.Y. Correct. Law § 706. (As noted above in IIA, gubernatorial pardons are not generally available in New York State.) Nor does a certificate preclude a licensing agency from relying on the conviction as the basis for the exercise of its

discretionary power to deny or revoke a license. §§ 701(3), 703-a. *See, e.g., People v. Adams,* 747 N.Y. S. 2d 909 (2002)(CRD creates a "presumption of rehabilitation" and removes the automatic bar from obtaining a license, but does not establish a prima facie entitlement to the license; the licensing agency still maintains the ultimate control whether to grant the license). CRD does not authorize a job applicant with a criminal record to deny on an employment application that he has ever been convicted of a crime, but the employer must consider the certificate, which establishes a "presumption of rehabilitation" as to the criminal offenses specified in the certificate. See § 753(2), discussed in Part III infra; Op. Atty Gen. (Inf.) 81-124 (1981).

These certificates, with certain exceptions, preclude reliance on the conviction as an automatic bar or disability, but they do not preclude agencies from considering the conviction as a factor in licensing or other decisions. N.Y. §§ 701(3), 703-a(3). *Compare Meth v. Manhattan and Bronx Surface Transit Operating Auth.*, 521 N.Y.S.2d 54 (N.Y. App. Div. 1987) (transit authority improperly denied employment as a bus driver to man convicted of bribery, who had been granted certificate of relief from disabilities; authority presented no evidence of consideration of the eight factors to rebut the presumption of rehabilitation that the certificate of relief from disabilities creates), *with Soto-Lopez v. New York City Civil Serv. Comm'n*, 713 F. Supp. 677 (S.D.N.Y. 1989) (dated manslaughter conviction alone was not directly related to a caretaker position nor did it pose an unreasonable risk to persons or property; however, unreasonable risk test met when combined with more recent conviction for sale of narcotics).

Public Office: A CRD does not apply to "the right of such person to retain or to be eligible for public office." § 701(1). Nor does a CRD overcome automatic forfeiture resulting from convictions for violations of N.Y. Pub. Health Law § 2806(5) (nursing home operator's license) or N.Y. Veh. & Traf. Law § 1193(f)(2) (drivers license suspension). However, these exceptions do not appear in the statute authorizing issuance of CGCs. Therefore, a CGC would appear to be sufficient to overcome bars to public employment. *Compare People v. Olensky,* 91 Misc. 2d 225, 397 N.Y.S. 2d 565 (1977)(Notary Public was a "public officer" so that CRD not sufficient to enable defendant to obtain a notary public commission and work as a court reporter); with N.Y. Exec. Law § 130 (executive pardon or CGC sufficient to overcome bar to notary public position for person with conviction). Accordingly, a first offender who is eligible for a CRD must in addition obtain a CGC if he wishes to obtain certain kinds of public employment deemed to be a "public office," or over come the specific disabilities in the public health and vehicle codes. *But see People v. Flook,* 164 Misc. 2d 284, 285 (1995)(noting that some licensing statutes require persons convicted of the designated crimes to obtain a CGC and others permit them to obtain either a CGC or a CRD, and finding no relevant distinction between the two statutes for purposes of restoration of firearms rights).

Firearms: A Certificate of Relief from Disabilities may expressly restore firearm rights. N.Y. Correct. Law §§ 700(1)(a), 701(1). It is not clear whether a CRD can provide relief from the federal firearms bar.

Process: Application for CRD at www.courts.state.ny.us/6jd/forms/dmv/dp-52.pdf. The court may request an investigation from the probation service, and a written report. § 702(3). If a CRD is sought from the Parole Board after service of a prison term, the process may take several months. *See* http://parole.state.ny.us/ParoleCert.pdf. Certificate may be temporary during the period of parole, and becomes permanent if not revoked. "In granting or revoking a certificate of relief from disabilities the action of the board of parole shall be by unanimous vote of the members authorized to grant or revoke parole. Such action shall be deemed a judicial function and shall not be reviewable if done according to law." § 703(5).
The process for seeking a CGC is more or less the same, except that an applicant must satisfy the "good conduct" waiting period specified in § 703-b(3). The waiting period "shall be measured either from the date of the payment of any fine imposed upon him or the suspension of sentence, or from the date of his unrevoked release from custody by parole, commutation or termination of his sentence." Id. The board "shall have power and it shall be its duty to investigate all persons when such application is made and to grant or deny the same within a reasonable time after the making of the application." Vote by whole board, or of a unanimous three-member panel. § 703-b(1).

Frequency of Grants: According to the Division of Criminal Justice Services, an average of 3200 certificates of both kinds are issued each year. (This data is not broken down by type of certificate. However, the Division also reports that between 1972 and 2003 there were almost 100,000 CRDs granted, but only 1826 CGCs.) Approximately 1000 applications are made to the Parole Board for both kinds of certificates annually, of which about half are granted. (About 95% of CGC applications are granted.) The bulk of the remaining grants are made by the courts. A recent report of a New York State Bar Association committee speculated that the relatively low number of certificates issued each year can be attributed by the fact that most offenders are not told about them. *See* "Reentry and Reintegration: The Road to Public Safety: Report and Recommendations of the Special Committee on Collateral Consequences of Criminal Proceedings" at 99-106 (May 2006), http://www.nysba.org/MSTemplate.cfm?Section=Report__Re-Entry_and_Reintegration__The_Road_to_Public_Safety&Site=Special_Committee_on_Collateral_Consequences_of_Criminal_Proceedings&Template=/ContentManagement/HTMLDisplay.cfm&ContentID=74434.

Contact: Felix Rosa, Director of Executive Clemency and Secretary of the Parole Board. frosa@parole.state.ny.us. 518-473-5424.

III. Nondiscrimination in Licensing and Employment:

- NYS Human Rights Law, N.Y. Exec. Law § 296(16), prohibits public and private employers and occupational licensing agencies from denying any individual employment or a license (or otherwise discriminating against that person) because of any arrest that did NOT result in a conviction. (These arrests should be sealed under N.Y. Crim. Proc. Law § 160.50 and viewed as a legal nullity under § 160.60.) These protections do not apply to police or law enforcement jobs. Also, they apply only to applicants for employment, not current employees.
- N.Y. Correct. Law §§ 750-755 make it unlawful for public employers, occupational licensing authorities, and private employers with more than 10 employees, to discriminate against current or potential employees based on a previous conviction. Law enforcement positions are excluded fron the definition of "employment" under this section. § 750(5). Employers and licensing agencies may not disqualify people based upon their criminal record unless disqualification is mandated by law, and the person has not received a certificate of relief from disabilities or certificate of good conduct. § 751. They may not "discriminate against" applicants with criminal records unless:
  (1) there is a "direct relationship" between one or more of the previous criminal offenses and the specific license or employment sought; or
  (2) the issuance of the license or the granting of the employment would involve an unreasonable risk to property or to the safety or welfare of specific individuals or the general public. § 752.
  The term "direct relationship" is defined as follows: "the nature of criminal conduct for which the person was convicted has a direct bearing on his fitness or ability to perform one or more of the duties or responsibilities necessarily related to the license or employment sought."

Section 753(1) provides that it making a determination under § 752 a public agency or private employer "shall consider" the following factors:
(a) "the public policy of this state . . . to encourage the licensure and employment of all persons previously convicted of one or more criminal offenses;"
(b) specific duties and responsibilities necessarily related to the license or employment sought;
(c) the relation of the conviction to the applicant's ability to perform his responsibilities;
(d) time elapsed since offense;
(e) age of the person at the time of offense;
(f) seriousness of the offense;
(g) any information produced by the person, or produced on his behalf, in regard to his rehabilitation and good conduct; and
(h) the interest of the employer of protecting property, and the safety and welfare of individuals or the general public.

Section 753(2) provides that the public agency or private employer

shall also give consideration to a certificate of relief from disabilities or a certificate of good conduct issued to the applicant,* which certificate shall create a presumption of rehabilitation in regard to the offense or offenses specified therein.

This provision has been interpreted by the courts top create a presumption of rehabilitation that must be given effect by the employing or licensing agency. *See Bonacorsa v. Lindt*, 71 N.Y. 2d 605, 611 (1988)(Presumption of rehabilitation created by certificate of good conduct applies, even when applicant's prior conviction directly related to license or employment sought; because presumption applies, agency or employer must consider statutory factors to determine whether direct relationship is sufficiently attenuated to warrant issuance of license or employment). *See also Arrocha v. Board of Educ. Of City of New York,93 N.Y. 2d 361 (1999)(*Board of Education's determination that teaching license applicant's prior conviction for sale of cocaine came within statutory "unreasonable risk" exception to general rule that prior conviction should not place person under disability, was neither arbitrary nor capricious, where Board properly considered all statutory factors and determined that those weighing against granting license outweighed those in favor; age of conviction, applicant's positive references and educational achievements, and presumption of rehabilitation were outweighed by teacher's responsibility as role model and nature and seriousness of applicant's offense.).

If denied employment or licensure based on conviction, an individual is entitled to a statement of reasons. § 754. Section 755 specifies the mode of enforcement (in case of public employer through a civil action, and private employer through division of human rights and commission on human rights).

- Hazmat Drivers Licenses – New York law disqualifies persons from obtaining a Hazmat endorsement to a commercial truckers license who have been convicted of certain felonies within the past ten years, or who have been released from prison within the past ten years. N.Y. Vehicle & Traffic Law § 501(6). This law contains no provision for waiver. It imposes a stricter standard than the federal law (seven and five years waiting period, with a waiver provision).
- Methods of enforcement of the New York nondiscrimination law, and a review of employment discrimination claims filed by convicted persons with New York's Division of Human Rights, can be found at http://www.altrue.net/altruesite/files/hprp/publications/abell%20final.pdf), Homeless Persons Representation Project, "Ex-Offenders and Employment: A Review of Maryland's Public Policy and a Look at Other States," December 2001, rev. June 2002).

* Certificate of Relief from Disabilities, N.Y. Correct. Law §§ 700-703, or a Certificate of Good Conduct, §§ 703-a, 703-b, may be obtained to restore certain rights, and may be limited to one or more specific rights. *See* discussion in Part II C above.

JUNE 11, 2007

NORTH CAROLINA

I. Automatic Restoration of Rights:

Civil rights are lost upon conviction of a felony. N.C. Const. art. VI, § 2(3) (vote); *id.* § 8 (office); N.C. Gen. Stat. § 9-3 (jury). Automatically restored upon unconditional discharge of sentence or unconditional pardon. N.C. Gen. Stat. § 13-1. A certificate evidencing unconditional discharge and restoration of the rights of citizenship must be filed with the court in the county of conviction (North Carolina state offenses) or the county of residence (for offenses under federal law or the law of another state). § 13-2. As of 1995, people with felony convictions may not possess firearms, absent a pardon. § 14-415.1(b)(1).

II. Discretionary Restoration Mechanisms:

A. Executive pardon:

- *Authority*: Governor's power unlimited, subject to restriction only in the manner of applying. N.C. Const. art. III, § 5(6). Post Release Supervision and Parole Commission has authority to assist the Governor in investigating pardon applications, N.C. Gen. Stat. § 143B-266(a), which it may do at the request of the Governor's office.
- *Eligibility*: Five-year waiting period from release from supervision, which may be reduced if specific need is shown. Persons convicted under federal law or the law of another state are not eligible to apply for a gubernatorial pardon. Three-year wait to reapply after denial.
- *Effect:* According to the website of the Governor's Clemency Office, there are three types of pardon in North Carolina: pardon of forgiveness, which does nor erase or expunge, or restore firearms rights, but is useful in seeking employment; and unconditional pardon is generally given to restore firearms privileges; pardon of innocence. Only the last-mentioned provides basis for judicial expungement. See http://www.doc.state.nc.us/clemency/glossary.htm.
- *Process:* N.C. Gen. Stat. § 147-21 provides that all applications must be submitted to the Governor in writing, and accompanied by a statement of reasons and a copy of the indictment. The Governor's Clemency Office oversees and coordinates investigations by the Parole Commission, and prepares reports. See application forms at http://www.doc.state.nc.us/clemency/. All applicants for clemency are also listed, with details of their offense conduct. By statute OEC must notify victim when considering clemency grant. § 15A-838. Victim has constitutional right to notice, and also to present written statement to OEC. By executive order DA in county of conviction must be notified.

- *Frequency of Grants*: Pardons rare – only two since 2001, both granted for innocence. Average about 60-80 applications annually. Recommendations are submitted by Governor's clemency staff to Governor's Legal Counsel. In past governors have pardoned fairly regularly, but present governor has not. Source: Governor's Office of Executive Clemency.
- *Contact*: Pat Hansen, Governor's Clemency Office, 919-715-1695. clemency@ncmail.net

B. Judicial sealing or expungement of adult felony convictions:

- *Youthful misdemeanor offenders*: First offender misdemeanors committed under age 18, and first offender alcohol-possession misdemeanors committed under age 21, may be expunged two years after commission of offense or any period of probation, whichever is later. *See* N.C. Gen. Stat. § 15A-145. Effect of expungement is that person is "restored, in the contemplation of the law, to the status he occupied before such arrest or indictment or information." *Id.* Law enforcement records also expunged, though retained for court to determine whether previous conviction.

- *Nonconviction records*: Where charges are dismissed or the person found not guilty, may apply to the court for expungement if no prior felony convictions or expungements. §§15A-146(a). "No person as to whom such an order has been entered shall be held thereafter under any provision of any law to be guilty of perjury, or to be guilty of otherwise giving a false statement or response to any inquiry made for any purpose, by reason of his failure to recite or acknowledge any expunged entries concerning apprehension or trial." See also 15A-147(a)-(b)(expungement in case of identity theft); § 15A-149 (innocence).

- *First-offender misdemeanor drug cases*: Deferred adjudication for first offender misdemeanor and minor drug offenses: charges dismissed if probation completed successfully (including any treatment ordered). No conviction results, including for predicate offense purposes. N.C. Gen. Stat § 90-96(a). If under 21, records of arrest may be expunged. § 90-96(b); § 90-96(d).

C. Administrative certificate: N/A

III. Nondiscrimination in Licensing and Employment:

North Carolina has no general law regulating consideration of conviction in employment or licensure. It does apply a direct relationship test in connection with some licenses. *See, e.g.,* N.C. Gen. Stat. § 88A-21(a)(1) (grounds for

discipline include "Conviction of [a crime] if any element of the crime directly relates to the practice of electrolysis").

JULY 27, 2005

NORTH DAKOTA

I. Automatic Restoration of Rights:

The rights to vote and to hold public office are lost upon conviction of a felony and sentence to imprisonment, "during the term of actual incarceration," N.D. Cent. Code § 12.1-33-01, and restored upon release from prison. § 12.1-33-03. Release from incarceration also restores the right to sit on a jury, except for certain offenses. *See* § 27-09.1-08(2)(e).

Firearm privileges are automatically restored 10 years following a conviction or release from incarceration or probation, whichever is later, and five years after a misdemeanor conviction or release from incarceration or probation. N.D. Cent. Code §§ 62.1-02-01(1), 62.1-02-01(2).

II. Discretionary Restoration Mechanisms:

A. Executive pardon:

- *Authority*: The constitution vests the pardon power (except in cases of treason or impeachment) in the Governor. N.D. Const. art 5, § 7. Governor may (but is not required to) appoint a Pardon Advisory Board, consisting of state Attorney General, two members of the Parole Board, and two citizens. N.D. Cent. Code § 12-55.1-02.*
- *Eligibility*: Under Board rules, applicant "must have encountered a significant problem with the consequences of his or her conviction or sentence (e.g. difficulty entering a professional school or securing employment)" or demonstrate some other "compelling need for relief as a result of unusual circumstances." http://www.state.nd.us/docr/parole/pardon_policy.htm. Persons convicted under federal law or the laws of another state are ineligible for a state pardon.
- *Effect:* Ordinarily pardon relieves collateral legal penalties, but does not expunge conviction. N.D. Cent. Code § 12-55.1-01.
- *Process:* The Pardon Advisory Board is not an administrative agency as defined under N.D. Cent. Code § 28-32-01(2)(a) and is not subject to the Administrative Agencies Practice Act. § 28-32-01(2)(n). Any rules the

* Until a 1996 constitutional amendment, the pardon power in North Dakota was exercised by the Board of Pardons, composed of the Governor, the Attorney General, the Chief Justice, and two appointees of the Governor. *See* N.D. Const. art 5, § 6 (1995). The Board's procedures and administrative process were detailed in N.D. Cent. Code § 12-55-01 et seq. (1995). *See* Nat'l Governors' Ass'n, *Guide to Executive Clemency Among the American States* 122-124 (1988).

Board may adopt need not be published in the N.D. Admin. Code. See above for internet cite to rules. Board meets twice a year to consider cases. Director of Field Services Division of Parole Board serves as Pardon Clerk. § 12-55.1-05. Application form at: http://www.cjpf.org/clemency/NorthDakotaApp.pdf. After application filed, Pardon Clerk must notify sentencing judge and state's attorney, who file with court their recommendations. §§ 12-55.1-07, 12-55.1-09. Pardon Clerk also directs field investigation, and prepares packet of cases for Board's semi-annual meeting. Applicants are immediately notified of the Board's recommendation to the Governor. The Governor's office follows up by sending a letter notifying the applicant of the Governor's decision. Law provides for reconsideration and revocation within 30 days. § 12-55.1-08.

- *Frequency of Grants*: 21 applications received in 2004, only two granted, 17 denied, two remain pending. Source: Pardon Advisory Board.
- *Contact:* Warren R. Emmer, Pardon Clerk, Pardon Advisory Board PO Box 5521, Bismarck, ND 58506-5521, 701-328-6192, wemmer@state.nd.us. Also Legal Counsel Ken Sorenson, ksorenso@state.nd.us.

B. Judicial sealing or expungement of adult felony convictions:

Set-aside for minor offenses: North Dakota law provides procedures for reducing a state felony conviction to a misdemeanor, N.D. Cent. Code § 12.1-32-02(9), and for "vacating" a state felony conviction after service of a probationary sentence. § 12.1-32-07.1. Under § 12.1-32-02(9), a person convicted of a felony (other than certain drug offenses) and sentenced to imprisonment for not more than one year "is deemed to have been convicted of a misdemeanor" upon successful completion of the term of probation imposed as part of the sentence. Under § 12.1-32-07.1, a person placed on probation when imposition of sentence is deferred may, in the court's discretion, be permitted to withdraw his guilty plea after completion of probation or discharge from probation, and the court may set aside the verdict of guilty and dismiss the information or indictment. Before dismissing the charge, the court may also reduce a felony conviction to a misdemeanor, which has the effect of releasing the defendant from all penalties and disabilities resulting from the offense, except for firearms disabilities. However, the court has no authority to expunge or seal records.

Expungement for first offender marijuana possession (misdemeanor): N.D. Cent. Code § 19-03.1-23: "Whenever a person pleads guilty or is found guilty of a first offense regarding possession of one ounce [28.35 grams] or less of marijuana and a judgment of guilt is entered, a court, upon motion, shall expunge that conviction from the record if the person is not subsequently

convicted within two years of a further violation of this chapter and has not been convicted of any other criminal offense."

C. Administrative certificate: N/A

III. Nondiscrimination in Licensing and Employment:

N.D. Cent. Code § 12.1-33-02.1: A person may not be "disqualified to practice, pursue, or engage in any occupation, trade, or profession for which a license, permit, certificate, or registration is required ... solely because of prior conviction of an offense." A person may be denied licensure because of a prior conviction only "if it is determined that such person has not been sufficiently rehabilitated, or that the offense has a direct bearing upon a person's ability to serve the public in the specific occupation, trade, or profession. A state agency, board, commission, or department shall consider the following in determining sufficient rehabilitation: a) the nature of the offense and whether it has a direct bearing upon the qualifications, functions, or duties of the specific occupation, trade, or profession; b) Information pertaining to the degree of rehabilitation of the convicted person; and c) the time elapsed since the conviction or release. Completion of a period of five years after final discharge or release from any term of probation, parole or other form of community corrections, or imprisonment, without subsequent conviction shall be deemed prima facie evidence of sufficient rehabilitation. If conviction of an offense is used in whole or in part as a basis for disqualification of a person, such disqualification shall be in writing and shall specifically state the evidence presented and the reasons for disqualification. A copy of such disqualification shall be sent to the applicant by certified mail."

The "direct bearing" standard and "rehabilitation" tests of this statute are incorporated into dozens of licensing statutes in the N.D. Cent. Code, including: liquor licenses (§ 5-03-01.1); teachers (§ 15.1-13-25); residential treatment centers for children (§ 25-03.2-04); architects and landscape architects (§ 43-03-13); lawyers (§ 27-14-02); barbers (§ 43-04-31.1); electricians (§ 43-09-09.1); funeral service director (§ 43-10-11.1); and pharmacists (§ 43-15-18.1).

MARCH 7, 2007

OHIO

I. Automatic Restoration of Rights:

A felony conviction results in the loss of civil rights, except that a person may vote during a period of probation ("non-jail community control sanction") or parole. Ohio Rev. Code Ann. § 2961.01(A). Other civil rights are restored upon a final release from parole or post-release control. § 2967.16(C). A final release is not available earlier than one year after release on parole or post-release control, and in the case of a person serving a minimum sentence of life, not earlier than five years after release on parole or post-release control. § 2967.16(A). A person sentenced to a "community control sanction" (including probation or a fine) regains the right to hold office and sit on a jury upon completion of the sanction. §§ 2961.01, 2967.16(C)(3).

The disqualification from office or employment for persons convicted of soliciting or receiving improper compensation terminates seven years after the date of conviction. Ohio Rev. Code Ann. § 2921.43(E).

The general restoration of rights includes only civil rights and not firearms privileges, which may be restored either by a pardon or by a court (see below).

A general survey of the collateral consequences of conviction in Ohio can be found in Kimberly R. Mossoney and Cara A. Roecker, "Ohio Collateral Sanctions Project," 36 U. Toledo L. Rev. 611 (2005).

II. Discretionary Restoration Mechanisms:

A. Executive pardon:

- *Authority*: Ohio Const. art. III, § 11: The pardon power, except for treason and cases of impeachment, is vested in the Governor, "subject ... to such regulations as to the manner of applying for commutations and pardon, as may be prescribed by law." Ohio Rev. Code Ann. § 2967.07 requires that all applications for clemency be made in writing to the Adult Parole Authority (part of Parole and Community Services Division of Department of Corrections), which is required by law to investigate and make a recommendation to the Governor on every application, but whose recommendation is advisory only. The constitution requires that the Governor must report to the legislature at every session. Ohio Const. art. III, § 11.
- *Administration:* "The Ohio Parole Board is the bureau of the Adult Parole Authority assigned to process clemency applications. The Governor may also direct the Parole Board to investigate and examine any case for the

propriety of clemency. Upon completion of its examination, the Parole Board sends a report to the governor providing a summary of the facts in the case, a recommendation for or against the granting of clemency, and the reasoning behind the recommendation." http://www.drc.state.oh.us/web/ExecClemency.htm.

- *Eligibility:* A person may apply for a pardon at any time, though ordinarily clemency is granted after a person has shown "an ability to live a crime-free lifestyle." *See* Ohio Parole Board Application for Executive Clemency Instructions and Guidelines at http://www.cjpf.org/clemency/OhioApp2.pdf. Also, a person who is denied clemency must wait two years to re-apply unless they Parole Board determines otherwise. Only Ohio convictions eligible. *Id.*
- *Effect:* An unconditional pardon "relieves the person to whom it is granted of all disabilities arising out of the conviction or convictions from which it is granted." Ohio Rev. Code Ann. § 2967.04(B). It "purges away all guilt and leaves the recipient from a legal standpoint in the same condition as if the crime had never been committed." *See State v. Cope* , 676 N.E.2d 141, 142 (Ohio Ct. App. 1996), *appeal denied*, 673 N.E.2d 135 (Ohio 1996), quoting from *State ex rel. Gordon v. Zangerle*, 26 N.E. 2d 190, 194 (Ohio 1940). Since a pardon "erases" the conviction, the recipient is "entitled" to have the court seal its records. *Id.* at 143. A person who has been pardoned may deny that he has a criminal record.
- *Process:* Application to Parole Board, which conducts investigation. Ohio Rev. Code Ann. §§ 2967.03, 29.67.07. Parole Board Instructions and Guidelines, *supra.* Thirty days prior to making a recommendation, Board must give notice to court, prosecutor, victim and/or victim's family. § 2967.12. Victim invited to submit written comments, and make recommendation. *Id.* Meritorious cases may or may not be granted a hearing, and a recommendation is then sent to the Governor. *See* Ohio Admin. Code 5120:1-1-15. The Governor reviews all clemency applications- even the Parole Board denials. He considers all factors (individuals are free to submit whatever information they believe is relevant). Obviously, factors like nature of the crime, time served, institutional adjustment/programming, recommendations of judge/prosecutor, letters of support, community service all factor into his decision, but everything is considered. He may grant full pardon, or include reservations. The entire process takes between 6-8 months. *See* http://www.cjpf.org/clemency/OhioApp2.pdf.
- *Frequency of Grants:* Very few of those who apply are granted (though most of those recommended favorably by Parole Board are granted). Voinovich (1991-1998) considered 4621 clemency applications, granted 69 pardons and 50 commutations. In 6 years (through the end of 2004) Taft has considered 1153 clemency applications, 225 for pardon. He has granted 48 pardons, slightly over 21% of those considered. (He has also granted eight commutations and 6 "imminent danger of death" compassionate releases.)

- *Contacts:* Gary Croft, Parole Board Chair, Gary.Croft@odrc.state.oh.us; Sarah West, Deputy Legal Counsel, Governor's office. 614-644-0872, swest@ gov.state.oh.us; Judge Robert Gorman, rgorman@cms.hamilton-co.org.

B. Judicial sealing or expungement of adult felony convictions:

1. First Offender Sealing

- *Authority:* Ohio Rev. Code Ann. §§ 2953.31-2953.36. Upon application, court may order all records relating to certain minor non-violent convictions sealed if it determines that: (1) the applicant has no other criminal record; (2) the applicant has no charges pending against him or her; (3) "the interest of the applicant in having the records pertaining to his conviction ... sealed are not outweighed by any legitimate governmental needs to maintain those records"; and (4) "the rehabilitation of an applicant ... has been attained to the satisfaction of the court." § 2353.32(C)(2).
- *Eligibility I:* The "first offender" requirement is a jurisdictional requirement for eligibility. *State v. Coleman*, 691 N.E.2d 369 (Ohio Ct. App. 1997) (Judge Bettman's concurring opinion points out the concerns associated with such a limiting definition). The original definition of "first offender" was enlarged by several amendments to address problems apparently perceived by the General Assembly. *See State v. Patterson,* 714 N.E. 2d 409 (Ohio Ct. App. 1998); *Anderson's Ohio Criminal Practice and Procedure* ch. 43 (9th ed, 2003). Section 2953.31(A) now provides that "two or more" convictions may be counted as one if they are "connected with the same act, or result from offenses committed at the same time;" or, if occurring within three months, "two or three" offenses are contained in the same indictment. *See State v. Broadnax,* ___N.E. ___, 2005 WL 1413235 (Ohio App. 1 Dist., 2005) (physician convicted of six counts of distributing drugs illegally on four different occasions held ineligible for sealing).
- *Eligibility II:* Persons convicted of a felony must wait three years after final discharge, misdemeanants one year. The sealing statute, by its terms, applies to federal and out-of-state convictions as well as Ohio convictions. Ohio Rev. Code Ann. § 2953.32(A)(1). Misdemeanor arrest records may also be sealed. § § 2953.32(A)(2).
- *Eligibility III*: Any crime carrying a mandatory prison term is ineligible; also, more specifically, first and second degree felonies, crimes of violence (including robbery and domestic violence), sex offenses, offenses against minors, certain traffic offenses. Ohio Rev. Code Ann. § 2953.36.

- *Procedure and Standards*: Spelled out in § 2953.32(B). Court must notify prosecutor, who is permitted to object. Information gathers information relevant to rehabilitation through probation office. In performing the balancing test set out in § 2353.32(C), courts must liberally construe the statute in favor of the individual's right to privacy, and should deny only when that right is outweighed by a legitimate government interest. *See* Pierre H. Bergeron and Kimberley A. Eberwine, *One Step in the Right Direction: Ohio's Framework for Sealing Criminal Records*, 36 U. Tol. L. Rev. 595, 600 (2005)(citing cases).

- *Effect:* Sealing "restores the person . . . to all rights and privileges not otherwise restored by termination of the sentence or community control sanction or by final release on parole or post-release control." Ohio Rev. Code Ann. § 2953.33(A). Private and public employers, including occupational licensing authorities, may not question a person about a sealed adult conviction, unless the question "bears a direct and substantial relationship to the position for which the person is being considered." § 2953.33(B). In addition, any public employee who discloses sealed conviction in connection with application for employment or license is guilty of a misdemeanor. §§ 2953.35; 2953.54. Sealing does not restore the right to hold public office to a public servant convicted of bribery in office. *State v. Bissantz*, 532 N.E.2d 126 (Ohio 1988). Sealed records may be used in sentencing for another offense, in determining whether to seal records of a subsequent conviction, and in charging a person with a new offense when the nature and character of that offense would be affected by the sealed information. Ohio Rev. Code Ann. §§ 2953.32(D), 2953.32(E). Sealed records may also be accessed by state agencies in connection with applications for state employment. § 2953.32(D).

  Disclosure: It appears that first offender sealing statute does not give recipient option of denying existence of record, even if questioned improperly about it. *Cf.* § 2953.55(A)(sealing upon finding of not guilty specifically permits a person to deny record).

- *Comments I*: Courts have expressed concern over sealing provision in suits brought by media to gain access to sealed records. *See State ex rel. Cincinnati Enquirer v. Winkler*, 782 N.E.2d 1247 (Ohio Ct. App. 2002) (*Enquirer II*); *State ex rel. Cincinnati Enquirer v. Winkler*, 777 N.E.2d 320 (*Ohio Ct. App. 2002) (Enquirer I)*. Legislative efforts to expand scope of statute to help returning offenders with employment opportunities have met with resistance. See Lisa Rab, "Forgive and Forget? The Push to Keep Criminal Records from Employers," CleveScene, http://www.clevescene.com/Issues/2005-09-21/news/news2.html

- *Comments II*: The record of sealing and expungement filings from Hamilton County suggests that felony offenders are aware of the availability of this remedy and do file applications to seal their records:

Year	Number of Filings

2004	635
2003	513
2002	583

No data on the frequency of grants could be obtained by the time of publication. Also, it is not clear whether the number of filings reflects only applications for relief from convicted persons or whether it also includes applications from people seeking the seal arrest records that did not result in conviction.*

- *Sealing of Arrest Records*: Sealing also available for records that did not lead to a conviction, or in which conviction was overturned, Ohio Rev. Code Ann. § 2953.52, and no inquiry may be made about such a sealed record. § 2953.55.
- *Sealing of Pardoned Offenses*: Trial court may exercise its common law jurisdiction to seal record of a conviction that has been erased by a pardon, regardless of whether petitioner has other offenses on his record. *See State v. Cope*, 676 N.E.2d 141 (Ohio Ct. App. 1996).
- *Firearms restoration*: Firearms disabilities, imposed for a conviction of a crime of violence or certain drug offenses, *see* Ohio Rev. Code. Ann. § 2923.13(A), may be removed by petitioning a state court for restoration of firearm privileges. The applicant must be "fully discharged from imprisonment, probation, or parole" have "led a law abiding life since his discharge or release" and "appear likely to continue to do so" and not be "otherwise prohibited by law from acquiring, having, or using firearms." § 2923.14(D).
- *Proposed Expansion of First Offender Expungement Authority:* Pending proposal has been introduced in Ohio legislature to expand expungement authority in Ohio Rev. Code Ann. §§ 2953.31-2953.36 to apply to people with prior offenses, after an eligibility period of seven years. H.B. 317. *See* www.restorationmovement.citymax.com.

---

* According to an e-mail from Judge Robert Gorman dated October 29, 2004, "the original reason for creating this remedy was to seal the records of people convicted of possession of marijuana and certain traffic offenses in the 1960's and 1970's. The intent was that those convictions, often the product of the culture of the day, would not interfere with current or future employment opportunities of young people. Gradually, as they became more comfortable with the concept, judges expanded expungement to all situations based on potential hardship. Judicial applications prompted the General Assembly to start tweaking the procedure by a series of amendments. For example, because of the Ohio Supreme Court's decision in *Pepper Pike v. Doe* [421 N.E.2d 1303 (Ohio 1981)], the General Assembly added a new section covering the sealing of *arrest* records where the charge was dismissed or the defendant was acquitted. The General Assembly later precluded the sealing of records for mandatory prison terms and certain specific felonies (R.C. 2953.36)."

C. Administrative certificate: N/A

III. Nondiscrimination in Licensing and Employment:

No nondiscrimination law per se. However, if conviction has been sealed pursuant to first offender sealing statute, Ohio Rev. Code Ann. § 2953.31 et seq., a person may not be questioned by an employer or licensing board about it "unless the question bears a direct and substantial relationship to the position for which the person is being considered." § 2953.33(B). If an arrest record not leading to conviction has been sealed pursuant to § 2953.52, an employer or licensing agency may not question the person about it at all, § 2953.55(A), and anyone who discloses the information is guilty of a misdemeanor in the fourth degree. § 2953.55(B).

MARCH 11, 2007

OKLAHOMA

I. Automatic Restoration of Rights:

Persons "convicted of a felony" may not register to vote "for a period of time equal to the time prescribed in the judgment and sentence." Okla. Stat. tit. 26, § 4-101(1). Felony offenders and persons convicted of a misdemeanor involving embezzlement are disqualified from office for 15 years after completion of sentence or until pardoned. §§ 5-105a(A), (B). (Permanent disqualification for a member of the legislature who is convicted of specified offenses. Okla. Const. art. V, § 18; Okla. Stat. tit. 21, § 312.) Persons who have been convicted of any felony or who have served a term of imprisonment in any penitentiary, state or federal, for the commission of a felony may not sit on a jury, unless that person has been "fully restored to his or her civil rights" (which in Oklahoma means a pardon). Okla. Stat. tit. 38, § 28(C)(6).

II. Discretionary Restoration Mechanisms:

A. Executive pardon:

- *Authority:* Governor's pardon power cannot be exercised except pursuant to a favorable recommendation from a majority of the Board of Pardon and Parole. Okla. Const. art. VI, § 10. Governor must report to the legislature on each clemency grant at each regular session, though no requirement that he state his reasons. Okla. Const. art. VI, § 10 (Governor must also approve all parole decisions, and commutation recommendations are interspersed with parole recommendation on monthly report to the Governor. *See* http://www.ppb.state.ok.us (Docket Results, Hearing Schedule).)
- *Administration:* Board has five members, three of which are appointed by Governor, other two, respectively, by Chief Justice of Supreme Court and presiding judge of the Oklahoma Criminal Court of Appeals. *Id.* Their terms expire with the Governor's. The board chooses their own chairman. Okla. Stat. tit. 57, § 332.4(A). Okla. Const. art. VI, § 10 provides: "It shall be the duty of the Board to make an impartial investigation and study of applicants for commutations, pardons or paroles, and by a majority vote make its recommendations to the Governor of all deemed worthy of clemency. Provided, the Pardon and Parole Board shall have no authority to make recommendations regarding parole for convicts sentenced to death or sentenced to life imprisonment without parole."
- *Eligibility:* Eligibility after service of sentence – or after five years of supervised parole whichever is shorter. Supervision may be terminated after three years – but then you have to wait until your parole runs out.

Persons convicted in other states and federal offenders ineligible. Misdemeanants may apply if they are not eligible for expungement, and if the applicant can demonstrate that the misdemeanor is prohibiting them from something like holding a state license. *See* Pardon and Parole Board, Policies and Procedures Manual (2000), Policy 004 (Eligibility Criteria) (available from Pardon and Parole Board).

- *Effect*: Pardon generally restores all legal rights lost as a result of conviction, except that firearms privileges are separately and specifically restored. A person convicted of a violent felony may not possess guns even with a pardon. *See* Okla. Stat. tit. § 1283(A), *amended by* 2005 Okla. Sess. Laws ch. 190. See also § 1283(B)(person convicted of a nonviolent felony who has received a "full and complete pardon" regains gun rights, including right to serve as peace officer, and to carry a concealed weapon). Ordinarily pardon does not serve as grounds for expungement, though non-violent first offenders who have been pardoned may seek expungement ten years after conviction. § 18(8) (see below). (See also juvenile expungement at § 18(5).) According to pardon instructions, it may or may not help with licensing decision depending on profession: "A pardon has little direct effect under Oklahoma law. However, it can be useful in helping you to present yourself as a responsible citizen. A pardon serves as recognition that you have adjusted well to society since completing your sentence." Pardon Application Instructions, Oklahoma Pardon and Parole Board Website, http://www.ppb.state.ok.us/ (accessed May 27, 2005).
- *Process:* Public hearing, majority vote, public record. Applicant must submit completed application form, and documents relating to conviction, including proof that fines and restitution paid; credit report, proof of employment and residence, etc.) Investigation conducted by parole officer of DOC – applicant advised to be candid, and to present himself as a "responsible and productive citizen." ("Information you might consider negative will not necessarily hurt your application. It may serve to show how you were able to overcome a problem and actually improve your chances of receiving a Pardon.") When an applicant lives in a different state, information is requested from authorities there about employment and living arrangements. Application with report from DOC then submitted to Board for consideration. Pardon and Parole Board, Policies and Procedures Manual, *supra*, Policy 004-10 (Pardon Consideration). .

  The Board holds a public hearing in every case and may take official action only in open public meeting, pursuant to the Oklahoma Open Meeting Act. Okla. Stat. tit. 57, § 332.2(G). Unlike hearings in commutation cases, however, where the applicant, official witnesses, and victim are all entitled to appear and give testimony, hearings on Pardon Applications are held by "Jacket Review", meaning that the applicant is not ordinarily present. Okla. Admin. Code § 515:1-7-1(d)(1). The Board

may grant the applicant the opportunity to appear, but this is very rare and has happened only once in the last eight years. Pardon Application Instructions, *supra*. According to Board staff, the process generally takes about six months to complete.

Board meets once a month or at the call of the chairman. Board must provide prosecutors list of those to be considered 20 days before hearing and notify victims as well. Okla. Stat. tit. 57, § 332.2(C); Okla. Admin. Code § 515:1-5-2(d). In the rare case that a pardon applicant is permitted to appear, victims, members of public, officials, and applicants themselves may all speak at hearing, subject to strict time limitations. Okla. Admin. Code § 515:1-7-1(d).

Recommendations must be posted on Board's website. Okla. Admin. Code § 515:1-5-2(b). Board forwards favorable recommendations to Governor within 30 days, and Governor has 90 days to act. Okla. Stat. tit. 57, § 332.19. If he doesn't approve, it is deemed denied. *Id.*

- *Frequency of Grants:* For at least the past ten years the Oklahoma Governor has approved about 100 pardons every year (about 80% of those that apply) and many hundreds of commutations. Recently the Board has received eight to 15 applications for pardon per month. Source: Oklahoma Pardon and Parole Board.
- *Contact:* Cary Pirrong, General Counsel, Oklahoma Pardon and Parole Board, cary.pirrong@ppb.state.ok.us. 405-602-5863, ext. 228.

B. Judicial sealing or expungement of adult felony convictions:

- *Authority*: District court in jurisdiction where records are located. Okla. Stat tit. 22, § 19(A).
- *Eligibility:* First offender misdemeanors may be "expunged" 10 years after judgment. Okla. Stat. tit. 22, § 18(7). Non-violent first offender felony offenders who have received "a full pardon" may also petition to have the record "expunged" after 10 years. §§ 18(8), 19(A). Expungement means "sealing" of records. § 18.*
- *Effect*: If records sealed, it is as if conviction never took place, and person may not be required to disclose it by employers, state, and local government agencies, educational institutions, and an applicant for job or benefit may deny existence of conviction. Such an application may not be denied solely because of the applicant's refusal to disclose arrest and criminal records information that has been sealed. Okla. Stat. tit. 22, §

* Section 8 provides that "Records expunged pursuant to paragraph 9 of this section shall be sealed to the public but not to law enforcement agencies for law enforcement purposes." Paragraph (9) of § 18(9) affords relief for victims of identity fraud. It is not clear what implications this provision has for records expunged pursuant to other paragraphs of § 18.

19(D). Any conviction that has been sealed may be ordered "obliterated or destroyed" after another 10 years. § 19(K).

- *Process:* The purpose of the expungement provisions is to aid those who are acquitted, exonerated, or who otherwise deserve a second chance at a clean record. Once an applicant seeking to expunge criminal records meets the presumption of harm, the State must show that the public interest in keeping the records does not harm privacy interests and serves the ends of justice. Okla. Stat. tit. 22, § 19 . *See Hoover v. State*, 29 P.3d 591 (Okla. Crim. App. 2001) (as amended).
- Articles: Stacy Morey & Dave Stockwell, *Expunging criminal records under Title 22, §§ 18, 19 and 991c*, 74 OKLA. B.J. 829 (2003); Edward D. Hasbrook, *Expungement: Second-chance statutes*, 66 OKLA. B.J. 2503 (1995).
- *Deferral of sentencing, probation leading to expungement:* Section 991c authorizes court to defer judgment for a period not to exceed five years in the case of first offenders (with consent of the DA), and to require defendant to meet a variety of community-based conditions. Okla. Stat. tit. 22, § 991c(A). Successful completion of conditions may lead to expungement. § 991c(C). *See also* Oklahoma Community Sentencing Act, Okla. Stat. tit. 22, § 988.1 (enacted in 1999). Section 988.1 gives sentencing court a wide menu of sentencing options for eligible offenders (eligibility determined pursuant to a risk-based index). Section 988.19 requires court to give first consideration to deferring prison sentence pursuant to § 991(c).
- *Nonconviction records:* Okla. Stat. tit. 22, § 18 provides for expungement of records of acquittals, or cases in which charges dismissed within one year.
- *Effect of expungement*: "Expungement" means "the sealing of criminal records . . . to the public but not to law enforcement agencies for law enforcement purposes." Okla. Stat. tit. 22, § 18

C. Administrative certificate: N/A

III. Nondiscrimination in Licensing and Employment:

No public or private employer may ask about or consider a sealed conviction. An applicant for employment need not, in answer to any question concerning arrest and criminal records, provide information that has been sealed, "and may state that no such action has ever occurred." Such an application "may not be denied solely because of the applicant's refusal to disclose arrest and criminal records information that has been sealed." Okla. Stat. tit. 22, § 19(F).

APRIL 28, 2007

OREGON

I. Automatic Restoration of Rights:

Person convicted of a felony and sentenced to a term of imprisonment "in the custody of the Department of Corrections," and execution of the sentence is not suspended, loses rights to vote, to hold office, to serve on a jury, and to hold "a position of private trust." Or. Rev. Stat. §§ 137.281(1), (3). Rights restored upon discharge or parole from imprisonment. § 137.281(1). Persons sentenced to jail do not lose civil rights. Eligibility for legislative office is lost upon conviction until sentence completed, including any period of post-prison supervision and payment of fine. Or. Const. art. IV, § 8(4). Firearms privileges automatically restored 15 years after discharge from sentence to first offenders, unless their offense involved criminal homicide or use of gun or knife. Or. Rev. Stat. § 166.270(4)(a).

II. Discretionary Restoration Mechanisms:

A. Executive pardon:

- *Authority:* Pardon power exclusively in Governor, except for cases of treason for which the legislature has the pardon power. Or. Const. art. V, § 14; Or. Rev. Stat. § 144.649. Must report to the legislature each grant of clemency, including the reasons. Or. Const. art. V, § 14.
- *Eligibility:* "Generally, the Governor will not exercise his clemency power to pardon applicants for crimes which the law allows a court to set aside; therefore, you should not file an application if you qualify for judicial expungement under [Or. Rev Stat.] § 137.225 and have not sought such expungement." Oregon Executive Clemency and Pardon Application, posted at http://www.cjpf.org/clemency/Oregon.html (accessed May 26, 2005) (emphasis in original).
- Effect: Restores legal rights lost as a result of conviction.
- *Standards:* "Clemency will be granted only in exceptional cases when rehabilitation has been demonstrated by conduct as well as words." Oregon Executive Clemency and Pardon Application, *supra.*
- *Process:* Applications must be filed with Governor's Office, with a copy served upon prosecuting DA, State Board of Parole and Post-Prison Supervision, Department of Corrections. Or. Rev. Stat. § 144.650(1). No fee. Governor may not act for 30 days after receipt. § 144.650(4). Governor's legal staff obtains information about the case from law enforcement agencies. The current Governor interviews each pardon

applicant personally before acting. If Governor has not acted within 180 days, application will be deemed denied. *Id.*

- *Frequency of Grants:* In past ten years pardons very rare. Present governor Kulongoski issued five grants in first two years in office, three for immigration purposes, two for employment purposes. Source: Office of the Governor.
- *Contact:* Lorna Hobbs, Office of the Governor, 503-378-6246 (Lorna.Hobbs@state.or.us); David Reese, Deputy General Counsel

B. Judicial sealing or expungement of adult felony convictions:

- *Set-aside of Conviction and Non-Conviction Records:* Or. Rev. Stat. § 137.225(1) through (12) authorizes sentencing court to "set aside" misdemeanor and minor felony conviction (Class C, except sex and traffic offenses, and some other minor crimes), and records of criminal matters that did not result in a conviction. Upon application, order must issue unless the court makes written findings by clear and convincing evidence that granting the motion would not be in the best interests of justice. § 137.225(11). (Statute as originally enacted in 1971 covered almost all offenses. 1971 Or. Laws chap. 434, § 2. Prior to 1993 amendments, more serious offenses eligible subject to a 10-year eligibility waiting period. Courts had no discretion to reject set-aside ex. on eligibility grounds. Or. Rev. Stat. § 137.225(1991); 1993 Or. Laws chap. 664, § 2; *see also State v. Langan*, 718 P.2d 719, 723 (Or. 1986) (statutory criteria, not discretion of trial court, control whether set aside should be granted)).
- *Effect:* Restores all rights and relieves all disabilities and seals record of the conviction. "Upon the entry of such an order, the applicant for purposes of the law shall be deemed not to have been previously convicted, or arrested as the case may be, and the court shall issue an order sealing the record of conviction and other official records in the case, including the records of arrest whether or not the arrest resulted in a further criminal proceeding." Or. Rev. Stat. § 137.225(3). Person whose conviction has been set aside is "able to represent to prospective employers that you have not been convicted of that crime." Oregon Executive Clemency and Pardon Application, *supra*. Set-aside also restores gun rights. Or. Rev. Stat. § 266.170(4)(a). However, Oregon courts have held that it is not a true expungement. *See State v. Langan*, 718 P. 2d 719 (1986)(noting that "expungement" is a "misnomer" because a set-aside order "is not designed to 'rewrite history' and deny the occurrence of an event but to limit the purposes for which official records may be used to exhume that past event"). Purpose of statute "to enhance employment and other opportunities for such formerly convicted persons...[The statute] does not, however, impose any duty on members of public who are aware of conviction to pretend that it does not exist."

Bahr v. Statesman Journal Co., 624 P.2d 664 (Or. App.), *rev. den.* 631 P.2d 341 (Or. 1981).

- *Eligibility*: Three years from the date judgment was pronounced for felonies, one year for nonconviction records, subject in either case to there having been no other conviction in past 10 years, or arrest within three years. Or. Rev. Stat. § 137.225(1)(a),(b). No standard set forth in statute.
- *Procedure:* Prosecutor must be served with copy of motion and given opportunity to oppose. Or. Rev. Stat. § 137.225(2)(a). Victim notified by prosecutor, § 137.225(2)(b), and given opportunity to be heard by court, § 137.225(3).
- *Frequency:* For the seven months between July 2005 and January 2006, the Oregon courts granted over 500 adult felony set-asides.

C. Administrative certificate: N/A

III. Nondiscrimination in Licensing and Employment:

Except for teachers licenses, a commission or agency may not deny, suspend or revoke an occupational or professional license "solely" for the reason that the applicant or licensee has been convicted of a crime, but "it may consider the relationship of the facts which support the conviction and all intervening circumstances to the specific occupational or professional standards in determining the fitness of the person to receive or hold the license." Or. Rev. Stat. § 670.280(2).

> [The state may] deny an occupational or professional license or impose discipline on a licensee based on conduct that is not undertaken directly in the course of the licensed activity, but that is *substantially related to the fitness and ability of the applicant or licensee to engage in the activity for which the license is required.* In determining whether the conduct is substantially related to the fitness and ability of the applicant or licensee to engage in the activity for which the license is required, the licensing board, commission or agency shall consider the relationship of the facts with respect to the conduct and all intervening circumstances to the specific occupational or professional standards.

Or. Rev. Stat. § 670.280(3)(emphasis supplied). *See Dearborn v. Real Estate Agency*, 997 P.2d 239, 242 (Or. App. 2000). (drug conviction unrelated to licensee's past or future conduct in professional real estate activity), *aff'd in relevant part*, 53 P.3d 436, 440-42 (Or. 2002). No provision governing public or private employment.

JUNE 18, 2007

PENNSYLVANIA

I. Automatic Restoration of Rights:

No person "confined in a penal institution" is eligible to vote. 25 Pa. Cons. Stat. §§ 2602(w), 3146.1.* The right to vote is restored automatically upon release from prison. *United States v. Essig*, 10 F.3d 968 (3d Cir. 1993). The disability has been interpreted to apply only to persons convicted of a felony. 1974 Op. Att'y Gen. Pa. 186, No. 47 (1974).**

A person convicted of a crime punishable by imprisonment for more than one year is ineligible to serve as a juror. 42 Pa. Cons. Stat. § 4502(a)(3). Persons convicted of bribery, perjury or "other infamous crime" (any felony) may not be elected to the General Assembly or hold any "office of profit or trust" in the state. Pa. Const. art. 4, § 18(d)(3). (This disability has been interpreted to apply only to elected or appointed office, and has not been extended to mere public employment.) These civil disabilities are removed only upon a Governor's pardon. Pa. Const. art. 4, § 9(a); 37 Pa. Code ch. 81, *available at* http://www.pacode.com/secure/data/037/chapter81/chap81toc.html.

II. Discretionary Restoration Mechanisms:

A. Executive pardon:

- *Authority*: Under the Pennsylvania Constitution the Governor has power to pardon, but he may not act unless he receives a favorable recommendation from a majority of the Board of Pardons (unanimous in the case of life sentences). Pa. Const. art 4, § 9(a): "no pardon shall be granted, nor sentence commuted, except on the recommendation in writing of a majority of the Board of Pardons, and in the case of a sentence of death or life imprisonment, on the unanimous recommendation in writing of the Board of Pardons, after full hearing in open session, upon due public notice."

---

* In 2005 the Pennsylvania General Assembly passed a bill that would have extended the period of disenfranchisement to felony offenders on parole and probation, as well as those actually incarcerated. *See* H.R. 1318, Session of 2005. This bill was vetoed by Governor Rendell in March of 2006. See http://www.governor.state.pa.us/governor/cwp/view.asp?a=3&q=445679.

** 25 Pa. Cons. Stat § 1301(a) provides that a person may not be permitted to register to vote if they have been confined in a prison during the past five years. However, in *Mixon v. Com.*, 759 A, 2d 442, (Cmwlth 2000), *affirmed* 783 A. 2d 442 (Pa. 2001), the court held that there was no rational basis for precluding the registration of those who were incarcerated within last five years and who were not registered previously, when those who were legally registered prior to incarceration could vote upon their release.

- *Administration:* Board of Pardon composed of Lieutenant Governor, who serves as Chairman; the Attorney General; and three members appointed by the Governor for six year terms with the approval of a majority of the members elected to the Senate. Pa. Const. art. 4, § 9(b). The three appointed members are a corrections expert, a crime victim representative, and doctor of medicine, psychiatrist or psychologist. *Id.*
- *Eligibility:* No eligibility waiting period, even prisoners may apply. (Consideration currently being given to inaugurating an eligibility waiting period to ease administrative burdens, subject to waiver.) Convictions obtained in other jurisdictions not eligible for Pennsylvania pardon.
- *Effect*: Pardon restores all rights lost as a result of conviction, and entitles recipient to judicial expungement. *Commonwealth v. C.S.*, 534 A.2d 1053 (Pa. 1987). Pardoned or expunged conviction may not be used in a licensing decision. 18 Pa. Cons. Stat. § 9124(b).
- *Process:* In no case may pardon be recommended without a public hearing, and "due public notice." Under elaborate Board rules governing clemency process, application (obtained for $8 fee from Board) includes questions relating to offense, subsequent rehabilitation. Individual must file application and ten copies, five passport photos, and filing fee of $25 (which may be waived upon proof of indigence). 37 Pa. Code §§ 81.221, 81.225. Application is public and may be inspected. § 81.227. Agents from the Pennsylvania Board of Probation and Parole conduct investigations for the Board of Pardons. Applications are sent to trial court, DA and DOC for recommendation. § 81.226(a). After all pertinent information has been compiled, the application will be reviewed for listing in a subsequent month's calendar.

  On merit review by Board, two votes are required for a public hearing, except that a vote by a majority of the Board is required for prisoners serving life sentences or sentences for crimes of violence. § 81.231. If a hearing is denied, application is deemed denied at that time. § 81.226(b). The applicant and the person representing the applicant will be advised whether or not a public hearing is granted, as well as, the time and place of the hearing.

  When a hearing is granted, applicants must appear personally before the Board. In every case prior to the public hearing, a legal notice will be published in a newspaper of general circulation in the county or counties where the applicant committed the crime(s) for which he/she is seeking clemency. The notice will include the applicant's name, conviction and the date and place of the hearing. Hearings of the Board are public and a record is kept. § 81.263. In non-capital cases 15 minutes allotted each side for presentation. Deliberations conducted in executive session after public hearing, decision announced publicly. § 81.301(a). Under Constitution, recommendation of the Board is by majority, except that it must be

unanimous in capital and life sentence cases. Pa. Const. art 4, § 9(a). Board provides the Governor with a written recommendation in every case, including the reasons for its recommendation.

Community Legal Services of Philadelphia has excellent description of Pennsylvania pardon process on its website. http://www.clsphila.org/Content.aspx?id=634

- *Frequency of Grants:*

  2006: 360 applications granted "merit review," 189 granted public hearing, 144 recommended favorably, 27 granted by Governor and 2 denied.

  2005: 617 applications received, 360 granted "merit review," 188 granted public hearing; 140 recommended favorably, 52 granted by Governor and 5 denied.

  2004: 578 applications received, 406 granted "merit review," 205 granted public hearing; 152 recommended favorably, 71 granted by Governor and 5 denied.

  2003: 564 received, 329 reviewed, 191 granted public hearing, 153 recommended favorably, 42 granted, 9 denied.

  2002: 488 received, 303 reviewed, 164 granted hearing, 164 heard, 127 recommended favorably, 123 granted and four denied.

  2001: 367 filed, 275 reviewed, 146 granted hearing, 138 heard, 122 recommended favorably, 121 granted

  2000: 332 received, 245 reviewed, 106 granted hearing, 87 recommended favorably, 84 granted.

Source: Pennsylvania Board of Pardons.

- Comments: The number of applications filed with the Board has more than doubled in the last 6 full years, from 261 in 1999 to 578 in 2004. Substantial number of pardon applications in recent years (20%) involve very minor "summary" offenses committed long ago (typically retail theft), which are posing an obstacle to the applicant's working in educational institution, health care, and other professions. Consideration being given to legislation to allow Secretary of State to grant "certificate of employability." Problems with health care professions in particular. Also, school districts will not hire people with conviction, even if very dated (shoplifting convictions dominate pardon caseload.)

- Contact: John Heaton – Executive Secretary Board of Pardons,
  333 Market Street, 15th Fl., Harrisburg, PA 17126-0333
  717-787-8125, jheaton@state.pa.us,
  http://sites.state.pa.us/PA_Exec/BOP/

B. Judicial sealing or expungement of adult felony convictions:

- Auth*ority:* Gubernatorial pardon entitles recipient to judicial expungement, after which an offender may deny that he has been convicted. *Commonwealth v. C.S.*, 534 A.2d 1053 (Pa. 1987). Expungement may be granted where a person has reached age 70 and has not been arrested for 10 years. 18 Pa. Cons. Stat. § 9122(b)(1). Finally, expungement of arrest records is available from court where case handled pursuant to Accelerated Rehabilitative Disposition, and defendant successfully completes terms of ARD probation, with the exception of certain sex offenses. § 9122(b)(1). Under a 2004 law, expungement is mandatory in the case of underage drinking summary convictions (§ 6308 of the Crimes Code) if the applicant is over 21 at the time of asking for expungement. Other than this, there is currently no authority for post-conviction expungement. A number of proposals have recently been introduced into the Pennsylvania legislature to expand expungement authority for misdemeanors and summary offenses, but as of September 2005 none had passed.

- Effect of expungement: Records destroyed except that the prosecuting attorney and the central repository shall, and the court may, maintain a list of the names and other criminal history record information of persons whose records are required by law or court rule to be expunged where the individual has successfully completed the conditions of any pretrial or post-trial diversion or probation program. Such information shall be used solely for the purpose of determining subsequent eligibility for such programs and for identifying persons in criminal investigations. Such information shall be made available to any court or law enforcement agency upon request. § 9122(c).

- *Arrest records*: Arrest records must be expunged by central repository where no disposition received within a year, or where a court orders expungement. § 9122(a). With regard to court records, the Pennsylvania courts recognize a constitutional right to seek expungement of an arrest record. See, e.g., *Commonwealth v. Armstrong*, 434 A.2d 1205, 1206 (Pa. 1981); *Commonwealth v. Wexler,* 431 A.2d 877, 879 (Pa. 1981); *Commonwealth v. Malone*, 366 A.2d 584, 487-88 (Pa. Super.1976)(noting serious losses that can be caused by an arrest record, including reputational and economic injury). This right is an adjunct of due process and is not dependent upon express statutory authority. *Commonwealth v. Armstrong*, 434 A.2d at 1206*; see also Commonwealth v. Rose,* 263 Pa.Super. 349, 397 A.2d 1243 (1979). "In determining whether justice requires expungement, the Court, in each particular case, must balance the individual's right to be free from the harm attendant to the maintenance of the arrest record against the Commonwealth's interest in preserving such records." *Commonwealth v. Wexler,* 431 A.2d at 879 (1981). The factors that must be considered in making such a determination include, but are not limited to: [T]he strength of the Commonwealth's case against the petitioner, the reasons the Commonwealth gives for wishing to retain the records, the petitioner's age, criminal record, and employment history, the length of time that has elapsed between the arrest and the petition to expunge, and the specific adverse consequences the petitioner may endure should expunction be denied. *Id.* (quoting

Commonwealth v. Iacino, 270 Pa.Super. 350, 411 A.2d 754, 759 (1979) (Spaeth, J., concurring)).

- *Effect:* As noted above, pardoned or expunged convictions may not be considered by a licensing board. 18 Pa. Cons. Stat. § 9124(b). Nor may summary offenses. *Id.*
- *Firearm:* Firearms rights may be restored by county court if a conviction has been vacated or pardoned, or if federal rights restored and 10 years passed since most recent conviction (excluding time spent in prison). 18 Pa. Cons. Stat. § 6105(d)(3). Procedure enacted in 2002 permits people with a single conviction under old Pennsylvania laws (with certain exceptions) to regain firearms rights through court of common pleas without having to be pardoned, unless "the applicant's character and reputation is such that the applicant would be likely to act in a manner dangerous to public safety." § 6105.1(a). (This provision intended to deal with old traffic violations made grounds for denial of firearms privileges.) This restoration also restores right to vote, serve on jury and hold public office. § 6105.1(e).

C. Administrative certificate: N/A

III. Nondiscrimination in Licensing and Employment:

Like New York, Wisconsin and Hawaii, Pennsylvania has a comprehensive nondiscrimination law covering licensure and both public and private employment. 18 Pa. Cons. Stat. §§ 9124, 9125. However, unlike these three states, Pennsylvania's law has no administrative mechanism for enforcement, and does not provide for attorneys fees.

Occupational licensing authorities may consider a conviction, but it "shall not preclude the issuance of a license, certificate, registration or permit." 18 Pa. Cons. Stat. § 9124(a). Licensing Boards may consider only misdemeanor convictions that "relate to" the occupation. § 9124(c). Pardoned or expunged convictions may not be considered in a licensing decision, nor may convictions "which do not relate to the applicant's suitability for the license, certificate, registration or permit." § 9124(b).

For both public and private employment, "[f]elony and misdemeanor convictions may be considered by the employer only to the extent to which they relate to the applicant's suitability for employment in the position for which he has applied." § 9125(b). (Certain job categories exempted by statute elsewhere in code, like health care). The statute requires the employer to notify the applicant in writing if the decision to deny employment or licensure is based in whole or in part on criminal history. §§ 9124(d), 9125(c). *See El v. SEPTA*, 297 F. Supp. 2d 758 (E.D. Pa. 2003)(under the Pennsylvania Constitution and the Pennsylvania Criminal History Record Information Act, it is against public policy to summarily reject an individual for employment as a driver of disabled people, on the ground that the individual has a prior criminal record, unless in doing so the employer is furthering a legitimate public objective (citing *Cisco v. United Parcel Servs., Inc.*, 476 A.2d 1340 (Pa. 1984)(employee properly dismissed where criminal

charges arose from performance of his duties)). Section 9125 does not provide for remedies or enforcement, but the Pennsylvania courts have held that a lawsuit can be brought to enforce its provisions under a common law "public policy violation" tort theory. *See Cisco v. United Parcel, supra*, 476 A. 2d at 1343.

Per Se Employment Barriers: Pennsylvania has one of the broadest laws in the country disqualifying people with any sort of criminal record from working with the elderly, mentally ill, or retarded, whether in nursing homes or personal care facilities. Penalties for violations of these laws involve both fines for the health care facility and potentially prison for facility administrators. This law was limited by the Pennsylvania Supreme Court in *Nixon v. Commonwealth*, 839 A.2d 277, 288-89 (Pa. 2003) (state could not refuse to re-employ convicted persons while continuing to employ similarly situated persons with no break in service).

The lifetime ban on employment of people with aggravated assault convictions in the Child Protective Services Law has also been held unconstitutional. *See Warren County Human Services v. State Civil Service Comm'n,* 844 A. 2d 70, 74 (Pa. Comm.), petition for appeal denied, 863 A. 2d 1152)(Pa. 2004). Notwithstanding this decision, in 2006 the Pennsylvania legislature extended to law to a range of occupations in which workers have "significant likelihood of regular contact with children." 23 Pa. Cons. Stat. § 6344.2(A). Although the scope of this law is unclear, the statute specifically identifies social services workers, mental health professionals, clergy, counselors, librarians, and doctors.

State law also prohibits people with certain convictions from working in child care, long-term and elder care, police forces, and schools. A study by Community Legal Services of Philadelphia found 40 professions in Pennsylvania in which an occupational license may be denied because of a criminal record, from accountant to veterinarian.

Municipal Hiring Policies: On November 1, 2006, the Philadelphia City Council held a hearing on a bill to strictly limit hiring discrimination against people with criminal records. Modeled after the Boston ordinance, the Philadelphia bill would require the employer to "first review the qualifications of an applicant and determine that an applicant or current employee is otherwise qualified for the relevant position before the Employer may conduct a criminal record check." The Philadelphia bill also goes further than the Boston ordinance by applying not only to city agencies and private vendors that do business with city, but also to all private companies employing more than 10 people within the City of Philadelphia. http://webapps.phila.gov/council/attachments/2144.pdf

SEPTEMBER 17, 2005

PUERTO RICO

I. **Automatic Restoration of Rights:** Puerto Rico's Constitution provides that "[s]uspension of civil rights including the right to vote shall cease upon service of the term of imprisonment imposed." P.R. Const. art. II, § 12. According to the Puerto Rico Board of Parole, the Governor of Puerto Rico has taken the position since the early 1980's that the right to vote during imprisonment has not been suspended, so that prisoners may vote. In any event, all civil rights are automatically reestablished to a convict who has served his sentence, without any intervention on the part of the Governor being necessary; executive clemency remains limited to eliminating the collateral consequence -- obtainment of license for practicing certain professions, driver's license, carrying of weapons, etc. -- that exist independently of the convict's civil and political rights. 1960 Op. P.R. Sec'y Justice No. 33.

II. **Discretionary Restoration Mechanisms:**

A. Executive pardon:

- *Authority:* Governor alone has authority to pardon violations of local law. P.R. Const. art. IV, § 4. He is required to keep a record of all pardons and "official signatures and recommendations in favor of each application." 3 P.R. Laws Ann. §10(1). Parole Board may make non-binding advisory recommendations to Governor.
- *Eligibility:* No formal eligibility restrictions, but informal policy of recent governors has imposed a five-year waiting period following completion of sentence. Governor's pardon power does not extend to federal offenses.
- *Effect*: A grant of full pardon "erases forever" a conviction. 1960 Op. P.R. Sec'y Justice No. 33. The pardon document by its terms "eliminates" the conviction from police and court records.
- *Process:* Pardon process administered by the Puerto Rico Board of Parole. http://www.jlbp.gov.pr/. Application form at http://www.cjpf.org/clemency/PuertoRicoApp2.pdf. Corrections Department makes recommendation to Parole Board, which in turn makes recommendation to Governor. *See id.*; *see also* 3 P.R Laws Ann. § 80 (Secretary of Justice must investigate and report to Governor on all applications for pardon and commutation referred to him). No hearing. Process usually takes about one year.
- *Frequency of Grants*: From 200 to 250 applications each year, about 10% granted. In 2004, 26 pardons (14 conditional, no guns, good behavior). With expansion of expungement authority in spring of 2005, *see* Part IB

below, number of applications are expected to decline. Source: Parole Board.

- *Contact*: Ana T. Dávila Laó
  Chair, Puerto Rico Board of Parole
  P.O. Box 40945, Minillas Station
  San Juan, Puerto Rico 00940

  PH: 787-754-8115, ext. 227; Adavila@jlbp.gobierno.pr

  Also: Evelyn Lopez-Cuevas, elopez@jlbp.gobierno.pr

B. Judicial sealing or expungement of adult felony convictions:

- *Expungement authority*: Broad expungement authority under 34 P.R. Laws Ann. § 1731 et seq., as amended by Law. No. 314 (September 15, 2004). (Chapter 119 is entitled "Elimination of Convictions of Misdemeanors from Criminal Record," though it authorizes such elimination for all felonies.)

- Misdemeanants may also apply in the first instance to the Superintendent of Police, who has independent authority to "eliminate" the conviction from the record; if Superintendent denies petition, he may go to court for relief.

- *Eligibility:* Misdemeanants and non-violent felony offenders may apply to the "court of first instance" for an order "eliminating" a conviction from their record, six months after completion of sentence for misdemeanants and five years after completion of sentence for a felony offense, as long as they have completed the sentence and not committed any further crimes, and court finds that they have "a good moral reputation in the community." § 1731(a), (b) and (c). (New law shortening eligibility waiting periods took effect May 1, 2005, when the new penal code went into effect. Waiting periods may be further reduced "for the meritorious cases.") In a following section that is not numbered, the court also has authority to "eliminate" violent felony convictions, including rape and murder, "as long as twenty (20) years have elapsed since serving the sentence for the last conviction, and that during time he/she has committed no offenses and that has a good reputation in the community."

- *Process:* In order to obtain an order under § 1731, the petitioner must first file in the district court of his domicile, which is required to hold a hearing at which counsels for relevant district attorney and Superintendent of Police must be present. *See* § 1732. May file in person or in writing. Hearing unnecessary if D.A. approves petition. *See also* § 1732 below: The "elimination of the antecedents from the

penal records shall be at the discretion of the Court, in agreement to the evaluation of the social and criminal record of the convict and based on the socio-penal reports which credit his/her rehabilitation." If district court denies petition, may appeal to court of first instance, whose decision is final. § 1733.

- *Certification of Rehabilitation for Prison Inmates*: In addition to § 1731, new penal code authorizes Secretary of Corrections to file motion with court in which he may certify that a person who has not completed his prison term has been totally rehabilitated. The Procurator General and victim may respond, and court may then issue certificate attesting to rehabilitation. *See* art. 104, Law No. 149 (June 18, 2004, art. 149 effective May 1, 2005). Procedure for implementing law has been developed by Department of Corrections, including affidavit of two psychiatrists.

- *Contact:* Alexis Bird, 787-224-8103; Department of Corrections Legal Counsel's Office. Art 104.

- *Comments:* In Puerto Rico's hotly contested elections, prisoner vote (including prisoner families) is considered very important (represents 50,000 votes). Issue of prisoner voting comes up every year.

C. Administrative certificate: N/A.

III. Nondiscrimination in Licensing and Employment: N/A

DECEMBER 5, 2006

RHODE ISLAND

I. Automatic Restoration of Rights:

Rhode Island Constitution provides that "No person who is incarcerated in a correctional facility upon a felony conviction shall be permitted to vote until such person is discharged from the facility. Upon discharge, such person's right to vote shall be restored." R.I. Const. art. 2, § 1.* Right to serve on jury also restored upon completion of sentence. R.I. Gen. Laws § 9-9-1.1(c). Must wait three years following completion of sentence to hold public office. R.I. Const. art. 3, § 2. No provision for restoration of firearms privileges other than pardon. R.I. Gen. Laws § 11-47-5.

II. Discretionary Restoration Mechanisms:

- Pardon: Power vested in Governor, "by and with the advice and consent of the senate," except in cases of impeachment. R.I. Const. art. 9, § 13. According to Governor's Office, a pardon restores ones right to hold public office and lifts occupational and licensing bars. No eligibility requirement – process unstructured. *See* R.I. Gen. Laws § 13-10-1.
- Frequency of Grants: Only a handful of applicants each year, and no pardon has been issued in more than a decade. (Requirement of going to legislature for consent evidently discourages exercise of power.) Source: Office of the Governor.

  Contact:
  Claire Richards
  Special Counsel to Governor
  401-222-8114
  crichards@gov.state.ri.us

- First Offender Expungement: First offenders may apply for judicial expungement 10 years after completion of sentence for felony offenses, 5 years for misdemeanors. R.I. Gen. Laws § 12-1.3-3(b)(1). Unavailable to persons convicted of specified serious violent offenses (though court statistics described in following section show that a number of less serious violent

* Prior to 2006 constitutional amendment, art. 2, § 1 provided that "No felon shall be permitted to vote until completion of such felon's sentence, served or suspended, and of parole or probation." That provision, approved by the voters in 1986, replaced a provision requiring persons convicted of a felony wishing to regain the vote to petition the General Assembly.

offenses have been expunged in past five years). Expungement releases "from all penalties and disabilities resulting from the crime," except that it may serve as a predicate offense, for sentencing purposes, in a subsequent prosecution. § 12-1.3-4(a). Generally expungement relieves legal disabilities (including firearms disabilities) and allows person to deny conviction, but conviction must be disclosed in connection with applications for certain jobs, such as teaching, law enforcement, and the practice of law. § 12-1.3-4(b). Conviction must also be disclosed for purposes of certain specified licensing decisions. § 12-1.3-4(c).

- Frequency of grants: According to a statistics compiled by the Rhode Island Judicial Technology Center, as reported in the Providence Journal, 4,201 misdemeanors and 490 felonies were expunged in 2004, up from a total of 1,441 felonies and misdemeanors in 2000. Katherine Gregg, *Campaign is on to Cut Time to Expunge*, PROVIDENCE J., May 1, 2005, at A1. Bills introduced in the Rhode Island House and Senate would allow a judge to expunge a felony after five years under one or more "extraordinary circumstances," which could include having been "continuously employed." According to the court statistics, since the beginning of 2000, "Rhode Island judges have expunged the records of 18,453 crimes where perpetrators...either were convicted or pleaded no contest." *Id.* The number of felonies expunged has risen from 335 in 2000 to 490 in 2004. The Judicial Technology Center statistics on convictions and nolo pleas are reported at Providence Journal Website, http://www.projo.com/extra/2005/expunge/pdf/expunged-by-year-through-2004.pdf, (accessed May 25, 2005); and Providence Journal Website, http://www.projo.com/extra/2005/expunge/pdf/totals-through-2004.pdf, (accessed May 25, 2005). The total number of criminal cases in which records were expunged, by calendar year from 2000 through 2004, is documented at Providence Journal Website, http://www.projo.com/extra/2005/expunge/pdf/totals-by-year-all-dispositions-through-2004.pdf, (accessed May 25, 2005). *See also* Katherine Gregg, *Judges Erased Indelible Crimes*, PROVIDENCE J., May 6, 2003.

III. Nondiscrimination in Licensing and Employment:

R.I. Gen. Laws § 28-5-7(7) – prohibits inquiries about arrests as unlawful employment practice, though specifically permits inquiries about convictions. Exception for law enforcement. *Id.*

Rhode Island has no general law regulating consideration of conviction in employment or licensure. It applies a direct relationship test in connection with disciplinary action for clinical laboratory scientists, R.I. Gen. Laws § 23-16.3-12 (3) (discipline authorized for "A conviction . . . which is a felony or which is a misdemeanor, an essential element of which is dishonesty, or of any crime which is directly related to the practice of the profession"), but a higher standard for

medical and dental licensure. *See* R.I. Gen. Laws § 5-37-5.1 (unprofessional conduct includes "conviction of a crime involving moral turpitude; conviction of a felony; conviction of a crime arising out of the practice of medicine'); R.I. Gen. Laws § 5- 31.1-10 (same for practice of dentistry and dental hygiene).

OCTOBER 8, 2005

SOUTH CAROLINA

I. Automatic Restoration of Rights:

Right to vote lost if an individual is "serving a term of imprisonment resulting from a conviction of a crime;" or, if an individual has been "convicted of a felony or offenses against the election laws." S.C. Code Ann. § 7-5-120(B)(2),(3). Imprisonment results in disqualification even if conviction is for a misdemeanor. Because eligibility for office is contingent on being a qualified voter, S.C. Const. art. XVII, § 1, a person disqualified from voting is also disqualified from office. Both rights are restored automatically upon completion of sentence, including parole and probation. S.C. Code Ann. § 7-5-120(B)(3). Person who is in jail or pre-trial facility and who has not been convicted of any crime is not disenfranchised and should be allowed to register and vote. 1993 Op Att'y Gen. No. 93-23.

The right to hold office after embezzlement of public funds restored by two-thirds vote of General Assembly upon payment in full of principal and interest of sum embezzled. S.C. Code Ann. § 16-13-210. Right to serve on jury restored only by pardon from Probation, Parole, and Pardon Board. §§ 14-7-810(1), 24-21-920.

Handgun privileges lost upon conviction of a violent offense. § 16-23-30(B). There is no provision for restoration other than a pardon.

II. Discretionary Restoration Mechanisms:

A. Executive pardon:

- *Authority*: Governor has authority to grant reprieves and commute death sentences, but all other clemency authority vested by statute in Probation, Parole, and Pardon Board. S.C. Const. art. IV, § 14; S.C. Code Ann. § 24-21-920. (Transferred by constitutional amendment from Governor in 1949. *See* 26 S.C. JUR. *Probation, Parole, and Pardon* § 28 (2004).) Board has seven members appointed by the Governor to six-year terms, six of whom are appointed from each of the state's six congressional districts and one at-large. They choose their own chair. S.C. Code Ann. § 24-21-10(B).
- *Eligibility*: For probationers, upon discharge from supervision. For parolees, after successful completion of five years under supervision, or discharge from supervision, whichever comes first. S.C. Code Ann. § 24-21-950(A)(1) through (3). No pardon application will be considered until restitution has been paid in full to victim. § 17-25-322(E). Federal and out-of-state offenders ineligible. *See also* § 24-21-950(5): The victim of a crime or a member of a convicted person's family living within the State may

petition for a pardon for a person who has completed supervision or has been discharged from a sentence. After denial must wait one year before reapplying. § 24-21-960(B).

- *Effect*: S.C. Code Ann. § 24-21-990: Pardon restores all civil rights, gun rights, and right to be licensed for any occupation requiring a license. *See also* S.C. Code Ann. § 24-21-940: "'Pardon' means that an individual is fully pardoned from all the legal consequences of his crime and of his conviction, direct and collateral, including the punishment, whether of imprisonment, pecuniary penalty or whatever else the law has provided." This provision is so broad that it precludes using pardoned conviction as a predicate offense. *State v. Baucom*, 531 S.E.2d 922, 924-25 (S.C. 2000). *See also Brunson v. Stewart*, 547 S.E.2d 504, 506 (S.C. Ct. App. 2001) (denial of handgun permit an impermissible collateral consequence, relying on reasoning of *State v. Baucom*); Request for Opinion Regarding Pardons and Sex Offender Registry, S.C. Op. Att'y Gen., 2002 WL 1340410 (Apr. 22, 2002) (sex offender no longer required to register, though pardon would not require the removal of his name and other information from the registry). *Cf.* Effect of Pardon on Admission to Criminal Justice Academy, S.C. Op. Att'y Gen., 2002 WL 1340420 (May 16, 2002) (facts underlying a pardoned conviction can still be considered in determining whether an applicant is suitable for admission to the Criminal Justice Academy). A pardon does not expunge record. 1984 S.C. Op. Att'y Gen. No. 84-115 at 268.

- *Process:* Hearing, majority vote. Process of investigation up to hearing takes seven to nine months. Board must hold hearings at least four times a year, at which it is required to allow applicant to appear. S.C. Code Ann. §§ 24-21-30, 24-21-50. Hearings are always before the full Board. Non-unanimous vote referred to full Board to decide by majority. *Id.* An order of pardon must be signed by two-thirds of Board. § 24-21-930. If denied, must wait one year to reapply. *See* § 24-21-960(B). Pardon application package available at http://www.dppps.state.sc.gov/index.html. Statutory application fee of $50 instituted in 1993, recently raised to $100. S.C. Code Ann. § 24-21-960(A).

- *Frequency of Grants*: Board generally approves about 60% of the 60-80 pardons requests it hears at each quarterly hearing. In 2003, 312 hearings, 184 grants (59%). Few misdemeanants apply. Source: South Carolina Pardon Board.

- *Contact*: Pete O'Boyle, S.C. Pardon Board. 803-734-9267, poboyle@ppp.state.sc.us.

B. Judicial sealing or expungement of adult felony convictions:

- *First-time drug offenders:* Deferred adjudication and probation for first-time minor drug offenders: charges dismissed if probation completed successfully. No conviction results, including for predicate offense purposes. S.C. Code Ann. § 44-53-450(a). If under 25 at time of offense, records of arrest may be expunged. § 44-53-450(b).

- *Youthful Offender Act:* Youthful offenders (between 17 and 25) convicted of non-violent felony that provides for a maximum term of imprisonment of fifteen years or less may be sentenced to probation and treatment. S.C. Code Ann. § 24-19-10 *et seq.*

- *Pretrial Intervention:* S.C. Code Ann. § 17-22-10 *et seq.* – Most non-violent first offenders eligible for pretrial intervention, eventual non-criminal disposition. Standards for admission: § 17-22-60: "Intervention is appropriate only where: (1) there is substantial likelihood that justice will be served if the offender is placed in an intervention program; (2) it is determined that the needs of the offender and the State can better be met outside the traditional criminal justice process; (3) it is apparent that the offender poses no threat to the community; (4) it appears that the offender is unlikely to be involved in further criminal activity; (5) the offender, in those cases where it is required, is likely to respond quickly to rehabilitative treatment; (6) the offender has no significant history of prior delinquency or criminal activity;(7) the offender has not previously been accepted in a pretrial intervention program." Court receives recommendations from prosecutor and victim. § 17-22-150(a) provides for non-criminal disposition upon successful completion of probation and restitution to victim, and the offender may apply to the court for "an order to destroy all official records relating to his arrest and no evidence of the records pertaining to the charge may be retained by any municipal, county, or state entity." (Records may be maintained by the government for a two year period, after which they may be "destroyed." The effect of the order is "to restore the person, in the contemplation of the law, to the status he occupied before the arrest. No person as to whom the order has been entered may be held thereafter under any provision of any law to be guilty of perjury or otherwise giving a false statement by reason of his failure to recite or acknowledge the arrest in response to any inquiry made of him for any purpose."

- *Arrest records where charges dismissed or finding of not guilty*: S.C. Code Ann. § 17-1-40: If charges dismissed or person found not guilty, all records must be destroyed and "no evidence of such record pertaining to such charge shall be retained by any municipal, county or State law enforcement agency."

C. Administrative certificate: N/A

III. Nondiscrimination in Licensing and Employment:

S.C. Code Ann. § 40-1-140: A person may not be refused an authorization to practice, pursue, or engage in a regulated profession or occupation "solely because of" a prior criminal conviction unless the criminal conviction "directly relates" to the profession or occupation for which the authorization to practice is sought. A board may refuse an authorization to practice if it finds the applicant is unfit or unsuited to engage in the profession or occupation.

JANUARY 14, 2007

SOUTH DAKOTA

I. Automatic Restoration of Rights:

A. *Civil Rights*: Civil rights are lost upon a sentence to imprisonment, and regained only when prison sentence fully discharged, including parole. *See* S.D. Codified Laws § 23A-27-35: "A sentence of imprisonment in the state penitentiary for any term suspends the right of the person so sentenced to vote, to hold public office, to become a candidate for public office and to serve on a jury, and forfeits all public offices and all private trusts, authority, or power during the term of such imprisonment." *See also* S.D. Const. art. 3, § 3 (disqualifying from legislative office those who cannot vote); S.D. Codified Laws § 16-13-10 (convicted felons may not sit on jury unless civil rights restored). Rights are lost even if prison sentence is suspended by court, and are not restored until "the termination of the time of the original sentence or the time extended by order of the court." § 23A-27-35. Upon issuance of discharge certificate by Secretary of Corrections, a person is considered "restored to the full rights of citizenship." §§ 24-5-2, 24-15A-7. Discharge certificate not issued until entire prison sentence completed, including any period of parole. *Id.* People not sentenced to penitentiary do not lose any civil rights.

B. *Firearms*: Firearms rights not lost unless convicted of a "crime of violence," in which case rights restored automatically after 15 years without another conviction for a crime of violence or certain drug felonies. S.D. Codified Laws § 22-14-15, *amended by* 2005 S.D. Laws 120. Crime of violence defined in § 22-1-2(9). Earlier relief by pardon only if specified in pardon document. § 24-14-12.

II. Discretionary Restoration Mechanisms:

A. Executive pardon:

- Authority: According to the Supreme Court of South Dakota, there are two legally distinct types of pardons in South Dakota. The Governor may act independently under S.D. Const. art. 4, § 3. Alternatively, Governor may pursue advisory route recognized in S.D. Codified Laws § 24-14-1 and delegate by executive order advisory authority to Board of Pardons and Paroles.* *See Doe v. Nelson,* 680 N.W.2d 302, 313 (S.D. 2004). The

* Under § 5 of 1898 S. D. Constitution, the Board of Pardons consisted of the presiding judge, the secretary of state and the attorney general, and its approval was required for executive clemency except in cases where the sentence was two years in prison, or less than $200. The 1960 amendment of § 5 reconstituted this board as the Board of Pardons and Paroles, required its approval for all cases of executive

Board may also recommend to the Governor first offender "exceptional pardons." *See* § 24-14-8, discussed below. The history of the pardon power in South Dakota, including its regulation by the legislature beginning in 1960, is reviewed in Eric R. Johnson, *Doe v. Nelson, The Wrongful Assumption of Gubernatorial Plenary Authority over the Pardoning Process,* 50 S.D. L. Rev. 156 (2005).

- *Administration*: The Board of Pardons and Paroles is a nine member appointed board charged with the authority to make decisions of parole, the revocation of parole, and parole policy and procedure. S.D. Codified Laws §§ 24-13-1, 24-13-2. Three of the board members are appointed by the Governor, three are appointed by Attorney General, and the remaining three are appointed by the South Dakota Supreme Court. One of the appointees by each appointing authority must be an attorney. Each member of the board must be a resident of South Dakota and be appointed for a four-year term with the advice and consent of the Senate, and may be reappointed. The Board is required by law to meet at least every three months, and names its own chair. §§ 24-13-4, 24-13-6. The Board is administered under the jurisdiction and direction of the Department of Corrections but retains "quasi-judicial, quasi-legislative, advisory and other non-administrative functions" independent of the Department of Corrections. § 24-13-3.
- *Eligibility*: Ordinarily no eligibility period, except that first offenders must wait five years after release to apply for "exceptional pardon" under § 24-14-8. Out of state convictions ineligible. *United States v. Capito*, 992 F.2d 218, 219-20 (8th Cir. 1993); *Thompson v. United States*, 989 F.2d 269, 270-71 (8th Cir. 1993).
- *Effect:* Relief from disabilities and sealing. Persons pardoned pursuant to statutory provisions are "released from all disabilities consequent on the person's conviction [except for firearms privileges if not specified, SDCL § 24-14-12] . . . . The pardon restores the person, in the contemplation of the law, to the status the person occupied before arrest, indictment, or information. No person as to whom such order has been entered may be held thereafter under any provision of any law to be guilty of perjury or of giving a false statement by reason of such person's failure to recite or acknowledge such arrest, indictment, information, or trial in response to any inquiry made of such person for any purpose." § 24-14-11.

  In addition, upon the granting of a pardon under the provisions of the statute, the records are sealed: "the Governor shall order that all official

---

clemency, and gave the Board the power to parole. In 1972, the Board's statutory role in advising the Governor was eliminated, as was the requirement that the Governor report all pardons to the legislature. *See* Historical Notes following S.D. Const. art. 4, § 3, S.D.Codified Laws. In *Doe,* 680 N.W.2d at 313, the South Dakota Supreme Court held that the state has a "two-prong" pardon system: (1) a pardon granted by the Governor with input from the Board of Pardons and Paroles, which may be sealed pursuant to statute; and (2) a pardon granted solely by the Governor with no advice from the Board, which must be open to public inspection.

records relating to the pardoned person's arrest, indictment or information, trial, finding of guilt, application for a pardon, and the proceedings of the Board of Pardons and Paroles shall be sealed. The Governor shall file a public document with the secretary of state certifying that the Governor has pardoned the person in compliance with the provisions of this chapter. The document shall remain a public document for five years and after five years that document shall be sealed." § 24-14-11 The pardoned offense shall be considered a prior conviction for the sole purpose of sentencing for subsequent offenses, determination of habitual offender status under chapter 22-7, or whether the defendant has prior driving under the influence convictions.

The Supreme Court of South Dakota held in the *Doe* case, *supra*, that records of a pardon issued by the Governor alone pursuant to his constitutional power, "without following the provisions of this chapter," may not be sealed. *See Doe,* 680 N.W.2d at 309 n.8, 313 (quoting S.D. Codified Laws § 24-14-11). *See also* 3 S.D. Op. Att'y Gen. 01 (2003), 2003 WL 21406288.

- *Process:* In cases where a pardon application is referred to the Board for advice, pursuant to the procedure set forth in S.D. Codified Laws §§ 24-14-1 through 5, the Board investigates the case and refers it back to Governor with a non-binding recommendation for action. The Board meets in open session at facilities provided by the Department of Corrections "at least every three months" to hear applications for parole, for the discussion and adoption of policy, for revocation decisions, "and upon request of the Governor, [to] make recommendation for pardon, commutation, reprieve, or remission of fines or forfeitures." § 24-13-6. Board is required to "publish annually a schedule of hearing dates and locations for the next calendar year." S.D. Admin. Code § 17:60:01:04.

  Clemency applicants must give notice to the prosecutor, Attorney General, and sentencing judge 30 days before application is considered, § 24-14-3, *amended by* 2005 S.D. Laws 132, § 5, and also to the victim. § 24-14-4.1. They must also publish notice of application in newspaper of general circulation in the county where crime was committed once a week for three weeks. § 24-14-4, *amended by* 2005 S.D. Laws 132, § 6. (Board website advises that if no newspaper, must post notice on door of county courthouse. *See* http://www.state.sd.us/corrections/Executive%20Clemency%20Application.pdf.) Two-step hearing: hearing panel makes recommendation to Board after interviewing applicant, then public hearing before the Board. Board has subpoena power. § 24-13-8. Whenever the Board of Pardons and Paroles recommends clemency to the Governor, the recommendation shall be in writing. § 24-14-7. The board shall keep a record of its findings and the reasons for its recommendation. *Id.* Instructions and application form:
  http://www.state.sd.us/corrections/Executive%20Clemency%20Applicatio

n.pdf. Favorable pardon recommendations must be by majority. S.D. Codified Laws § 24-13-4.6.

- *Exceptional Pardons:* Applicants for first offender "exceptional pardons" under S.D. Codified Laws § 24-14-8, *amended by* 2005 S.D. Laws 132, § 7, must wait for five years following release from confinement, and are required to comply with all procedures applicable to ordinary pardons except for requirements of publication in § 24-14-4. § 24-14-9.
- *Criteria:* Factors to be considered by Board in regulations that are relevant to post-sentence pardon include: "The applicant has shown remarkable rehabilitation;... review of the totality of applicant's circumstances indicates that applicant has carried the stigma of the crime for a long enough period to justify its removal;...the applicant wishes to pursue a professional career from which society can benefit, but a felony conviction prevents it." *See* S.D. Admin. R. 17:60:05:12.
- *Frequency of Grants*: 279 pardons issued between 1995 and 2002, many by Governor alone without involvement of Board. Board receives 60-70 applications annually – better than 50% granted. A lot of minor indiscretions as well as those involving guns cause employment problems. Source: South Dakota Board of Pardons and Paroles
- *Contact:* Glenn Stanley, Office Manager, S.D. Board of Pardons and Paroles, South Dakota State Penitentiary
  1600 North Drive PO Box 5911 Sioux Falls, SD 57117-5911
  Phone (605) 367-5040 Fax (605) 367-5025, glenn.stanley@state.sd.us

B. Judicial sealing or expungement of adult felony convictions:

First offender sealing: Deferred adjudication procedure available for first offenders, which results in no conviction. Under S.D. Codified Laws § 23A-27-13, court may suspend imposition of sentence and place on probation person with no prior felony convictions. Upon successful completion of sentence person is discharged without adjudication of guilt, and court records are sealed. § 23A-27-17. Proceeding shall not be deemed a conviction for purposes of disqualification, except for sex offenders seeking to obtain teaching certificates. § 23A-27-14. Proceeding in probation without adjudication may be considered by court in imposing subsequent sentence.

C. Administrative certificate: N/A

III. Nondiscrimination in Licensing and Employment: N/A

MARCH 10, 2007

TENNESSEE

I. Automatic Restoration of Rights:

Voting: Tennessee has changed its rules on restoration of voting rights several times in the past 30 years, and as a result has created what is perhaps the most confusing situation in the nation. The Tennessee Constitution provides that persons convicted of an "infamous crime" shall not be permitted to register to vote. Tenn. Const. art. 1, § 5. By statute, conviction of a felony renders an individual "infamous," and disqualified from voting. Tenn. Code. Ann. § 40-20-112. Effective July 1, 2006, all but a few categories of serious felony offenders convicted after 1981 are eligible to have their right to vote restored upon expiration of sentence, and may register upon obtaining a "certificate of restoration" from prison authorities or from the Board of Probation and Parole. *See* §§ 40-29-202(a), 203(a). All court-ordered restitution must be paid, § 40-29-202(b), and a convicted person must also be current in child support obligations. § 40-29-202(c). Persons convicted of murder, rape, treason or voter fraud are permanently ineligible to vote (presumably unless pardoned). § 40-29-204.*

Other civil rights: Persons convicted of "a felony or an infamous crime and sentenced to the penitentiary" are disqualified from office unless and until their rights have been restored by a court. Tenn. Code Ann. § 40-20-114. Also disqualified from holding office, without regard to their sentence, are those convicted of bribery, larceny, or any "infamous" offense. § 8-18-101(1). Persons convicted of specified "infamous crimes" are also disqualified from jury service, § 22-1-102, and a sentence of imprisonment disqualifies a person from serving as executor, administrator, or guardian. § 40-20-115. These rights may be restored only through the judicial procedure described in § 40-29-101 through 105, notwithstanding restoration of the right to vote. See § 40-29-201(c).**

Firearms: For felony offenders convicted between 1986 and 1996 and not sentenced to the penitentiary, firearms rights are restored automatically by the

* Prior to the passage of Chapter 860 (signed into law on June 14, 2006), Tennessee had one of the most complex felony disenfranchisement schemes in the country. Persons convicted after 1996, between 1981 and 1986, and prior to 1973, were permanently disenfranchised unless pardoned by the governor or restored to the vote by action of a court. Persons convicted between 1973 and 1981, and *most* of those convicted between 1986 and 1996, were automatically eligible to vote upon completion of sentence, and were permitted to register upon obtaining a "certificate of restoration" from prison authorities or from the Board of Probation and Parole. § 40-29-105(a) and (b). As under current law, those convicted of murder, rape, treason, voter fraud were permanently disenfranchised. § 40-29-105(b)(2).

** Prior to the passage of Chapter 860, see note 1 supra, the automatic restoration procedure specified in § 40-29-105(b)(3) for persons convicted between 1986 and 1996 accomplished restoration of all civil rights. *See* Tenn. Op. Att'y Gen. No. 02-119 (2002). The law makes clear that this is no longer the case. § 409-29-201(c).

"certificate of restoration" provided for in §§ 40-29-105(b). *See* Tenn. Op. Att'y Gen. No. 02-119. However, persons convicted during this ten-year period who were sentenced to the penitentiary (and presumably also persons convicted prior to 1986 and after 1996) must obtain a court order before being allowed to carry a firearm. *Id.* Persons convicted of a violent offense may never regain the right to possess a handgun. *State v. Johnson*, 79 S.W.3d 522, 528 (Tenn. 2002). Persons who are subject to federal firearms disabilities by virtue of not having had their rights restored under state law, are ineligible for a handgun permit under state law. *See* Tenn. Code Ann. § 39-17-1351(b); *see also* Tenn. Op. Att'y Gen. No. 02-119.

II. Discretionary Restoration Mechanisms:

A. Executive pardon:

- *Authority*: Governor has full authority to pardon, except in cases of impeachment – Tenn. Const. art. 3, § 6; Tenn. Code Ann. § 40-27-101. Governor may be advised by Board of Probation and Parole, but its role does not limit his power. *See* Tenn. Code Ann. §§ 40-28-104(a)(10), 40-28-128. Governor may also issue exonerations, signifying innocence. § 40-27-109. Governor required to keep a record of the reasons for each clemency grant and associated documents, and "submit the same to the general assembly when requested." § 40-27-107.
- *Administration:* Board of Probation and Parole is composed of seven members appointed by the Governor to six-year terms. Board makes "nonbinding" recommendations to governor, "based upon its application of guidelines and criteria adopted by the governor." Tenn. Code Ann. § 40-28-104(a)(10). *See also* Tenn. Comp. R. & Regs. § 1100-1-1-.15(1)(d)6.
- *Eligibility:* Pardon application form (available from the Board), provides that an applicant must have completed sentence, including any period of community supervision. In addition, the Governor "will give serious consideration" to pardon requests where: 1) applicant has had no conviction for five years since completion of sentence for which he seeks pardon; 2) applicant has "demonstrated good citizenship," which means "both specific achievements and incident-free behavior;" and 3) petition has demonstrated with proper verification a specific and compelling need for a pardon." *See also* "Criteria" below. Federal and out-of-state offenders are not eligible for a Governor's pardon.
- *Effect:* Pardon has limited legal effect, and does not restore civil or other rights lost under state law, and is not entered into a law enforcement database. An individual who receives a pardon that restores full rights of citizenship must still petition the court for restoration. § 40-29-105(c). A pardon is of limited effect where other collateral disabilities are

concerned, because these are not considered "punishment," *e.g.*, disqualification from employment as police officer. *See* Tenn. Op. Att'y Gen. No. 84-063 (1984) (person convicted of felony may not serve as police officer even if pardoned by the Governor, and hence is subject to prosecution for carrying a firearm). Pardon does not entitle a person to expungement; it is a "forgiving" but "not a forgetting." *See, e.g., State v. Blanchard*, 100 S.W.3d 226, 131 (Tenn. Crim. App. 2002). However, a pardon may be helpful in connection with employment and licensing decisions. For example, according to the Board, applications for some nursing licenses provide that an applicant need not report a felony conviction if it has been pardoned. In addition, a pardon may serve as grounds for a court order restoring civil rights. *See* Tenn. Code Ann. §§ 40-29-105(b)(1)(A), (c)(2)(A).

- *Process:* Hearing held by Board in every case where applicant deemed worthy of favorable consideration. *See* Tenn. Comp. R. & Regs. § 1100-1-1-.15(1)(b)2, (c)1. After determination of eligibility, Board collects background information about the crime and applicant's adjustment since release. § 1100 - 1-1-.15(1)(d)1-4. Hearing is not held in every case (2/3 of applications filed are denied without a hearing). If a hearing is held, Board notifies various interested parties, including prosecutor, judge and police. The legislative oversight committees also receive notification of the hearing. After Board makes its recommendation to Governor, it forwards to legislative oversight committees the names of those it is recommending and those it is not, along with reasons in each case. § 1100-1-1-.15(1)(f).

- *Criteria:* By statute Board of Probation and Parole must base clemency recommendations "upon its application of guidelines and criteria adopted by the governor." Tenn. Code Ann. § 40-28-104(a)(10). The Governor's eligibility guidelines set forth on the pardon application form (available from the Board) are described above. To demonstrate good citizenship, an applicant must provide written communication from at least five persons verifying the period of good citizenship, and written verification of a specific and compelling need. "The need for a pardon will not be found compelling when other provisions of the law provide appropriate relief for the petitioner."

  The Board's formal regulations set forth additional criteria for granting a pardon, which include the nature and severity of the crime, the applicant's previous criminal record, the views of the trial judge and the district attorney general who prosecuted the case; the comparative guilt of others involved in the applicant's offense; the applicant's circumstances in the community; any mitigating circumstances surrounding the offense; the views of the community, victims of the crime or their families, institutional staff, parole officers or other interested parties; and medical and psychiatric evaluation when required by Board. Tenn. Comp. R. & Regs. § 1100-1-1-.15(1)(d)6.

- *Frequency of Grants:* From 1996 to 2002 (Governor Donald Sundquist), the Board received 241 applications for pardon, granted a hearing in 32 cases, and recommended about half of these favorably to the Governor. Fifteen pardons were granted by Governor Sundquist. From 2003 to May 2005 (Governor Phil Bredesen), the Board received 47 applications, and granted six hearings, but no pardons have yet been granted. Source: Board of Probation and Parole.
- *Contact:* C. Edward Scudder, Jr., General Counsel, State of Tennessee Board of Probation and Parole, 404 James Robertson Parkway, Nashville TN 37243 (615-741-1673); charles.scudder@state.tn.us,.

B. Judicial Restoration or Expungement

- *Judicial Restoration of Rights*: Tenn. Code Ann. § 40-29-101 provides a procedure through which "[p]ersons rendered infamous or deprived of the rights of citizenship by the judgment of any state or federal court *may* have their full rights of citizenship restored by the circuit court." § 40-29-101 (emphasis added). (As noted in section I, above, the right to vote can be restored without court action upon expiration of sentence. *See* § 40-29-202(a) and 203(a).) A petition may be based on a pardon or expiration of the maximum sentence, and the petitioner must also demonstrate to the court that he or she "merits having full rights of citizenship restored." § 40-29-105(c).
- *Process:* The judicial restoration procedure requires filing of petition in circuit court in county of residence with proper notice to both federal and state prosecutors and proof of character. Tenn. Code Ann. §§ 40-29-102 through 104. Federal and out-of-state offenders residing in the state are also eligible. Petitioner must demonstrate to the court that "ever since the judgment of disqualification, the petitioner has sustained the character of a person of honesty, respectability and veracity, and is generally esteemed as such by the petitioner's neighbors." Tenn. Code Ann. § 40-29-102. There is a presumption that the full citizenship rights of the petitioner shall be restored, which may be overcome only upon proof by a preponderance of the evidence either 1) that the petitioner is not eligible for restoration or 2) there is otherwise good cause to deny the petition. *See* Tenn. Code Ann. § 40-29-105(c)(3).
- *Pretrial diversion, exoneration:* Tenn. Code Ann. § 40-15-102 through 106. Misdemeanants and Class D felony offenders who have had no prior deferral (ex. sex offenders) may be placed on probation for up to two years. Upon successful conclusion the court will expunge record. Convictions may also be expunged in case where there has been an "exoneration" from Governor in case of innocence. § 40-27-109(a). *See State v. Blanchard, supra*, 100 S.W.3d at 228. Effect of expunging records of criminal charge is to restore person to position he or she

occupied prior to arrest or charge, and thus persons whose records have been expunged may properly decline to reveal or acknowledge existence of charge. Tenn. Code Ann. § 40-32-101(B) and (C). *See also Pizzillo v. Pizzillo*, 884 S.W.2d 749 (Tenn. Crim. App. 1994). Expunged records remain available to law enforcement.

- *Nonconviction records:* Tenn. Code Ann. § 40-32-101(A). Court may order "destruction" of records in case of acquittal, or where charges dismissed.

C. Administrative certificate: N/A

III. Nondiscrimination in Licensing and Employment: N/A

AUGUST 15, 2007

TEXAS

I. Automatic Restoration of Rights:

Right to vote is lost upon conviction of "any felony," Tex. Const. art. 6, § 1, as is the right to sit on a jury. Tex. Gov't Code Ann. § 62.102(7). Right to vote automatically restored upon completion of sentence. Tex. Elec. Code Ann. § 11.002. Other civil rights are restored only through a pardon, or gubernatorial restoration of rights for federal and foreign first offenders pursuant to Tex. Code Crim. Proc. Ann. art. § 48.05(a). Persons convicted in other states must seek relief in the jurisdiction of their conviction.

II. Discretionary Restoration Mechanisms:

A. Executive pardon:

- *Authority*: Under Tex. Const. art. 4, § 11(b), the Governor may not issue a pardon except upon affirmative written recommendation from a majority of the members of the Board of Pardons and Paroles (except for a one-time 30-day reprieve in a capital case). *See* Texas Board of Pardons and Paroles, Executive Clemency in Texas, http://www.tdcj.state.tx.us/bpp/exec_clem/exec_clem.html (May 28, 2005). Board consists of seven members appointed by the Governor to staggered six-year terms. Tex. Gov't Code Ann. § 508.031(a). Governor also selects chair. Board members are full-time government employees. They may be removed by the governor that appointed them at any time; those appointed by another governor may be removed only for cause.
- *Eligibility:* Upon completion of sentence. 37 Tex. Admin. Code § 143.5. Generally outstanding fines or other monetary obligations do not bar consideration. Applications from misdemeanants accepted. See also first offender restoration available to federal and foreign offenders, discussed below.
- *Effect*: Full pardon defined as "an unconditional act of executive clemency by the governor which serves to release the grantee from the conditions of his or her sentence and from any disabilities imposed by law thereby." 37 Tex. Admin. Code § 141.111. Pardon restores all civil rights lost as a result of conviction, and removes barriers to some, but not all, types of employment and professional licensing. The state board advises that "licenses are granted at the discretion of the state licensing boards of each profession, and it is advisable to contact those boards directly to learn whether a pardon is necessary or sufficient to restore licensing eligibility in a particular field." *See* Texas Board of Pardons and Paroles, Executive Clemency in Texas, *supra*. *See also* Tex. Op. Atty. Gen. No. MW-270 (1980) (pardon does not entitle felony offender to be certified as peace

officer); *Dixon v. McCullen,* 527 F. Supp. 711 (N.D. Tex. 1981) (pardon removes some, but not all, legal disabilities; it does not overcome statute automatically excluding convicted persons from certification as a police officer.)

Expungement following pardon: According to state pardon board, "A person who is convicted and who receives a full pardon is entitled under Article 55.01(a)(1)(B) to an expunction of all records and files relating to the conviction." *See* Texas Board of Pardons and Paroles, Executive Clemency in Texas, *supra.* The record is not automatically expunged upon a grant of a full pardon. "This can only be accomplished by petitioning a court in the county of conviction." After expungement, an individual may deny the fact of conviction. Tex. Code Crim. Proc. Ann. art. 55.01(a)(1)(B). Full pardon does not relieve obligation to register as sex offender. Only a "special pardon" — a full pardon on the grounds of innocence — declares a person innocent of the crime and provides for complete freedom from legal implications of the conviction. Arts. 62.11(b) and (c). *See also* art. 62.0105, which lists several grounds on which a court may exempt a person from obligation to register.

- *Process:* Applicant files petition with Board Executive Clemency Section, which conducts an investigation. Individual board members review each petition and case their vote without consulting with others. Texas law allows Board members to perform their duties in clemency matters without meeting as a body, and without holding a public hearing. Tex. Gov't Code Ann. § 508.047(b). (In this respect, Texas is unique among statutory pardon boards that have decision-making authority.) No hearing required for applicants for first offender restoration of rights, though three character affidavits are required. Board must recommend to the Governor in writing by majority. All Board recommendations for and against clemency are public information. The Board does not publish substantive criteria upon which it makes decisions in clemency matters.*
- *Frequency of Grants:* The Board received 358 applications for full pardon in FY 2002, and recommended 56 favorably; no pardons were granted by the Governor that year. The Board received 238 applications for pardon in FY 2003, and recommended 76 favorably; 67 were granted by the

* Texas legislature is currently considering legislation that would require the Board to meet before deciding capital cases, though there has not yet been any effort to extend this process to other clemency cases. Senate Bill 548 would require the board to meet formally to decide clemency requests at the prison where the inmate is housed. Board members also would be allowed to participate in the meeting over a telephone conference call or via a video conference. S.B. 548, 79th Leg. (Tex. 2005). The meetings would not be public, but the inmate would be allowed to be present, unless there were overriding security issues. The inmate's lawyer and someone representing the victim's family also could participate. The Board could meet privately to discuss the case. But the chairman, at the conclusion of deliberations, would have to announce each member's vote on the petition, and each member would have to sign his or her written recommendation.

Governor (of which 35 were pardons to Tulia defendants). About 20% of all applications for pardon are from misdemeanants. Source: Texas Board of Pardons and Parole.

- *First Offender Restoration Process*: For federal and foreign felony offenders with only one conviction (including misdemeanors), not involving drugs, guns, violence or firearms, Governor may also restore civil rights under Tex. Code Crim. Proc. Ann. art. 48.05. This authority is also dependent upon receiving an affirmative recommendation from the Board. This is "a form of pardon that restores all civil rights under the laws of this state that an individual forfeits as a result of the individual's conviction of an offense, except as specifically provided in the certificate of restoration." Art. 48.05(k). An individual convicted of a prior federal offense may not apply for restoration of civil rights forfeited in the state as a result of the federal conviction if the individual has also been convicted of a misdemeanor offense. Tex. Op. Atty. Gen. No. DM-486 (1998). Federal and foreign first offender become eligible for restoration of rights three years after federal convictions, and two years after foreign convictions. Tex. Code Crim. Proc. Ann. art. 48.05(b)(2). Offenders may apply either to local sheriff, who sends it on to the Board, or directly to the Board, which conducts a paper review.
- *Contact*: Maria Ramirez, Board of Pardons and Parole, 512-406-5852, maria.ramirez@tdcj.state.tx.us.

B. Judicial sealing or expungement of adult felony convictions:

- *Expungement*: Under Art. 55.01 of the Texas Code of Criminal Procedure, "expunction" of all records may be ordered in cases where an arrest does not result in a conviction, or where the offense has been subsequently pardoned. Individuals are entitled to expungement of acquittals, dismissals, and arrests not leading to conviction, unless they arise out of a "criminal episode," another offense for which the person was convicted or remains to be prosecuted, or if the person has been convicted of another crime within the previous five years. Expungement applies to pardons restoring civil rights, as well as pardons predicated upon a finding of innocence. *See Ex parte Hernandez,* 165 S.W.3d 760, 763 (Tex. App.-Eastland, 2005). Except for Class C misdemeanors, offenders are not entitled to expunction where a period of community supervision has been ordered, even if the charges are later dismissed pursuant to a deferred adjudication plan. § 55.01(2)(B). See below.

- *Procedure*: Expungement of "all records and files relating to the arrest" may be accomplished by petitioning the district court in the county of conviction. Tex. Code Crim. Proc. Ann. art. 55.01(a)(1)(B). Once an applicant for expungement of arrest records demonstrates his eligibility under the

provisions of the statute governing expungement of records, the trial judge does not have the discretion to dismiss the petition or deny the request for an expunction. *Perdue v. Texas Dept. of Public Safety,* 32 S.W.3d 333, 334-35 (Tex. App. 2000). Pursuant to the procedure set forth in art. 55.02, the court order shall order any records and files that are the subject of the petition to be returned to the court or "destroyed." Art. 55.02, § 5(d). The effect of expungement: "the release, maintenance, dissemination, or use of the expunged records and files for any purpose is prohibited," and "the person arrested may deny the occurrence of the arrest and the existence of the expunction order." Art. 55.03(a) and (b). "When questioned under oath in a criminal proceeding about an arrest for which the records have been expunged, [the person] may state only that the matter in question has been expunged." Art. 55.03(c).

- *Deferred adjudication nondisclosure:* Under Section 411.081 of the Texas Government Code, a person placed on deferred adjudication community supervision under Section 5, Article 42.12, Code of Criminal Procedure, who subsequently receives a discharge and dismissal under Section 5(c), Article 42.12, may petition the court for an "order of nondisclosure." See Acts 2005, 79th Leg., ch. 177, § 3, and ch. 1309, § 3, eff. Sept. 1, 2005. A person may petition the court regardless of whether the person has been previously placed on deferred adjudication community supervision for another offense. Under Art. 42.12, most offenses are eligible for deferred adjudication, except for DUI, repeat drug trafficking near school, and a range of repeat felony sex crimes. After notice to the state and a hearing on whether the person is entitled to file the petition and issuance of the order is "in the best interest of justice," the court "shall issue an order prohibiting criminal justice agencies from disclosing to the public criminal history record information related to the offense giving rise to the deferred adjudication." An order of nondisclosure prohibits criminal justice agencies from disclosing to the public criminal history record information related to an offense, and criminal history record information subject to an order of nondisclosure is excepted from required disclosure under the Public Information Act. A criminal justice agency may disclose criminal history record information that is the subject of the order only to other criminal justice agencies, for criminal justice or regulatory licensing purposes, one of the licensing and employment agencies listed in 411.081(i), or the person who is the subject of the order. (The agencies listed in (i) include schools, hospitals, various public licensing boards and agencies.)

  If a law enforcement agency receives a request for information subject to a section 411.081(d) nondisclosure order from a person who is not authorized to receive the information, the agency may inform the person that it has "no record." Op.Atty.Gen.2004, No. GA-0255. A person may petition the court that placed the person on deferred adjudication for an order of nondisclosure on payment of a $28 fee to the clerk of the court in addition to any other fee that generally applies to the filing of a civil petition. Waiting periods for

serious misdemeanors (2 years) and felonies (5 years) and certain serious offenses excepted. *See* also Tex. Code Crim. Proc. art. 42.12, § 5(a) and (c) ("a dismissal and discharge under this section may not be deemed a conviction for the purposes of disqualifications or disabilities imposed by law for conviction of an offense," but it may be taken into account in subsequent prosecution, and for various licensing purposes.) See FAQs at http://www.txdps.state.tx.us/administration/crime_records/pages/faq.htm. *See also State v. Macais*, 30 K.A.2d 79, 39 P.3d 85 (Kans. App. 2002)(Texas deferred adjudication is counted as a prior conviction for sentencing purposes in Kansas as Texas court can defer adjudication only after defendant pleads guilty or nolo contender).

C. Administrative certificate

N/A

III. Nondiscrimination in Licensing and Employment:

Tex. Occupations Code Ann. § 53.021(a): "A licensing authority may suspend or revoke a license, disqualify a person from receiving a license, or deny to a person the opportunity to take a licensing examination on the grounds that the person has been convicted of a felony or misdemeanor that directly relates to the duties and responsibilities of the licensed occupation."

JANUARY 26, 2006

UTAH

I. Automatic Restoration of Rights:

Civil rights: Persons convicted of a felony lose the right to vote. *See* Utah Code Ann. § 20A-2-101(2)(b)("Convicted felon" whose rights have not been restored may not vote). For persons convicted in Utah state court, right to vote is restored automatically upon 1) a sentence to probation by the sentencing court; 2) upon release on parole by the Board of Pardons; or 3) upon successful completion of a term of incarceration. § 20A-2-101.5. Federal offenders and out-off-state offenders are presumably remitted to the restoration procedures in their state of conviction.

Eligibility to serve on jury lost unless and until conviction expunged. § 78-46-7(2). No provision on public office, except that a person may be removed for "high crimes and misdemeanors" or malfeasance in office. §§ 77-5-1 (impeachment of governor and other state officers), § 77-6-1 (removal from office of justices of the peace and municipal officers).

Firearms: Restrictions on firearms have been tightened in recent years. Now no persons convicted of any felony may possess any firearm or other "dangerous weapon," defined broadly. Utah Code Ann. §§ 76-10-503(1) and (2). Persons convicted of "crime of violence" or on probation or parole, formerly the only category regulated, subject to greater penalties. *Id.*[*] Firearms restrictions may be removed only by expungement (if eligible) or pardon.

II. Discretionary Restoration Mechanisms:

A. Executive pardon:

- *Authority* to pardon vested in Board of Pardons and Paroles. Utah Const. art VII, § 12; Utah Code Ann. § 77-27-5(4). (The Governor may grant respites or reprieves in all cases of convictions for offenses against the state except treason or conviction on impeachment, but these respites or reprieves may not extend beyond the next session of the board.). Board is composed of five full-time salaried members, and five pro tem members

[*] Until 2000 amendment, these restrictions did not apply to target concessions, shooting ranges, competitions, and hunting. See Utah Cod Ann. 76 -10-512 (1999). These exceptions are now available only to juvenile offenders. *See* Laws 2000, c. 303, § 8, eff. May 1, 2000.

who fill in and are paid on a per diem basis, all appointed by Governor to five-year terms. § 77-27-2.**

- *Eligibility* – Board only considers those whose sentences have been expired for five years and who have exhausted judicial remedies including expungement. Utah Admin. Code § 671-315. State offenders only.

- *Effect*: Restores all rights, relieves legal disabilities. Board generally specifies whether pardon restores firearms privileges.

- *Process*: Hearing, majority vote, reasons given. Pardon may not be granted except after a full hearing before the board, in open session, and after previous notice to DA, judge, and law enforcement of the time and place of the hearing has been given. Utah Admin. Code § 671-315. Board may deny pardon by majority vote without hearing. The proceedings of the Board shall be recorded and filed as provided by statute with all papers used upon the hearing. Utah Admin. Code § 671-304. Decisions by majority. Utah Const. art VII, § 12. The decision of the Board is reduced to writing, including a rationale for the decision, and published. Utah Admin. Code § 671-305.

- *Frequency of Grants*: Board receives only three to five requests for pardon a year, and about 10 have been granted in the past decade. Possibility of regaining rights through judicial expungement makes pardon process less important. Source: Board of Pardons and Paroles.

- *Contact*: John Greene, Administrator, Board of Pardons and Paroles, 801-261-6464.

B. Judicial sealing or expungement of adult felony convictions:

- *Expungement*: A person convicted of a crime may petition the convicting court for an expungement of the record of conviction. Utah Code Ann. § 77-18-11(1). Certain crimes are excepted: capital and first degree felonies, forcible second degree felonies, sex offense involving a minor, vehicular homicide, other sex offenses. § 77-18-11(11), citing § 77-18-12, *amended by* 2005 Utah Laws 2.

  - *Eligibility*: complex eligibility requirements set out in § 77-18-12. Seven years for felony, three to five for misdemeanors. Longer (10 years) for alcohol- and drug-related offenses. Recidivists must wait 20

** Until 1992 constitutional amendment, the Board of Pardons consisted of the Governor, the Attorney General, and the Justices of the Supreme Court. See Utah Const. Art. VII, § 12 (1991). *See also* National Governors' Ass'n, Guide to Executive Clemency Among the American States 149-150 (1988).

years. Utah Code Ann § 77-18-12(3). Application forms and instructions at http://www.utcourts.gov/howto/expunge/#district

- *Process*: Utah Code Ann. § 77-18-12. Court must require a "certificate of eligibility", which is issued after investigation by the Utah Bureau of Criminal Identification. See § 77-18-12; § 53-10-202.5. The statutory fee for each certificate of eligibility is $25. § 77-18-11(2)(b). Notice must be given to prosecutor, DOC, victim. § 77-18-11. If prosecutor or victim objects, or if petitioner disagrees with conclusions of the UCBI, petitioner may ask for a hearing. The court in its discretion may also request a written evaluation by Adult Parole and Probation of the Department of Corrections, which shall include a recommendation concerning expungement, certification that the petitioner has completed all requirements of sentencing and probation or parole, and any rationale that would support or refute consideration for expungement. The conclusions and recommendations contained in the evaluation shall be provided to the petitioner and the prosecuting attorney and the victim. § 77-18-11(6). The prosecutor or victim may object, in which case the judge will order a hearing. If neither objects, court has authority to issue expungement without a hearing, in reliance on the UBCI certificate. 77-18-11(10). If petitioner found to be eligible, the court "shall issue a certificate . . . unless there is clear and convincing evidence to persuade the court that it would be contrary to the interest of the public to grant a requested expungement." § 77-18-13(2).

- *Effect*: A person receiving expungement "may respond to any inquiry as though the conviction did not occur." § 77-18-13(3). Otherwise expungement of uncertain effect. E.g., it may still be used for various purposes, as in subsequent sentencing or firearms prosecution. Utah Code Ann. §§ 77-18-13(3), 77-18-15(4), (7). *Doe v. Dep't of Pub. Safety*, 782 P.2d 489 (Utah 1989) (Department of Public Safety could not ask about or obtain expunged convictions of applicant for employment with Department of Corrections; prohibition against employer asking about expunged convictions was not exception to or limitation upon general expungement provisions; and expungement statute's failure to limit rights of licensing agencies to receive information did not give Department right to expunged information). *See Thompson v. Dep't of Treasury*, 557 F. Supp. 158 (D. Utah, 1982) (judicial expungement granted to petitioner under Utah statutes did not completely erase prior convictions and, therefore, petitioner was not entitled to relief from federal firearms disability). *See* Michael D. Mayfield, Comment, *Revisiting Expungement: Concealing Information in the Information Age*, 1997 Utah L. Rev. 1057, 1058-60.

- *Contact*: Marlene Bills, 801-238-7192. marleneb@email.utcourts.gov; Patricia A. Nosanchuk, patrician@email.utcourts.gov, court data processing, 801-578-3831. jolenec@email.utcourts.gov. UBCI contact Becky Jones at 801-965-4445.

- *Frequency of Grants* – In CY 2003 the Utah courts expunged 321 felony convictions in CY 2004 they expunged 335 felony convictions. They expunged 540 misdemeanor convictions in CY 2003 and 701 misdemeanor convictions in CY 2004. About 50% of petitions for expungement are approved. Source: Office of Utah Court Administration.

C. Administrative certificate: N/A

III. Nondiscrimination in Licensing and Employment: N/A

Utah Admin. Code 606-2-2(U) and (V): Antidiscrimination regulations of Utah Labor Commission provide that it is improper to ask about arrest records not leading to conviction, and inquiry about felony conviction "advisable only if job-related."

Utah has no general law regulating consideration of conviction in employment or licensure. It does apply a direct relationship test in connection with termination of gasoline franchise arrangements. See Utah Code Ann. § 13-12-3(6)(b) (restricting termination except "Where the alleged grounds are caused by the conviction of the dealer or distributor . . . of a criminal offense directly related to the business").

October 11, 2005

VERMONT

I. **Automatic Restoration of Rights** – The right to vote and hold office are not lost upon conviction, and prisoners are permitted to vote by absentee ballot. Vt. Stat. Ann. tit. 28, § 807. Felony offenders are disqualified from jury service unless pardoned. Vt. Stat. Ann. tit. 4, § 962(a)(5); Vt. Stat. Ann. tit. 12, § 64. Firearms privileges are generally not lost upon conviction, though court may prohibit possession of firearms as a condition of probation. *See State v. Kasper*, 566 A.2d 982, 984 (Vt. 1989).

II. Discretionary Restoration Mechanisms

A. Pardon

- *Authority:* Vested in the Governor exclusively. Vt. Const. chap. II, § 20. At Governor's request, Parole Board may conduct investigations and act as advisory board. Vt. Stat. Ann. tit. 28, § 453. According to the Governor's office, Governor in recent years has pardoned only if there is a "compelling reason," and a key factor in determining whether there is a "compelling reason" in a case is whether conviction is preventing someone from getting a job or participating in profession. *See also* Vermont Dept of Corrections, Pardons, http://www.doc.state.vt.us/index.html.

- *Eligibility:* 10 years from date of conviction (informal requirement imposed by Governor's office).

- *Process:* Informal paper review for pardons. Statutory requirements for hearing appear to apply only to commutations. *See* Vt. Stat. Ann. tit. 28, § 809.

- *Frequency of Grants:* In recent years 50-60 applications annually, about 10% granted. Current Governor has granted just one pardon: philosophy that pardon "has to be saved for those situations that are extraordinary whether there was a miscarriage of justice or a penalty that does not fit the crime where situations are quite unique." Source: Governor's Office; Anson Tebbetts, *Governor Douglas Pardons Essex Woman*, Channel 3 News (Dec. 24, 2004), http://www.wcax.com/Global/story.asp?S=2732498&nav=4QcSUXdU

- *Contact*: Suzanne Young, Governor's Office: 802-828-3333. trish.damery@state.vt.us

B. Judicial sealing or expungement of adult felony convictions:

Deferred sentencing: Vt. Stat. Ann. tit. 13, § 7041 authorizes deferred sentencing, upon consent of DA, dismissal of charges upon successful completion of probation, and expungement of record. "Upon discharge the record of the criminal proceedings shall be expunged as if an application pursuant to section 5538 of Title 33 had been granted, except that the record shall not be expunged until restitution has been paid in full, absent a finding of good cause by the court." (Note: Vt. Stat. Ann. tit. 33, § 5538(c) provides for the "sealing" of juvenile records, after which "matter…shall be considered never to have occurred, all index references thereto shall be deleted, and the person, the court, and law enforcement officers and departments shall reply to any request for information that no record exists with respect to such person upon inquiry in any matter.") In determining whether to order deferred sentencing or imprisonment, the court "shall consider the nature and circumstances of the crime, the history and character of the defendant, the need for treatment, and the risk to self, others and the community at large presented by the defendant." Vt. Stat. Ann. tit. 13 § 7030. No crimes specifically excluded by statute though many by policy.

First Offender Diversion: Vt. Stat. Ann. tit. 3, § 164 – DA discretion as to who is eligible. Two years after successful completion of diversion program, record may be sealed and "the matter…shall be considered never to have occurred, all index references thereto shall be deleted, and the participant, the court, and law enforcement officers and departments shall reply to any request for information that no record exists with respect to such participant inquiry in any matter."§ 164(g).

C. Administrative Restoration – N/A

III. Occupational licensing and employment –

Vermont has no general law regulating consideration of conviction in employment or licensure. It does apply a "substantial relationship" test in connection with at least one license, veterinary medicine: Vt. Stat. Ann. Tit. 26, § 2424(e) ("As used in this section, "in good standing" means that the applicant: . . . (5) has not been convicted of a felony; or (6) has no criminal conviction record nor pending criminal charge relating to an offense that relates substantially to the practice of veterinary medicine.")

- Pardon: Eligibility rules informal, dating from 1990. Generally, must first have rights restored, and wait five years after completion of sentence. Federal and out-of-state offenders are not eligible. If a pardon application is denied, applicant may reapply after two years.

- *Effect*:
  - Restoration of rights restores right to vote, sit on jury, hold public office, and serve as a notary public.
  - Pardon: "Simple" pardon does not expunge the record, but "it does constitute official forgiveness and often serves as a means for the petitioner to advance in employment, education, and self-esteem." *See* "Absolute" pardon generally granted only for innocence. ("Conditional" pardon reduces sentence.) Pardon is useful in signifying rehabilitation, but Virginia authorities advise that it is not clear what if any legal effect a pardon may have under state law. Pardon does not entitle a person to judicial expungement unless granted for innocence ("absolute" pardon). Neither restoration of rights nor pardon restores right to possess firearms, which is controlled by court. Va. Stat. Ann. §18.2-308.2, *amended by* 2005 Va. Acts ch. 600 *and* 2005 Va. Acts ch. 833; *see also* http://www.commonwealth.virginia.gov/FAQs/FAQs.cfm#clem (persons whose civil rights have been restored may apply to the court for restoration of gun rights).

- *Process*:
  - Restoration of rights – In 2003, Governor Mark Warner implemented expedited application process for non-violent offenders seeking right to vote. Simple one-page application filed with Secretary of Commonwealth, who does a records check. Longer 13-page application form still necessary for persons convicted of violent offenses, including drug trafficking offenses, and election fraud. Restoration of rights first step in pardon application process. Va. Stat. Ann. § 53.1-231.1 requires Director of Corrections to give notice upon completion of sentence of procedure for regaining rights. In January 2006 incoming governor Timothy Kaine promised to continue the expedited policy established by his predecessor.
  - Court route to restoration - Alternative process through petition to local circuit court to restore right to vote (unavailable for those convicted of violent felonies, drug-trafficking, or election fraud). Petition filed with court, which holds a hearing and makes a determination as to whether the person has demonstrated "civil responsibility," then makes recommendation to the governor. Va. Stat. Ann. § 53.1-231.2.
  - Pardon - applications are sent to Parole Board for investigation, and Board makes nonbinding recommendation to governor. Va. Code

MAY 5, 2007

VIRGINIA

I. Automatic Restoration of Rights: N/A

Person convicted of felony loses right to vote and serve on jury. Va. Const. art. II, § 1; Va. Code Ann. § 8.01-338 (2). Right to vote regained only by action of the governor, through restoration of rights or pardon. Va. Const. art. V, § 12. *See also* Va. Stat. Ann. § 53.1-231.2 (procedure for petitioning court for restoration, with subsequent referral to governor for action). According to the Office of the Secretary of the Commonwealth, people with out-of-state convictions may vote in Virginia if their rights have been restored in the jurisdiction of conviction; or, if they cannot show that their voting rights were restored, they may apply for restoration in Virginia.

II. Discretionary Restoration Mechanisms:

A. Executive pardon:

- *Authority:* Governor may grant full pardon or limited restoration of rights. Va. Const. art. V, § 12. Constitution also requires governor to make annual report to the legislature setting forth "the particulars of every case" of pardon granted, with reasons.
- *Administration*: Legislature has authorized Parole Board at the request of the governor to investigate and make recommendations on pardon cases, but this does not limit governor's power. Va. Stat. Ann. §§ 53.1-136(5), 53.1-231. Parole Board consists of five members appointed by the governor to open-ended terms. No more than two are full-time. One must be representative of victims group. Applications for both pardon and restoration of rights made to Office of the Secretary of the Commonwealth. *See* http://www.commonwealth.virginia.gov/JudicialSystem/Clemency/pardons.cfm. Secretary of the Commonwealth alone makes recommendation in restoration of rights cases.
- *Eligibility:*
  - Restoration of rights: Residents of Virginia, or persons convicted of state or federal offense in Virginia, may apply. Three years after completion of sentence for nonviolent applicants, five years after completion of sentence for violent and drug offenses (other than simple possession), and election fraud. No offenses are specifically excluded, but governor may decide not to grant some due to nature of offense or some other unstated subjective criterion.

Ann. § 53.1-136(5). "Evidence of good citizenship is required, as are favorable recommendations from the official involved in the case and the Virginia Parole Board." The governor is required by the state constitution to give a reason for each grant in his report to the legislature (see above), but he generally gives no reasons for denials.

- *Frequency of Grants*:
  - Restoration: Between January 2006 to April 2007, Governor Kaine granted restoration to 676 nonviolent, 83 drug, and 19 violent offenders. During this period, ___ applications were rejected, generally based on seriousness of offense or overall criminal record. Between January 2002 and January 2006, Governor Mark Warner restored civil rights to 3,486 people, and rejected 195 applications. (Predecessor Governor Gilmore restored rights to 238 people, and his predecessor George Allen to 480. Governor Robb restored rights to 1180 people between 1982 and 1986.)
  - Pardon – In 2006 Governor Kaine issued 6 simple pardons, one conditional pardon, and two reprieves. His predecessor Governor Warner Mark granted a total of ___ pardons during his four years in offfice. Source: Office of the Secretary of the Commonwealth
- *Contact*:

  Pardon: Patricia Tucker, Pardon Specialist, Office of the Secretary of the Commonwealth, 804-692-0105, patricia.tucker@governor.virginia.gov

  Restoration of Rights: Micah Womack, Restoration of Rights Director, Office of the Secretary of the Commonwealth, Post Office Box 2454 Richmond, Virginia 23218-2454, (804) 692-2531, micah.womack@governor.virginia.gov.

B. Judicial Restoration or Expungement

Nonconviction records may be expunged under Va. Code Ann. § 19.2-392.2, in case of acquittal or where charges nol prossed or dismissed, or where conviction has been pardoned for innocence.

C. Administrative certificate: N/A

III. Nondiscrimination in Licensing and Employment:

Va. Stat. Ann. § 54.1-204 ("Prior convictions not to abridge rights"): A person shall not be refused a license or occupational/professional certificate "solely because of" a prior criminal conviction, unless the criminal conviction "directly relates" to the occupation or profession for which the license, certificate or registration is sought. However, the regulatory board shall have the authority to

refuse a license, certificate or registration if, based upon all the information available, including the applicant's record of prior convictions, it finds that the applicant is unfit or unsuited to engage in such occupation or profession.

In determining whether a criminal conviction directly relates to an occupation or profession, the regulatory board shall consider the following criteria: 1. The nature and seriousness of the crime; 2. The relationship of the crime to the purpose for requiring a license to engage in the occupation; 3. The extent to which the occupation or profession might offer an opportunity to engage in further criminal activity of the same type as that in which the person had been involved; 4. The relationship of the crime to the ability, capacity or fitness required to perform the duties and discharge the responsibilities of the occupation or profession; 5. The extent and nature of the person's past criminal activity; 6. The age of the person at the time of the commission of the crime; 7. The amount of time that has elapsed since the person's last involvement in the commission of a crime; 8. The conduct and work activity of the person prior to and following the criminal activity; and 9. Evidence of the person's rehabilitation or rehabilitative effort while incarcerated or following release. Applicant denied licensure because of criminal record shall be so informed.

JULY 2005

VIRGIN ISLANDS

I. **Automatic Restoration of Rights:** Persons sentenced to a term in prison of more than one year and less than life loses all civil rights "and forfeits all public offices and all private trusts, authority or power during such imprisonment." 14 V.I. Code Ann. § 91. May not serve on jury unless pardoned. 4 V.I. Code Ann. § 471(1).

II. **Discretionary Restoration Mechanisms:**

A. Executive pardon:

Governor has power to pardon violations of local law. V.I. Organic Act of 1954, § 11. Felony offenders prohibited from sitting on any board or commission of the VI unless pardoned. 3 V.I. Code Ann. § 65d.

No information on process or frequency of grants.

B. Judicial sealing or expungement of adult felony convictions:

First Offender Probationer Expungement: 5 V.I. Code Ann. § 3711(c)(1) provides procedure for non-violent offender with no prior felony or misdemeanor convictions, to be sentenced to probation and have conviction expunged upon successful completion. "Upon fulfillment of the terms of probation the defendant shall be discharged without court adjudication of guilt, and an order shall be entered expunging the finding, verdict or plea of guilty as the case may be."

Drug Possession: 19 V.I. Code Ann. § 607(b) - deferred adjudication for first-time drug possession, with no conviction resulting if probation successfully competed. Expungement of records only if offense committed when under 21.

C. Administrative certificate: N/A

III. **Nondiscrimination in Licensing and Employment:** N/A

MARCH 12, 2007

WASHINGTON

I. Automatic Restoration of Rights:

Article VI, Section 3 of the Washington State Constitution provides that "[a]ll persons convicted of an infamous crime ... are excluded from the elective franchise." "Infamous crimes" are defined as those "punishable by death in the state penitentiary or imprisonment in a state correctional facility," Wash. Rev. Code § 29A.04.079, and have historically included only felonies. *See State v. Collins*, 124 P. 903 (Wa., 1912). Disenfranchised felony offenders in Washington remain ineligible to vote until they have completed all the requirements of their sentences, and have obtained certificates of discharge from the sentencing court under Wash. Rev. Code § 9.94A.637. A discharge may be issued only when the convicted person has completed "all requirements of the sentence, including any and all legal financial obligations." § 9.94A.637(4). (For pre-1984 offenses that involved a prison sentence, and certain sex offenses committed after 2001, certificate of discharge must be obtained from the Indeterminate Sentence Review Board.) A discharge under this section has "the effect of restoring all civil rights lost by operation of law upon conviction."

The Department of Corrections is responsible for notifying the court when an offender has completed the requirements of the sentence. Wash. Rev. Code § 9.94A.637. When an offender either is not subject to supervision by DOC or does not complete the requirements of the sentence while under supervision of the department, it is the offender's responsibility to provide the court with verification of the completion of the sentence conditions other than the payment of legal financial obligations. (Prior to 2003 amendments to § 9.94A.637, an offender discharged from supervision by DOC without paying costs and fines could never be discharged in the ordinary course, and thus could never regain the right to vote.)

The restoration system, while in theory automatic, has been characterized as "so bewildering that almost nobody negotiates it well."* The affirmative obligation to apply to the court for discharge and to pay all financial obligations stemming from conviction make restoration more onerous than analogous provisions of other states, where outstanding financial obligations are either waived or ignored. *See* Jill Simmons, Note & Comment, *Beggars Can't be Voters: Why Washington's Felon Re-enfranchisement Law Violates the Equal Protection Clause*, 78 WASH. L. REV. 297, 305-07 (2003). An offender who cannot pay his fine may petition the court for remission of all or part of the court fees and costs based upon

* Editorial, "Felon-voting laws confusing, ignored." *Seattle Times*, May 22, 2005. "You need a degree in government to figure it out," one official told the paper.

"manifest hardship." Wash. Rev. Code § 10.73.160(4). Alternatively, he may petition the governor to restore his civil rights or for pardon. *See United States v. Loucks*, 149 F.3d 1048, 1050 (9th Cir. 1998). The requirement that an offender pay all outstanding financial obligations before being permitted to vote has been held unconstitutional under both the federal and state constitutions. *See Madison v. Washington*, No. 04-2-33414-4 SEA (Sup. Ct., King Cty, March 37, 2006) **

Federal and out-of-state offenders must apply to the governor for restoration of rights.

II. Discretionary Restoration Mechanisms:

A. Executive pardon:

- *Authority:* Pardon power vested in Governor, subject to any restrictions imposed by the legislature. Wash. Const. art III, § 9. Governor must report to legislature every session on pardons granted, and reasons. Wash. Const. art III, § 11. Governor may (but is not required to) seek advice from State Clemency and Pardons Board. Wash. Rev. Code §§ 9.94A.880, 9.94A.885, 10.01.120. Governor may also grant restoration of rights without a pardon, which has the effect of discharging unpaid portion of fine. Wash Rev. Code §§ 9.96.010, 9.96.020. The State Clemency and Pardons Board is composed of five members appointed by the governor to four-year terms, subject to confirmation by the senate. They receive no compensation, and staff is provided by the Governor's office. The board elects its own chairman from among its members.
- *Effect*: Pardon has effect of vacating conviction. Wash. Rev. Code. § 9.94A.030 ("A conviction may be removed from a defendant's criminal history only if it is vacated pursuant to Wash Rev. Code §§ 9.96.060, 9.94A.640, 9.95.240, or a similar out-of-state statute, *or if the conviction has been vacated pursuant to a governor's pardon.*"); *see also* 1967 Wash. Att'y Gen. Op. No. 6; *State v. Cullen*, 127 P.2d 257, 259 (Wash. 1942)
- *Eligibility:* No requirements. Federal and out-of-state offenders may apply to Board for restoration of rights but not for pardon.
- *Process:* Hearing mandatory in all cases, majority rule. Application form at http://www.cjpf.org/clemency/WashingtonApp.pdf. Petition must be filed with Clemency and Pardons Board, which cannot recommend clemency until a public hearing has been held on the petition. The prosecuting attorney of the county where the conviction was obtained

** The Ninth Circuit held in *Farrakhan v. Washington*, 338 F.3d 1009, 1016 (9th Cir. 2003) that Washington's disenfranchisement provisions could be challenged as racially discriminatory under the Voting Rights Act, but the court of appeals rejected a specific challenge to the State's restoration scheme on standing grounds.

must be notified at least thirty days prior to the scheduled hearing, and the prosecuting attorney shall make reasonable efforts to notify victims, survivors of victims, witnesses, and the law enforcement agency or agencies that conducted the investigation, of the date and place of the hearing. Wash. Rev. Code § 9.94A.885(3).

- *Frequency of Grants:* About 25-40 petitions for pardon received each quarter, but the Governor's staff forwards few of these to the Board for hearing. Pardons have been rare in recent years (no more than 3-6 pardons granted each year for past decade). (Press accounts in December 2004 report that outgoing Gov Locke pardoned or commuted 48 people in final months, including at least one pardon to avoid deportation.). Source: Office of the Governor.
- *Contact*: Shelby Hultman, Legal Affairs Assistant, Office of the Governor, 360-902-4111. Shelby.Hultman@gov.wa.gov.

B. Judicial sealing or expungement of adult felony convictions:

- *Vacating Record of Conviction*: Wash. Rev. Code. § 9.94A.030 provides that "a conviction may be removed from a defendant's criminal history only if it is vacated pursuant to Wash Rev. Code §§ 9.96.060 [misdemeanors], 9.94A.640 [Class B and C felonies], 9.95.240 [probationary sentences], or a similar out-of-state statute, or if the conviction has been vacated pursuant to a governor's pardon." Vacation unavailable for violent or sex offenses, including domestic violence.
    - *Class B and C felonies* (except crimes against the person, sex offenses) vacation available from sentencing court after satisfaction of an eligibility waiting period: 10 years for Class B felonies, five for Class C felonies. Wash. Rev. Code § 9.94A.640. Vacation unavailable for Class A felonies, or if person has charges pending or was convicted since offense for which vacation sought. Upon petition, if the court finds the offender eligible, court may clear the record of conviction by: (a) Permitting the offender to withdraw the offender's plea of guilty and to enter a plea of not guilty; or (b) if the offender has been convicted after a plea of not guilty, by the court setting aside the verdict of guilty; and (c) by the court dismissing the information or indictment against the offender.
    - *Probationary sentences*: After conviction of "any crime," court may suspend or defer sentence, and place defendant on probation. Wash. Rev. Code §§ 3.66.067; 9.95.200. Upon successful completion of probation, or "at any time," guilty plea may be withdrawn or conviction set aside, and defendant released of all penalties and disabilities, provided that, in subsequent prosecution conviction may

be pleaded and proved Wash. Rev. Code § 9.95.240(1). After the period of probation has expired, the defendant may apply to the sentencing court for a vacation of the defendant's record of conviction under § 9.94A.640. A conviction that has been vacated under this section may not be disseminated or disclosed by the state patrol or local law enforcement agency to any person, except other criminal justice enforcement agencies. § 9.95.240(2)(a) and (b).

- *Misdemeanor offenses.* Vacation also available for misdemeanor offenses under § 9.96.060, on same terms and to same effect as for felony offenses under § 9.94A.640 (above). Waiting period of three to five years following discharge.

- *Nonconviction records*: Nonconviction records in criminal justice agency files may be sealed administratively two years after disposition favorable to defendant. Criminal Records Privacy Act, Wash. Rev. Code § 10.97.060. Court has no jurisdiction to seal nonconviction records. *See State v. Shineman*, 94 Wash. App. 57 (1999). Agency may refuse to make deletion in the case of deferred prosecution (though court may vacate record of conviction, as describe above).

- *Effect of Vacation:* Once the court vacates a record of conviction:

  [T]he fact that the offender has been convicted of the offense shall not be included in the offender's criminal history for purposes of determining a sentence in any subsequent conviction, and the offender shall be released from all penalties and disabilities resulting from the offense. For all purposes, including responding to questions on employment applications, an offender whose conviction has been vacated may state that the offender has never been convicted of that crime. Nothing in this section affects or prevents the use of an offender's prior conviction in a later criminal prosecution.

  Wash. Rev. Code § 9.94A.640 (1), (3). Record preserved for future criminal prosecutions. *See State v. Breazeale*, 994 P.2d 254 (Wash. Ct. App. 2000), *aff'd in part, rev'd in part*, 31 P.3d 1155 (Wash. 2001).

- *Firearms Restoration*: Vacation of sentence does not restore firearms rights. 1988 Wash. Att'y Gen. Op. No. 10. Wash. Rev. Code § 9.41.040 permits petition to court to restore firearms privileges. Persons sentenced to probation regain rights automatically if they have not previously been convicted of a sex offense prohibiting firearm ownership under subsection (1) or (2) of this section and/or any felony defined under any law as a class A felony or with a maximum sentence of at least twenty years, or both, the individual may petition a court of

record to have his or her right to possess a firearm restored. Eligibility in case of felony five years without conviction or pending charges, and no prior offenses prohibiting gun possession; for misdemeanor after three years. If a person is convicted of a crime for which Wash. Rev. Code § 9.41.040 prescribes no procedure for the restoration of firearm possession rights, the only available statutory remedy is a pardon by the governor with a finding either of innocence or of rehabilitation. 2002 Wash. Att'y Gen. Op. No. 4. Section 9.41.040(3) provides that possession of a firearm is not prohibited for someone who has a "certificate of rehabilitation." This term is not defined, however, and Washington courts have been held to have no authority to issue such certificates. *See State* v. *Masangkay*, 91 P.3d 140, 141 (Wash. Ct. App. 2004) (Wash. Rev. Code § 9.41.040(3), which contains the "certificate of rehabilitation" language, cannot reasonably be interpreted as authorization for Washington courts to issue certificates of rehabilitation).

C. Administrative certificate: N/A

III. Nondiscrimination in Licensing and Employment:

Policy expressed in Wash Rev. Code ch. 9.96A ("Restoration of Employment Rights")(1973):

> "it is the policy of the state of Washington to encourage and contribute to the rehabilitation of felons and to assist them in the assumption of the responsibilities of citizenship, and the opportunity to secure employment or to pursue, practice or engage in a meaningful and profitable trade, occupation, vocation, profession or business is an essential ingredient to rehabilitation and the assumption of the responsibilities of citizenship."

§ 9.96A.010. Most public employers and licensing agencies may not disqualify from employment or licensure solely because of conviction, but may consider a conviction only if 1) the conviction occurred within the last ten years; and 2) the crime "directly relates" to the employment or license sought. § 9.96A.020. Several important exceptions dealing with vulnerable adults and children: offenders who have committed "crimes against persons" and "crimes of financial exploitation" cannot work in nursing homes, adult family homes, and child care facilities. Wash. Rev. Code §§ 9.96A.060, 43.43.842. Law enforcement agencies do not have to comply with standards governing other public employees. § 9.96A.030 Individuals convicted of fraud may be barred from employment in county treasurer's office; sex offenders may be barred from many positions in education, including teaching, even if more than 10 years have passed since conviction. § 9.96A.020. Schools districts are required to conduct records checks of all employees, as is the Department of Social and Health Services. Wash. Rev. Code § 28A.400.303.

OCTOBER 12, 2005

WEST VIRGINIA

I. Automatic Restoration of Rights:

Persons convicted of "treason, felony, or bribery in an election" cannot vote "while such disability continues." W. Va. Const. art. IV, § 1. Right to serve on jury and hold office also forfeited. W. Va. Stat. §§ 6-5-5, 52-1-8(b)(5). Civil rights restored automatically upon completion of sentence, including parole (unless for bribery of a state officer). *See Webb v. County Court of Raleigh County*, 168 S.E. 760 (W. Va. 1933); 51 W. Va. Att'y Gen. Op. 182 (1965). Federal courts reach opposite conclusion respecting restoration of jury right under state law, *see U.S. v. Morrell*, 61 F.3d 279 (4th Cir. 1995), though § 52-1-8 appears to link right to vote and right to serve on jury. Disqualification from office permanent in the case of crimes involving elections and bribery. W.Va. Const. art 6, § 45; W. Va. Code § 61-5-4, -5; W. Va. Code § 6-5-5.

II. Discretionary Restoration Mechanisms:

A. Executive pardon:

- *Authority* to pardon exclusively in Governor, except for impeachment. W. Va. Const. art 7, § 11. Governor required to report the particulars of every case to the legislature, with reasons for each grant. W. Va. Code § 5-1-16. As a matter of policy, Governor does not consider an application except upon recommendation of Parole Board.
- *Eligibility*: State offenders only.
- *Effect*: Pardon does not restore firearms rights. *Perito v. County of Brooke*, 597 S.E.2d 311 (W.Va. 2004). W. Va. Code § 61-7-7(c) - Must go to circuit court and prove fitness.
- *Frequency of Grants*: Pardons rarely granted – only 121 in 36 years, by nine governors. Conditional pardons (a sort of parole) more frequent (200 in this same time period) Executive records kept by Secretary of State: Pardons, Reprieves, Commutations, and Respites, available at http://www.wvsos.com/execrecords/code/wvcpardons.htm. Source: Governor's Office.
- *Contact:* Janet Shelton, Office of General Counsel, Governor's Office, Charleston, WV 25305-0770. 304-558-2000

B. Judicial sealing or expungement of adult felony convictions:

Persons granted full and unconditional pardon may apply for expungement from circuit court in which convicted, 2 years after pardon and 20 years after

discharge from sentence, with certain exceptions for violent crimes. W.Va. Code § 5-1-16a. If a conviction is expunged, educational institutions and licensing authorities may not consider. Otherwise no authority to expunge adult convictions.

C. Administrative certificate: N/A

III. Nondiscrimination in Licensing and Employment:

West Virginia has no general law regulating consideration of conviction in employment or licensure, except that licensing authorities may not consider expunged convictions, W. Va Code § 5-1-16a(b). (Expungement available only if conviction has been pardoned, and then not until 2 years after pardon, 20 years after offense committed. See above.)

West Virginia does require that a conviction be "directly related" to the practice of a few professions. *See* W. Va Code § 30-3-14(c)(2)("Being found guilty of a crime in any jurisdiction, which offense is a felony, involves moral turpitude or directly relates to the practice of medicine"); § 30-16-11(a)(3) (same, chiropractic); § 47-14-11(a)(4)("found guilty of a crime in any jurisdiction which directly relates to the sale of preneed funeral contracts").

OCTOBER 15, 2005

WISCONSIN

I. Automatic Restoration of Rights:

Right to vote and sit on jury lost upon conviction of "treason, felony, or bribery," and automatically restored upon completion of sentence. Wis. Stat § 304.078. Jury right depends upon being a qualified elector, and is restored along with vote upon completion of sentence. § 756.01(1). Right to hold public office and other rights lost (*e.g.,* firearms, licenses) restored only by pardon. Wis. Const. art. 13, § 3; Wis. Stat. §§ 111.335(cg), (cs), 941.29 (1)(a),(b),(5).

II. Discretionary Restoration Mechanisms:

A. Executive Pardon

- *Authority*: Governor has exclusive power to pardon, except in cases of treason and impeachment. Wis. Const. art V, § 6. Must communicate annually with legislature each case of clemency and the reasons. *Id.*

- *Administration:* Governor appoints a non-statutory Pardon Advisory Board (PAB) – seven members, including one from Department of Justice, one from Department of Corrections, four public members, and Governor's Legal Counsel (chairperson). As of June 2005, the public members were a public defender, a district attorney, a firefighter, and a pastor.

- *Eligibility:* Ordinarily must wait five years from completion of sentence, including probation and parole – though this may be waived by PAB in "extraordinary circumstances." Only available to Wisconsin felons – not misdemeanants (unless "extraordinary circumstances"), or out-of-state or federal offenders. Executive Clemency Information, http://www.wi-doc.com/PDF_Files/Doyle%20Pardon%20Packet.pdf including application form at: http://www.wi-doc.com/index_adult.htm.

- *Process:* By statute, notification must be published in county paper, or posted on courthouse door. Wis. Stat. § 304.09. Notice must also be delivered to DA, judge and victim or victim's family. *Id.* Process includes a public hearing before Board. Board meets four times a year, and considers approximately 24 cases each meeting. Executive Clemency Information, *supra.*

- *Effect of Pardon*: Restores all rights and privileges lost as a result of conviction (including gun rights), relieves legal disabilities and signals

rehabilitation, but does not expunge or seal the conviction. Conviction must be revealed if asked, but also the fact that it has been pardoned. Executive Clemency Information, *supra.*

- *Standards:* According to Executive Clemency Information, *supra*, an applicant should have a "significant and documented need" such as employment, education or job training. Pardons to clear conscience or regain firearms rights are not generally granted, unless the conviction is old and minor. Factors taken into account include age and seriousness of conviction, extent of need, applicant's "personal development" since crime was committed, community or civic contributions. Pardon specifically not considered an "ordinary" part of offender reentry.

- *Frequency of Grants*: Pardons rarely granted. About 150 applicants per year meet eligibility requirements. Another 250 apply for waivers, either because they don't meet five year requirement or because they are misdemeanants. Governor generally follows Board recommendations, decides negative as well as positive. As of June 2005, Gov. Doyle had granted 28 pardons since taking office in 2003. Source: Governor's Office.

- *Contact:* PAB: Secretary, Mara Koeller, 608-266-7603, mara.koeller@gov.state.wi.us

B. Expungement or sealing of adult convictions: No expungement or sealing for adult felony convictions. Misdemeanor convictions may be expunged only if committed before age 21. *See* Wis. Stat. § 973.015.

C. Administrative Restoration: N/A

III. Occupational licensing and employment:

*Wisconsin Fair Employment Act (*1977) expressly bars employers from discriminating in employment and licensing decisions on the basis of an individual's criminal record. Wis. Stat. § 111.321. However, it is not unlawful to discriminate against those previously convicted of a crime if the circumstances of the particular criminal offense "substantially relate to the circumstances of the particular job or licensed activity," or if the person is not bondable. § 111.335(b). Licensing authorities are specifically prohibited from issuing licenses to convicted persons for certain professions if they have not been pardoned (e.g. security personnel and private investigators, installer of burglar alarms), or who have been convicted of certain offenses (including drug offenses). § 111.335(cg), (cs). For a more complete discussion of the adoption

and modification of Wisconsin's Fair Employment Act, *see* Jeffrey D. Myers, *Note, County of Milwaukee v. LIRC: Levels of Abstraction and Employment Discrimination Because of Arrest or Conviction Record*, 1988 Wis. L. Rev. 891 (1988). *See also* Thomas M. Hruz, Comment, *The Unwisdom of the Wisconsin Fair Employment Act's Ban on Discrimination on the Basis of Conviction Records*, 85 MARQ. L. REV. 779, 779-801 (2002) (discussing recent interpretation and application of Act). It is employment discrimination to ask an employee or applicant for employee for information about arrest record, except when charges are pending. § 111.335(a)(1).

As an integral part of the state's nondiscrimination scheme, the provision is enforced by the Labor and Industry Review Commission (LIRC). In *County of Milwaukee v. LIRC*, 407 N.W.2d 908, 916 (Wis. 1987), the Wisconsin Supreme Court rejected an interpretation of the "substantial relationship" test as "a detailed inquiry into the facts of the offense and the job." Instead, the court looked to the circumstances fostering criminal activity as essential evaluative criteria, such as having the opportunity for criminal behavior. There, the county was permitted to terminate a crisis intervention specialist after he was convicted of homicide by reckless conduct and multiple misdemeanor counts of patient neglect arising from actions taken during his previous employment as a nursing home administrator. Since the *County of Milwaukee* decision, the "substantial relationship" test has for the most part been applied in favor of employers. *See, e.g., Halverson v. LIRC*, 146 Wis. 2d 867, 431 N.W.2d 328 (Ct. App. 1988) (unpublished) (shoplifting substantially related to work involving the need to enter residential and commercial premises when customers may not be present); unsupervised time and the duty of handling money). However, in *Wal-Mart Stores v. LIRC*, 583 N.W.2d 674, 1998 Wisc. App. LEXIS 1529 (1998) (unpublished), the court of appeals held that a misdemeanor involving marijuana did not substantially relate to a "stocker" position at a retail store involving a highly regimented and structured workday. *See also Milwaukee Bd. of Sch. Dirs. v. LIRC*, No. 00-1956, 2001 Wisc. App. LEXIS 601, at *25 (June 12, 2001) (unpublished) (school district improperly discriminated against an individual convicted of a class C felony by refusing to hire him as a boiler attendant).

OCTOBER 30, 2005

WYOMING

Automatic Restoration of Rights:

A person convicted of a felony forfeits the right to vote, to serve on a jury, and to hold public office. Wyo. Stat. Ann. §§ 6-10-106(a), 1-11-102. For most felony offenders, civil rights regained either by pardon or restoration of voting rights from Governor. Wyo. Const. Art 4, § 5; Wyo. Stat. Ann. §§ 6-10-106(a), 7-13-105(a).

First offender restoration: Since July 1, 2003, first-time non-violent felony offenders have been able to apply to the Wyoming Board of Parole for a certificate that restores voting rights five years after successful completion of sentence. Wyo. Stat. Ann. § 7-13-105(b). See IIC below. All other persons seeking to reinstate the right to vote must apply to the Governor for either a pardon or a restoration of rights.

Firearms: A person convicted of a "violent felony" may not possess firearms (including long guns) unless pardoned. *See* Wyo. Stat. Ann. §§ 6-8-102, 6-1-104(a)(xii).

Licensing statutes: A number of occupational and professional licensing statutes provide that conviction may be grounds for suspension or disqualification of persons convicted of a felony. *See, e.g.,* Wyo. Stat. Ann. § 33-15-121(a)(i) (dental hygienist); § 26-23-321(b)(title agent); § 33-7-311(a)(iii)(barber school instructor). *But see* Wyo. Stat. Ann. § 33-12-135(b) (cosmetologist), *repealed by* 2005 Wyo. Sess. Laws ch. 98 (limiting felonies disqualifying a person from being a licensed cosmetologist to crimes which "adversely relate[]" to cosmetology).

Discretionary Restoration Mechanisms:

Executive pardon or restoration of rights:

- *Authority:* Governor has authority under constitution to pardon. Wyo. Const. Art 4, § 5. Constitution provides that the legislature may control manner of applying, but it evidently has not done so. Governor must report to the legislature at each session on clemency grants and the reasons for each one.
- *Eligibility*: Persons seeking a pardon or restoration of rights must wait ten years and five years respectively (previously twenty years and ten years) from the time of completion of sentence before applying. Federal and out-of-state offenders are also eligible. Governor's policy generally excludes

persons convicted of sexual crimes or crimes involving a child as a victim from consideration.

- *Process:* Application for pardon described in Wyo. Stat. Ann. § 7-13-803 through 806. Governor must give notice to DA three weeks prior to acting, and DA must provide details of offense. § 7-13-805(b). According to the Wyoming Attorney General's Office, entire pardon process generally takes about 4-6 weeks to complete from submission of application. Wyoming Board of Parole has a role only in commutation cases, and in statutory restoration of voting rights.
- *Frequency of Grants:* According to the Wyoming Attorney General's Office, there have been only two pardons granted since 1995, and 10 gubernatorial restorations of rights
- *Contact:* Paul Rehurek, Deputy Attorney General, PREHU@state.wy.us, 307-777-7894; Tony Escamilla, Deputy Director, Wyoming Board of Parole. tescam@state.wy.us 307-777-5444.

B. Judicial sealing or expungement of adult felony convictions:

Deferred adjudication for first offenders: A first offender who pleads guilty to a misdemeanor or a non-violent felony may be placed on probation for a period of at least one year and no more than five years; upon successful completion of probation, the court may discharge the person and dismiss the proceedings, and the matter "shall not be a conviction for any purpose." Wyo. Stat. Ann. § 7-13- 301.

Expungement: Wyoming, noted in the 1962 NCCD report as the only state that then made expungement available by statute to persons sentenced to a prison term, now affirmatively prohibits its courts from expunging criminal records, except as specifically authorized by law. *See* Wyo. Stat. Ann. § 7-13-307. The Wyoming Supreme Court has held that Wyoming courts have no inherent power to expunge the felony record of a person who has not been pardoned for the purpose of restoring civil rights, and that it would be an encroachment on the executive power to pardon. *Stanton v. State*, 686 P.2d 587 (Wyo. 1984).

Misdemeanors: Expungement of misdemeanor records for the purpose of restoring firearms rights, *see* Wyo. Stat. Ann. § 7-13-1501.

Deferred Sentencing: First Offender Statute, Wyo. Stat. Ann. § 7-13-301, permits delayed imposition of sentence for first offenders, ex. serious violent offenses and sex offenses. With consent of the defendant and the state and without entering a judgment of guilt or conviction, court may defer further proceedings and place the person on probation for a term not to exceed five (5) years upon terms and conditions set by the court. Charges dismissed after successful completion of probation. Specifically prohibits expungement. *See* § 7-13-307.

C. Administrative restoration:

First Offender Restoration: Under 2003 law, Wyo. Stat. Ann. § 7-13-105(b), Parole Board "shall" restore voting rights to nonviolent first offenders (including out-of-state and federal) five years after successful completion of all terms of sentence. Upon receipt of the written application, the board makes an initial determination of eligibility. Should the board deny the application at this initial determination, the applicant shall have the right to request a contested case hearing before the board as provided by and in accordance with the Wyoming Administrative Procedure Act. The decision of the board after such hearing shall be deemed a final administrative determination, shall be in writing, and, shall in the case of a denial of the application, state the findings of the board and the reasons for the denial and shall not be subject to judicial review. § 7-13-105(c).

From July 1, 2003 until July 31, 2004, six people applied for restoration under this provision, five of whom were approved. The sixth applicant was found ineligible. Source: Wyoming Parole Board.

Nondiscrimination in Licensing and Employment: N/A

JANUARY 17, 2007

FEDERAL*

I. Automatic Restoration of Rights:

- Vote: Right to vote depends upon state law, for both state and federal offenders. *See Richardson v. Ramirez*, 418 U.S. 24, 54 (1974). Most states that do not restore the right to vote automatically give federal offenders access to their restoration procedures. *See* Resource Guide, Part V.

- Jury: Eligibility for federal jury service is lost upon conviction in state or federal court of a crime punishable by more than one year if a person's "civil rights have not been restored." 28 U.S.C. § 1865(b)(5). The courts and the Administrative Office of United States Courts interpret this provision to require an affirmative act (such as a pardon or expungement) to restore federal jury eligibility. *See, e.g., United States v. Hefner*, 842 F.2d 731, 732 (4th Cir. 1988) (legislative history of § 1865(b)(5) indicates that "some affirmative act recognized in law must first take place to restore one's civil rights to meet the eligibility requirements of section 1865(b)(5)"). Thus the automatic restoration of rights that takes place in many states upon completion of sentence will not be sufficient. *See* Paul J. Komives & Peggy S. Blotner, *Loss and Restoration of Civil Rights Affecting Disqualification for Federal Jury Service*, 70 MICH. BUS. L.J. 542 (1991).

- Office-holding: The U.S. Constitution does not prohibit convicted persons from holding office, but some statutes provide that conviction will result in the loss of office. *See, e.g.,* 18 U.S.C. § 201(b) (sentencing court may order disqualification from federal office of official convicted for bribery); "Federal Statutes Imposing Collateral Consequences Upon Conviction," U.S. Department of Justice, Office of the Pardon Attorney, at 2-3 ("OPA Federal Summary"), available at http://www.usdoj.gov/pardon/collateral_consequences.pdf (hereinafter OPA Federal Summary). A felony conviction does not disqualify a person from federal employment, but may be considered in connection with determining suitability.

- Labor organizations: Prohibitions relating to office-holding in labor organizations and employee benefit plans last 13 years, but may be removed earlier if civil rights have been "fully restored" or if a federal court or the Parole Commission so directs. 29 U.S.C. §§ 504, 1111.

- Federal defense contractors:

  - Defense Contractor Personnel: Persons convicted of fraud or any felony arising out of a contract with the Department of Defense are prohibited for a period of "not less than five years after the date of conviction" from working in a management or supervisory capacity with a defense contractor, or from serving on

* Includes military cases prosecuted under the UCMJ.

the board of directors or acting as a consultant for any company that is a defense contractor. 10 U.S.C. § 2408(a). (Waiver prior to five years available from Secretary of Defense "in the interests of national security." § 2408(a)(3).)

- DOD Security Clearance: *See* part III, *infra.*

- Discretionary relief may be available from a variety of other federal collateral disabilities from responsible agency officials. *See* OPA Federal Summary, *supra*, at 15-16; *see also* parts IIC and III, *infra.*

II. Discretionary Restoration Mechanisms:

A. Executive pardon:

- *Authority*: Exclusively in President, cannot be limited or regulated by Congress. U.S. Const. Art. II, sec. 2. By Executive Order, Attorney General is charged with providing advice on pardon policy and investigating and making recommendations on all applications for pardon and commutation. *See* 28 C.F.R. Part 1.

- *Eligibility*: Five years after completion of sentence, beginning upon release from prison, or date of sentencing if not incarcerated. Waiver possible. Ordinarily must have completed parole. 28 C.F.R. Part 1. Offenders whose convictions were prosecuted under the Uniform Code of Military Justice are eligible to apply for a presidential pardon, as are D.C. Code offenders.

- *Effect*: A pardon "in no way reverses the legal conclusion of the courts; it "'does not blot out guilt or expunge a judgment of conviction.'" *Hirschberg v. Commodity Futures Trading Com'n*, 414 F. 2d 679, 682 (7th Cir. 2005), *citing In re North,* 62 F.3d 1434, 1437 (D.C.Cir.1994). *See also Nixon v. United States,* 506 U.S. 224, 232 (1993) ("a pardon is in no sense an overturning of a judgment of conviction by some other tribunal"); *Burdick v. United States,* 236 U.S. 79, 94 (1915) (a pardon "carries an imputation of guilt"). The effect of a presidential pardon is not to prohibit all consequences of a pardoned conviction, but rather to preclude future punishment for the conviction. *See Nixon,* 506 U.S. at 232; *Bjerkan v. United States,* 529 F.2d 125, 127-28 (7th Cir.1975). Thus a pardon relieves legal disabilities arising under state or federal law solely by virtue of the conviction, but it does not preclude adverse action taken on the basis of the conduct underlying the conviction. *See* Effects of a Presidential Pardon, 19 Op. Off. Legal Counsel No. 160, 1995 WL 861618 (June 19, 1995). In this regard, a pardon may be taken as evidence of rehabilitation and good character.

- *Process*: Application to Office of the Pardon Attorney (OPA), U.S. Department of Justice, on a form provided by that office. *See* http://www.usdoj.gov/pardon/pardon_petition.htm. Investigation by OPA, which in meritorious cases will include an FBI background investigation and inquiry to U.S. Attorney and sentencing judge, recommendation through Deputy Attorney General to President. No formal hearing. Official pardon recommendations and OPA advice to

President are confidential. Pardon recommendations handled in White House by Office of White House Counsel. Processing time varies in ordinary cases from 18 months upwards: there is no time limit on the consideration of federal pardon cases, and as of August 2005 some applications had been pending since the Clinton Administration.

- *Criteria*: Standards applicable to Justice Department review of pardon applications are set forth in § 1-2.112 of United States Attorneys Manual. http://www.usdoj.gov/pardon/petitions.htm. Factors to be considered include
  - 1) **Post-conviction conduct, character, and reputation** ("An individual's demonstrated ability to lead a responsible and productive life for a significant period after conviction or release from confinement is strong evidence of rehabilitation and worthiness for pardon. The background investigation customarily conducted by the FBI in pardon cases focuses on the petitioner's financial and employment stability, responsibility toward family, reputation in the community, participation in community service, charitable or other meritorious activities and, if applicable, military record. In assessing post-conviction accomplishments, each petitioner's life circumstances are considered in their totality: it may not be appropriate or realistic to expect "extraordinary" post-conviction achievements from individuals who are less fortunately situated in terms of cultural, educational, or economic background."
  - **2. Seriousness and relative recentness of the offense:** "When an offense is very serious (e.g., a violent crime, major drug trafficking, breach of public trust, or white collar fraud involving substantial sums of money), a suitable length of time should have elapsed in order to avoid denigrating the seriousness of the offense or undermining the deterrent effect of the conviction. In the case of a prominent individual or notorious crime, the likely effect of a pardon on law enforcement interests or upon the general public should be taken into account. Victim impact may also be a relevant consideration. When an offense is very old and relatively minor, the equities may weigh more heavily in favor of forgiveness, provided the petitioner is otherwise a suitable candidate for pardon."
  - **3. Acceptance of responsibility, remorse, and atonement.** "The extent to which a petitioner has accepted responsibility for his or her criminal conduct and made restitution to its victims are important considerations. A petitioner should be genuinely desirous of forgiveness rather than vindication. While the absence of expressions of remorse should not preclude favorable consideration, a petitioner's attempt to minimize or rationalize culpability does not advance the case for pardon. In this regard, statements made in mitigation (e.g., "everybody was doing it," or "I didn't realize it was illegal") should be judged in context. Persons seeking a pardon on grounds of innocence or miscarriage of justice bear a formidable burden of persuasion."
  - **4. Need for relief.** "The purpose for which pardon is sought may influence disposition of the petition. A felony conviction may result in a wide variety of

legal disabilities under state or federal law, some of which can provide persuasive grounds for recommending a pardon. For example, a specific employment-related need for pardon, such as removal of a bar to licensure or bonding, may make an otherwise marginal case sufficiently compelling to warrant a grant in aid of the individual's continuing rehabilitation. On the other hand, the absence of a specific need should not be held against an otherwise deserving applicant, who may understandably be motivated solely by a strong personal desire for a sign of forgiveness."

- 5: **Official recommendations and reports.** "The comments and recommendations of concerned and knowledgeable officials, particularly the United States Attorney whose office prosecuted the case and the sentencing judge, are carefully considered. The likely impact of favorable action in the district or nationally, particularly on current law enforcement priorities, will always be relevant to the President's decision. Apart from their significance to the individuals who seek them, pardons can play an important part in defining and furthering the rehabilitative goals of the criminal justice system."

Frequency of Grants: Historically, American presidents have pardoned regularly and generously. Presidential pardoning has abated in recent years, however, compared to pre-1980 grant rates. *See* Margaret Colgate Love, *The Pardon Paradox: Lessons from Clinton's Last Pardons,* 32 CAPITAL LAW REVIEW 185 (2002); Love, *Of Pardons, Politics and Collar Buttons: Reflections on the President's Duty to Be Merciful*, 27 FORDHAM URBAN LAW JOURNAL 1483 (2000). As of January 2007, after six years in office, President George W. Bush had granted 113 pardons (and three commutations), and had denied 961 applications. As of that date, over 1000 applications for pardon remained pending, awaiting presidential action.[1] The rate of application has not abated despite the sluggish grant rate. Source: OFFICE OF THE PARDON ATTORNEY, PRESIDENTIAL

[1] The number of presidential pardons each year has steadily declined 1980, as has the percentage of applications granted. President Ronald Reagan was the last president to issue pardons regularly each year, and his 393 pardons represented only about 20% of the applications he acted on. Reagan's 393 pardons in eight years can be compared to the 534 pardons issued by his predecessor Jimmy Carter in four. (He commuted only thirteen sentences compared to Carter's 29.) Going further back in time, President Ford issued 382 pardons in two and one half years, and President Nixon 863 in eight years, Johnson 960 in four, and Kennedy 472 in three. The percentage of applications acted on favorably also steadily declined from Nixon (51%) through Ford (39%) and Carter (34%) to Reagan (20%). *See* OFFICE OF THE PARDON ATTORNEY, PRESIDENTIAL CLEMENCY ACTIONS BY ADMINISTRATION, 1945 TO PRESENT (2005). A sharper downward trend in federal pardoning began with President George H.W. Bush (68 pardons in four years, 7% of those acted upon), and continued under Clinton: excluding the last minute irregular grants on the eve of his leaving office, President Clinton issued only 178 pardons and 21 commutations (12 of which were FALN members) through the end of FY 2000, acting favorably on only 11% of the pardon applications decided during that period of time. *Id.* President George W. Bush's 113 pardons out of over 1000 cases decided yields a grant rate of about 10 %. To be fair, a majority of President Bush's pardon denials came at the beginning of his tenure, in cases left undecided by the Clinton Administration. The issuance of nine presidential pardon warrants during the two-year period from November 2004 to December 2006 is a hopeful indication that the pace of federal pardoning may pick up as President Bush nears the end of his second term, though his pardoning rate still lags considerably behind that of even his most recent predecessors.

CLEMENCY ACTIONS BY ADMINISTRATION, 1945 TO PRESENT (November 2005); W.H. Humbert, THE PARDONING POWER OF THE PRESIDENT (1941).

- Contact: Susan Kuzma or Samuel Morison, Office of the Pardon Attorney, U.S. Department of Justice, 202-616-6070. susan.kuzma@usdoj.gov; samuel.morison@usdoj.gov

B. Judicial sealing or expungement of adult felony convictions:

- *Inherent expungement authority*: There is no general federal expungement statute, and federal courts have no inherent authority to expunge records of a valid federal conviction. *See, e.g., United States v. Crowell*, 374 F.3d 790, 792 (9th Cir. 2004). However, some courts have held that federal courts have inherent ancillary authority to expunge criminal records where an arrest or conviction is found to be invalid or a clerical error is made. *United States v. Sumner,* 226 F.3d 1005, 1009 (9th Cir.2000).
- *Misdemeanor Marijuana Possession*: Congress has provided that where a person with no prior drug conviction is found guilty of misdemeanor marijuana possession under 21 U.S.C. § 844, courts may impose probation before entry of judgment, and subsequently dismiss the case without entry of judgment and no conviction resulting. *See* 18 U.S.C. § 3607(c). Expungement of all records is available if the defendant was less than 21 years of age at the time of offense. The effect of expungement under § 3607 is explained as follows:

  > "The expungement order shall direct that there be expunged from all official records, except the nonpublic records referred to in subsection (b), all references to his arrest for the offense, the institution of criminal proceedings against him, and the results thereof. The effect of the order shall be to restore such person, in the contemplation of the law, to the status he occupied before such arrest or institution of criminal proceedings. A person concerning whom such an order has been entered shall not be held thereafter under any provision of law to be guilty of perjury, false swearing, or making a false statement by reason of his failure to recite or acknowledge such arrests or institution of criminal proceedings, or the results thereof, in response to an inquiry made of him for any purpose."

  18 U.S.C. § 3607(c). (Before its 1984 amendment, § 844(b) itself permitted expungement for misdemeanor marijuana possession. *See* § 219(a), Pub. L. 98-473, 98 Stat. 1837.) Congress has directed that DNA analysis be expunged from certain indices when a conviction has been overturned. 10 U.S.C. § 1565(e); 42 U.S.C. § 14132(d). *See also*18 U.S.C. § 921(a)(20), (33)(B)(ii) (defining certain crimes to exclude convictions that have been expunged).

- *Youth Corrections Act*: Between 1950 and 1984, offenders between the ages of 18 and 26 could have their convictions "set aside" after successful completion of

probation under the Federal Youth Corrections Act, 18 U.S.C. §§ 5005-5056 (1984). The effect of a set-aside under this statute was never settled in the courts, and the YCA was in any event repealed in its entirely by the Sentencing Reform Act of 1984. (A companion House bill pending at that time would have extended the set-aside remedy to all federal offenders, and clarified its effect as full expungement permitting an individual to deny having been convicted. *See* Margaret Colgate Love, *Starting Over With a Clean Slate: In Praise of a Forgotten Section of the Model Penal Code,* 30 FORDHAM URB. L.J. 1705, 1715-16 (2003).)

C. Administrative certificate:

While there is no general administrative relief mechanism available from federal collateral consequences, waivers in particular cases may be available from responsible agency officials for both state and federal offenders subject to disabilities under particular federal statutes. *See generally* "Federal Statutes Imposing Collateral Consequences Upon Conviction," U.S. Department of Justice, Office of the Pardon Attorney, at 15-16, available at http://www.usdoj.gov/pardon/collateral_consequences.pdf. For example, exceptions to the prohibition on military enlistment of felony offenders may be authorized by the Secretary of the service involved in "meritorious cases." 10 U.S.C. § 504. Also, persons prohibited from holding national security clearance by virtue of their conviction may be granted a waiver "in accordance with standards and procedures prescribed by, or under the authority of, an Executive order or other guidance issued by the President." 10 U.S.C. § 986. See also the waiver authority of the FDIC and TSA described in Part III.

A few federal statutes specifically incorporate a waiver provision based on state provisions for pardon or restoration of rights. For example, under the Firearms Owners Protection Act of 1986, state convictions that have been expunged, set aside, or pardoned, or for which a person has had civil rights restored, do not constitute "convictions" for purposes of prosecution as a felon in possession. 18 U.S.C. § 921(a)(20) (2000); James W. Diehm, *Federal Expungement: A Concept in Need of a Definition*, 66 ST. JOHN'S L. REV. 73, 99 (1992). In certain cases, an alien may avoid deportation based on conviction if he is pardoned. *See* Elizabeth Rapaport, *The Georgia Immigration Pardons: A Case Study in Mass Clemency*, 13 FED. SENTENCING REP. 184, 184 (2001). A felony offender is disqualified from serving on a federal jury "if his civil rights have not been restored." 28 U.S.C. § 1865(b)(5) (2000). The federal prohibitions relating to involvement in labor organizations and employee benefit plans last up to thirteen years, but may be removed earlier if an individual's civil rights have been "fully restored." 29 U.S.C. §§ 504, 1111 (1998). See also the Transportation Safety Administration regulations described in Part III, *infra,* which give effect in connection with employment in transportation-related occupations to both state pardons and state expungements.

III. Nondiscrimination in Licensing and Employment:

Civil Rights Act of 1964: There is no general provision in federal law that prohibits consideration of a criminal conviction in connection with employment or licensure. The

Equal Employment Opportunity Commission has taken the position that "an employer's policy or practice of excluding individuals from employment on the basis of their conviction records has an adverse impact on Blacks and Hispanics in light of statistics showing that they are convicted at a rate disproportionately greater than their representation in the population. Consequently, the Commission has held and continues to hold that such a policy or practice is unlawful under Title VII in the absence of a justifying business necessity." EEOC Guidance No. N-915, February 4, 1987, Policy Statement on the Issue of Conviction Records under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq., EEOC Compliance Manual, February 4, 1987 (No. 918), citing previous decisions. *See also* EEOC Guidance No. N-915-061, September 7, 1990, "Policy Guidance on the Consideration of Arrest Records in Employment Decisions under Title VII of the Civil Rights Act of 1964, as amended."
http://www.hirenetwork.org/fed_occ_restrictions.html

Fair Credit Reporting Act: Prohibits a "consumer reporting agency," including private firms that supply criminal background information to employers, from disseminating to a prospective or current employer information about arrests that are more than seven years old, for which the statute of limitations has run. *See* 15 U.S.C. § 1681c(a)(2). However, convictions of any age may be reported. 15 U.S.C. § 1681c(a)(5). Additional notice and other procedural protections required by the FCRA also apply directly to an employer, as discussed in FTC advisory letters. http://www.cardreport.com/laws/fcra/ftc-opinion/fcra-opinion.html

Federally Regulated Occupations and Employments: Federal law now authorizes or requires criminal history background checks, and mandates disqualification based on certain convictions, for a wide variety of state-licensed occupations and employments. *See* Legal Action Center, National H.I.R.E. Network, "Federal Occupational Restrictions Affecting People with Criminal Records," http://www.hirenetwork.org/fed_occ_restrictions.html. Some of these regulatory schemes contain time limits or provide for administrative waiver, as described below.

1. **Security Regulation of the Transportation Industry:** Since 9/11, the nation's transportation industry has adopted a new regime of criminal background checks intended to identify workers who may pose a terrorism security risk. Starting with the USA Patriot Act, 49 U.S.C. § 5103a, a progression of federal laws and regulations have been enacted to screen workers employed in the air, sea and ground transportation industries. Although the laws themselves vary in specificity, by regulation and policy the Transportation Security Administration (TSA) has attempted to harmonize the different screening policies, though the Aviation and Transportation Security Act of 2001 imposes more stringent limits on airport employment than those applicable to maritime employees and commercial drivers.

- **Airport Employment:** The Aviation and Transportation Security Act of 2001 (ATSA), denies "unescorted access" authority to anyone convicted of disqualifying offenses within the past ten years. 49 U.S.C. § 44936(b)(1). Major categories of workers covered by the ATSA include airport screeners, mechanics, flight attendants and pilots, fleet service workers, and workers handling commercial or passenger

cargo in secured areas. § 44936(a)(1)(B). (TSA has proposed regulations to extend a separate level of screening to workers who handle cargo in *unsecured* areas). The ATSA itself includes a list of disqualifying criminal offenses covering various dangerous acts related to transportation, crimes involving espionage and treason, violent felonies, property crimes including theft and burglary that resulted in a felony conviction, and any felony related generally to "dishonesty, fraud or misrepresentation." *See* 49 U.S.C. § 44936(b)(1)(B); *see also* TSA regulations at 49 C.F.R. §§ 1542.209, 1544.229, and 1544.230. In addition, some misdemeanors may also be disqualifying. Most notably, both felony and misdemeanor convictions for unlawful possession or use of a "weapon" (ranging from explosives to firearms, knives, brass knuckles, black jacks, and mace) result in disqualification. *See United States v. Baer*, 324 F.3d 282, 284-86 (4th Cir. 2003) (misdemeanor firearms offense is disqualifying under § 44936). In contrast to the Hazmat regulations (below), the TSA regulations make simple possession of a controlled substance also a disqualifying offense. 49 C.F.R. § 1542.229. There is no provision for waiver.

Expunged and Pardoned Offenses: The TSA has taken the position that a "conviction" does not include offenses that have been discharged or set-aside after successful completion of probation, or convictions that have been expunged or pardoned. *See* May 28, 2004, Memorandum from the Office of the TSA Chief Counsel, "Legal Guidance on Criminal History Records Checks" at 4, http://www.tsa.gov/interweb/assetlibrary/CHRCMay04.pdf. *See also* http://www.tsa.gov/interweb/assetlibrary/TSA_CHRC_Legal_Guidance.doc; http://www.hirenetwork.org/patriot_act.htm. Expungement must "nullify" the conviction, which means it "must remove the criminal record from the applicant's file and cannot impose any restrictions or disabilities on the applicant." Examples of restrictions specifically mentioned in the TSA memorandum include limitations on ownership of a firearm, and limitations on employment as law enforcement officer, teacher, or health care provider. Therefore "some expungements remove the disabling effect of the underlying conviction and some do not." The memorandum also takes the position that "*all pardons will act to nullify the underlying conviction*" for purposes of the airport "unescorted access" authority. May 28 memo at 4. The credentialing authority may take into account convictions outside the 10-year period in making a suitability determination. *See* May 28 memo at 4-5.

Waiver: Unlike the regulations applicable to commercial drivers, the TSA regulations implementing the ATSA do not provide for waiver.

- **Hazmat Licenses for Commercial Drivers:** Under the USA Patriot Act, commercial drivers licensed by the states to transport hazardous material are subject to federal laws regulating their "hazardous materials endorsements" (HME), including new criminal background screening requirements imposed by the USA Patriot Act (49 U.S.C. § 5103a) to insure that "the individual does not pose a security risk warranting denial of the license." Drivers requiring HME endorsements range from municipal trash collectors carrying items like bleach and batteries, to interstate truckers carrying nuclear and biological waste. Unlike the ATSA, the

Patriot Act does not list disqualifying offenses or impose any time limits on their consideration. TSA's final regulations (49 C.F.R. §§ 1572.103 *et seq.*, 69 Fed. Reg. 68720 (Nov. 24, 2004)), list 35 "permanent" and "interim" disqualifying offenses. "Permanent disqualifying offenses" include convictions for especially serious crimes, including murder, espionage, acts of terrorism and crimes related to explosive devices. These offenses, whether felonies or misdemeanors, will be considered disqualifying no matter how dated. (Misdemeanor offenses are disqualifying only if they are of a "terroristic nature," such as sale of explosives, weapons.) The regulation's "interim disqualifying criminal offenses" are expressly limited to felonies and to those convictions that took place within the past seven years, or where the individual was released from prison within five years of the application. These include various acts of violence, weapons offenses, property crimes, and a general category of crimes involving "dishonesty, fraud, or misrepresentation, including identify fraud." Distribution of a controlled substance is also included as a disqualifying offense. However, TSA removed simple drug possession from the final list of disqualifying offenses, concluding that it "generally does not involve violence against others or reveal a pattern of deception . . . ."

The law permits states to enact their own Hazmat standards. As of August 2005, four states had done so. New York's law is stricter than the federal TSA regulations, disqualifying drivers for convictions within the past ten years, and for ten years following release from prison. *See* McKinneys Veh. & Traf. Law § 501(6). New York's law makes no provision for waiver.

Expunged and Pardoned Offenses: 49 C.F.R. § 1572.3 excludes from the definition of "conviction" any offense that has been discharged or set aside pursuant to a "first offender" or other similar authority, and any offense that has been expunged or pardoned. "For purposes of this part, a conviction is expunged when the conviction is removed from the individual's criminal history record and there are no legal disabilities or restrictions associated with the expunged conviction, other than the fact that the conviction may be used for sentencing purposes for subsequent convictions." The commentary to the TSA regulations refers to the May 28, 2004 policy memorandum applicable to airport personnel, discussed above, which notes that to be effective an expungement cannot place limits on hiring as a police officer, teacher, or health care worker. "TSA believes it is necessary to include this level of detail in the definition to ensure that applicants are treated consistently across the country. Procedures on expungements vary from state to state, and may change at any time. Therefore, TSA hopes to avoid inconsistent application of the law against hazmat drivers by providing the new definition." Commentary, 69 Fed. Reg. at 68730. Thus pardons and some expungements will be given effect even prior to the waiver stage (below).

Waiver: An individual denied a clearance due to a disqualifying conviction may petition the TSA for a waiver. In determining whether to grant a waiver, "TSA will consider the following factors: (i) The circumstances of the disqualifying act or offense; (ii) Restitution made by the applicant; (iii) Any Federal or State mitigation

remedies; (iv) Court records or official medical release documents indicating that the individual no longer lacks mental capacity; (v) Other factors that indicate the applicant does not pose a security threat warranting denial of the HME." 49 C.F.R. § 1572.143.

- **Maritime Employees**: The Maritime Transportation Security Act of 2002 (MTSA) establishes a new "transportation worker identification credential" (TWIC) required of anyone with unescorted access to a "secure area" of a port facility or vessel. 46 U.S.C. § 70105. Persons are ineligible for a TWIC if they have been convicted within the preceding 7-year period of a felony that "the Secretary believes could cause the individual to be a terrorism security risk to the United States" or if they have been released from incarceration within the preceding 5-year period for committing such a felony. (Note that these expiration dates have been adopted by the TSA for "interim" disqualifying offenses, but not for "permanent" disqualifying offenses, while the ATSA imposes a ten-year rule on all disqualifying offenses.) (As of February 2005 no implementing regulations had been issued by TSA to identify disqualifying offenses, or to define a "conviction.") Privacy protections written right into the law – individual employers may be informed only of the results.

  Waiver: The MTSA requires a "waiver" process that will "give consideration to the "circumstances of any disqualifying act or offense, restitution made by the individual, Federal and State mitigation remedies, and other factors from which it may be concluded that the individual does not pose a terrorism risk warranting denial of the card." Alternatively, a waiver may be granted if the employer establishes "alternative security arrangements acceptable to the Secretary." § 70105(c)(2). The TSA must also establish an appeals process that requires notice and a hearing. § 70105(c)(3).

2. **Banking Industry:** Section 19 of the Federal Deposit Insurance Act prohibits people who have been convicted of a crime of dishonesty, breach of trust, or money laundering from working in, owning, or controlling a bank (an "insured depository institution") unless they obtain a waiver from the FDIC. For purposes of this law, pre-trial diversion or similar programs are considered to be convictions. 12 U.S.C. § 1829(a). Certain crimes cannot be waived for a ten-year period after conviction, absent a motion by the FDIC and court approval. *See id.*. A 1998 FDIC policy statement (http://www.fdic.gov/regulations/laws/rules/5000-1300.html)("SOP") provides that all drug crimes require FDIC waiver, but that pre-trial diversion programs will be considered on a case-by-case basis, except for those that occurred prior to November 29, 1990 which do not require a waiver. Youthful offender adjudications and "de minimis crimes" are not considered "convictions" requiring a waiver, nor are convictions that have been "completely expunged." However, a conviction for which a pardon has been granted will require a waiver. *See* SOP Section (B)(1). The FDIC generally requires the institution to submit the request for FDIC approval on behalf of the job applicant. (LAC Hire Network reports that institutions rarely seek a waiver, except for higher level positions when the candidate is someone the institution really wants to hire. Individuals can only seek FDIC approval themselves if they ask the FDIC to waive the usual

requirement. *See* http://www.hirenetwork.org/FDIC.html.) In determining whether to grant an applicant a waiver, the FDIC will consider the following factors: (1) the conviction and nature and circumstances of the offense; (2) evidence of rehabilitation, including age at conviction, and time elapsed; (3) the position to be held; (4) amount of influence and control over the management of the institution; (5) management's ability to supervise and control the person's activities; (6) degree of ownership over the institution; (7) applicability of the institution's fidelity bond coverage to the individual; (8) opinion of primary Federal and/or state regulator; and (9) any additional relevant factors. *See* SOP, Section D.

3. **Defense Contracting** – DOD Security Clearance: Persons convicted of a felony and actually incarcerated as a result for a period of not less than one year, are ineligible for a Department of Defense security clearance. 10 U.S.C. § 986 (c)(1). Waiver may be granted by the Secretary of Defense "if there are mitigating factors." § 986(d). Any such waiver may be authorized only in accordance with standards and procedures prescribed by Executive Order or other guidance from the President. DOD Contractor personnel subject to additional disqualifications, *see* Part I, *supra.*

4. **Union Office**: Certain classes of felons are barred for 13 years after one's conviction from holding any of several positions in a union or other organization that manages an employee benefit plan, including serving as an officer of the union or a director of the union's governing board. 29 U.S.C. §§ 504, 1111.

5. **Healthcare:** Those convicted of certain crimes from providing healthcare services for which they will receive payment from Medicare, 42 U.S.C. § 1320a-7, or from working for the generic drug industry. 21 U.S.C. § 335a.

6. **Childcare:** Criminal history background checks are required for individuals who provide care for children. 42 U.S.C. § 13041. In addition, the Federal Child Protection Act, 42 U.S.C. § 5119(a), authorizes states to enact statutes concerning the facilitation of criminal background checks of persons who work with children. It authorizes states to institute mandatory or voluntary fingerprinting of prospective employees in childcare fields in order to facilitate criminal background checks.

7. **Prisoner Transportation** (including private prisoner transportation) is federally regulated. 42 U.S.C. § 13726(b) sets "minimum standards for background checks and pre-employment drug testing for potential employees including requiring criminal background checks, to disqualify persons with a felony conviction or domestic violence conviction from employment." The purpose of the act was to provide protection against risks to the public inherent in the transportation of violent prisoners and to assure the safety of those being transported.

Additional Note on Federal Criminal Background Checks: In June 2006 the Attorney General issued a report pursuant to § 6403(d) of the Intelligence Reform and Terrorism Prevention Act of 2004 (Pub. L.108-458, 118 Stat. 3638, 3758) making recommendations to Congress for standardizing non-criminal justice access to FBI-

maintained criminal history records. *See* The Attorney General's Report on Criminal Background Checks, http://www.usdoj.gov/olp/ag_bgchecks_report.pdf. The report recommends that the FBI's national database of criminal records generally be made more widely available to private employers and private screening firms for purposes of determining suitability for employment or placement in a position of trust.[2] It also recommends that privacy protections be created (including notice to an individual whose records have been requested, and an opportunity to review and challenge the accuracy of those records), and that procedures for assuring accuracy of records be improved. Report at pp 59-63, 72-73.[3] It recommends national standards relating to disposition reporting and record completeness, including declinations to prosecute and expungement and sealing orders, so that there is uniformity in improvements by repositories nationwide. Report at 73. As to suitability criteria, the report recommends that Congress consider "whether guidance should be provided to employers on appropriate time limits that should be observed when applying criteria specifying disqualifying offenses and on providing an individual the opportunity to seek a waiver from the disqualification." Report at p. 68.[4]

---

[2] Private employers cannot now access information from the FBI's national system except in limited situations. (See list of statutes authorizing access the FBI data for non-law enforcement purposes at p. 12, infra. However, the FBI can exchange the information with "authorized officials," which includes federal and state agencies that conduct criminal background checks for employment and licensing purposes. 28 U.S.C. § 534(a)(4). New federal regulations now authorize these "authorized officials" to outsource certain administrative functions to private screening firms, thus allowing these firms to directly access the FBI's records for the first time. 69 Fed. Reg. 75243 (Dec. 16, 2004). No state can access the FBI's records for employment or licensing purposes without FBI approval of required state legislation. 28 C.F.R. §§ 20.33, 50.12. To qualify for approval, the state must provide certain minimum protections, including a system of fingerprinting, notice to the worker whenever an FBI records search is conducted, and an opportunity on the part of the individual to challenge the accuracy of the FBI's records.

[3] Section 6402 of Pub. L.108-458, codified at 28 U.S.C. § 534, authorizes states to share FBI criminal history records with private employers of security guards relating to whether particular guards have been convicted of or charged with a felony. *See* 118 Stat. 3638, 3756-57. With the guard's written permission, a private employer may submit the guard's fingerprints to the state, which in turn will inform the employer whether the guard has been convicted of a felony within the previous ten years or has been arrested for a felony within the preceding year. *See* § 534(d)(1)(D).

[4] The Report contains the following list of statutes currently authorizing fingerprint checks for non-criminal justice purposes: 28 U.S.C. § 534 (2002) Note (federally chartered or insured banking industry and, if authorized by a state statute approved by the United States Attorney General (approval authority has been delegated to the FBI), state and local employment and licensing); 42 U.S.C. § 5119a (1998) (relating to providing care to children, the elderly, or disabled persons); 28 U.S.C. § 534 (2002) (relating to the parimutuel wagering industry (horse/dog racing)); 7 U.S.C. §§ 12a and 21(b)(4)(E) (2000), (commodity futures trading industry); 42 U.S.C. § 2169 (2005) (nuclear utilization facilities (power plants)); 15 U.S.C. § 78q(f)(2) (2004) (securities industry); 49 U.S.C. §§ 44935-44936(2003) (aviation industry); 49 U.S.C. § 44939 (2003) (relating to flight school training); 28 U.S.C. § 534 (2002) Note (nursing and home health care industry); 49 U.S.C. § 5103a (2005) (relating to issuance and renewal of HAZMAT-endorsed commercial driver license); 5 U.S.C. § 9101 (2000) (relating to federal government national security background checks); 25 U.S.C. §§ 3205 and 3207 (2000) (relating to Indian child care); 42 U.S.C. § 13041(1991) (relating to federal agencies and facilities contracted by federal agencies to provide child care); 42 U.S.C. §§ 1437d(q) (1999) (relating to public housing and section 8 housing); 25 U.S.C. § 4138 (1999) (relating to Indian housing); 25 U.S.C. § 2701 (1988) (relating to Indian gaming); 42 U.S.C. § 13726 (2000) (relating to private companies transporting state or local violent prisoners); 8 U.S.C. § 1105

(2001) (relating to visa issuance or admission to the United States); Executive Order 10450, 18 Fed. Reg. 2489 (Apr. 27, 1953) (follows 5 U.S.C. § 7311 (1966)) (relating to applicants for federal employment); Pub. L. No. 107-188 § 201 and 212 (2002), 116 Stat. 594 (2002 (relating to handling of biological agents or toxins); 46 U.S.C. §§ 70101 Note, 70105, and 70112 (2002) (relating to seaport facility and vessel security); Pub. L. No. 108-458 § 6402 (2004) (relating to private security officer employment).