



BRIAN SANDOVAL
Attorney General

STATE OF NEVADA
OFFICE OF THE ATTORNEY GENERAL

100 N. Carson Street
Carson City, Nevada 89701-4717
Telephone (775) 684-1100
Fax (775) 684-1108
<http://ag.state.nv.us>
E-Mail: aginfo@ag.state.nv.us

ANN WILKINSON
Assistant Attorney General

November 18, 2003

Dorla M. Salling, Chairman
Nevada Board of Parole Commissioners
1445 Hot Springs Road, #108-B
Carson City, Nevada 89711

Dear Ms. Salling:

As Chairman of the Nevada Board of Parole Commissioners (Parole Board), you have requested an opinion on several questions which can be combined into three areas: pardons, certificates of good conduct, and the sealing of records. Questions One A–One F deal with pardons. Questions Two A–Two C pertain to certificates of good conduct covered by Nevada Administrative Code (NAC) 213.130. Questions Three A and Three B address the sealing of records under chapter 179 of the Nevada Revised Statutes (NRS).

QUESTION ONE A

What is the effect of a pardon by the Pardons Board if the pardon does not specify which legal disabilities, incurred as a result of the subject conviction, were removed?

QUESTION ONE B

Is the Pardons Board restricted in its ability to remove any specific legal disability incurred by conviction?

QUESTION ONE C

Numerous professions, businesses, and occupations in Nevada require special licenses. Many laws mandate that such licenses issue only to persons of good moral character. Additional statutory restrictions focus on whether the prospective licensee

was ever convicted of a crime involving moral turpitude. Does a pardon with no restrictions, or one that does not specify what legal disabilities are removed, eliminate the applicant's moral guilt and thereby facilitate his obtaining a license?

QUESTION ONE D

If a sex offender receives a pardon, is he relieved of the requirement to register as a sex offender if the pardon does not specify removal of this requirement? If not, can the Pardons Board remove this requirement by stating so in the pardon?

QUESTION ONE E

If the Pardons Board restores the right to bear arms to an offender, are there other federal requirements with which the offender must comply in order to bear arms?

QUESTION ONE F

In granting a pardon, commutation, or remission may the Pardons Board impose any condition on the pardon and can a condition extend beyond the term of the offender's original sentence or even life?

ANALYSIS

In the United States the power to pardon has its roots in the English common law and has remained essentially unchanged since 1790. *Schick v. Reed*, 419 U.S. 256, 266 (1974). The power to pardon flows from the Constitution alone. *Id.* *The Federalist Papers* is widely regarded as the authoritative commentary on the United States Constitution and is comprised of 85 letters sent under the pseudonym of Publius as open letters to the public via New York newspapers between October 27, 1787, and August 16, 1788. The identity of Publius remained well guarded until several years after publication of the collection of letters. Collectively, Alexander Hamilton, John Jay, and James Madison were Publius and the letters, or *The Federalist Papers*, helped to win support for New York's ratification of the Constitution through public debate.

Alexander Hamilton understood that if New York failed to ratify the Constitution, the Constitution and the hopes for a "more perfect union" would fail. New York Governor George Clinton opposed the Constitution, putting its ratification in doubt. Hamilton addressed the issue of presidential pardons in *THE FEDERALIST* No. 69, in which he compared the power of the executive to grant pardons in England and in New York (whose Constitution served as a prime source of ideas for the United States Constitution). The power to pardon was absolute except to pardon impeachment. Hamilton addressed the public's concern over the potential for abuse if a single executive held the power to pardon and argued that the potential for abuse of the President's power was far less than that of the King of England, whose abuse would be

difficult to control because of his hereditary reign. Hamilton compared concern over the President's abuse of the power to the potential for abuse by the Governor of New York. Hamilton argued that because the President could be subjected to impeachment and prosecution for seditious activities and could not grant pardons for impeachment, the threat that the President could use the power to subvert the government was checked. Hamilton's view has been shared by the courts and has withstood the test of time.

There are two primary distinctions between the power to pardon under the United States Constitution and under the Nevada Constitution. First, the United States Constitution grants the power to pardon to the President, while the Nevada Constitution grants the power to the Governor, who must act in concert with the justices of the Nevada Supreme Court and the Nevada Attorney General, pursuant to Article 5, Section 14 of the Nevada Constitution. Several states, including Nevada, did not want to confer authority to pardon on the Governor alone. Further, the President may pardon a person either before or after he is convicted, but the Pardons Board may only pardon a person after he is convicted. However, both the President and the Pardons Board may impose such conditions, limitations, and restrictions on pardons as they deem appropriate. Article 5, section 14 of the Nevada Constitution provides:

The governor, justices of the supreme court, and attorney general, or a major part of them, of whom the governor shall be one, may *upon such conditions and with such limitations and restrictions as they may think proper*, remit fines and forfeitures, commute punishments . . . and grant pardons, after convictions, in all cases, except treason and impeachments, subject to such regulations as may be provided by law, relative to the manner of applying for pardons. [Emphasis added.]

Absent special authorization by the Nevada Constitution, the Legislature may not change, alter, or modify the constitutional powers of the Pardons Board. *King v. The Board of Regents*, 65 Nev. 533, 546, 200 P.2d 221, 227 (1948). As for the President, "[t]o the executive alone is intrusted the power of pardon; and it is granted without limit. . . . [A pardon] may be granted on conditions." *United States v. Klein*, 80 U.S. 128, 147 (1871).

The plain purpose of the broad [pardon] power conferred by § 2, cl. 1 [U.S. Const. Art. II, § 2, cl. 1], was to allow plenary authority in the President to "forgive" the convicted person in part or entirely, to reduce a penalty in terms of a specified

number of years, or to alter it with conditions which are in themselves constitutionally unobjectionable.

Schick v. Reed, 419 U.S. at 266. That power permits “the attachment of any condition which does not otherwise offend the Constitution.” *Id.* “[I]t is clear that the legislature cannot change the effect of . . . a pardon any more than the executive can change a law.” *United States v. Klein*, 80 U.S. at 148.

Very early on, the United States Supreme Court made clear that the President’s power to pardon could not be interrupted, abridged, or limited by any legislative enactment. *The Laura*, 114 U.S. 411 (1885). Therefore, if a pardon truly blotted out the existence of guilt and treated the offender as though he never committed an offense, the conviction could not be relied upon to in any way affect the individual’s rights. While courts look to English cases for guidance on pardon issues, “there are few reported contemporary [English] cases on the issue [of the effect of a full pardon on the continuing existence of a conviction].” *United States v. Noonan*, 906 F.2d 952, 960 (3rd Cir. 1990).

The United States Supreme Court case of *Ex parte Garland*, 71 U.S. 333 (1866), held the President’s power to pardon to be unlimited, except in the case of impeachment. *Id.* at 380. “Congress can neither limit the effect of his pardon, nor exclude from its exercise any class of offenders. The benign prerogative of mercy reposed in him cannot be fettered by any legislative restrictions.” *Id.* While this portion of the *Garland* Court’s decision has remained essentially unchallenged, the Court’s dicta regarding the effect of a pardon has been challenged. The dicta at issue stated, “when the pardon is full, 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 offence.” *Id.* The issue of the effect of the pardon *vis-à-vis* the individual pardoned is important in determining the applicability of legislation addressing such things as sentencing, offender registration requirements, licensing requirements for certain professions, occupations, and businesses, gun ownership, and voting.

The Supreme Court effectively overturned its dicta in *Garland* in the subsequent case of *Carlesi v. People of New York*, 233 U.S. 51 (1914). See also *Burdick v. United States*, 236 U.S. 79, 94 (1915) (holding a pardon does not blot out the pardoned offense and stating that a pardon “carries an imputation of guilt; acceptance a confession of it”). The *Carlesi* Court held that an individual’s prior pardoned offense could be used to enhance his sentence upon conviction of a second offense notwithstanding his receipt of a full pardon. In reaching its decision, the *Carlesi* Court referred to one of its earlier cases holding that enhancing a sentence of old offenders is not punishing offenders a second time for the prior offense. The pardoned offense is merely an indicator of character such that “the repetition of criminal conduct aggravates their guilt and justifies heavier penalties when they are again convicted.” *Graham v. State of West Virginia*, 224 U.S. 616, 623 (1912).

American Jurisprudence Second describes the various types of pardons as follows:

The different kinds of pardons are general, special or particular, conditional or absolute, statutory, not necessary in some cases, and in some grantable of course. An absolute pardon is a permanent and complete termination of penalty and remission of guilt.

A pardon is conditional when it is granted upon certain specified conditions. It may be granted either on a condition precedent, becoming operative when, and not until, the grantee has performed the designated act, or on a condition subsequent, in which case the pardon will take effect, so far as concerns the person of the grantee, as soon as it is delivered and accepted, but will become null and void upon the violation by the grantee of any of the specified terms or conditions.

59 AM. JUR. 2D *Pardon and Parole* § 2 (2003) (footnote omitted).

Questions One A–F require the foregoing background information and Question One A calls for some additional general discussion about the effect of a Nevada pardon. Nevada law is limited concerning the scope and application of the Pardons Board’s powers. In 1880 the Nevada Supreme Court noted that the legal authorities were uniform as to the effect of a full and unconditional pardon, holding that such pardons remove all disabilities resulting from a criminal conviction. See *State of Nevada v. Foley*, 15 Nev. 64, 67 (1880).

[T]he effect of a full pardon “is to make the offender a new man; to acquit him of all corporal penalties and forfeitures annexed to the offense for which he obtains his pardon, and not so much to restore his former, as to give him a new *credit and capacity*.”

Id. at 69. The *Foley* Court also found that the power to grant a full pardon includes the power to grant something less than a full pardon. *Id.* at 68. Only those convictions specified in the pardon are pardoned. See *id.* at 71-72. This office addressed the effect of a Nevada pardon in 1983 as follows:

An early Nevada case indicated that “a full and unconditional pardon of an offense removes all disabilities resulting from conviction thereof.” *State of Nevada v. Foley*, 15 Nev. 64, 67 (1880). Moreover, the court stated that a full

pardon makes "the offender a new man" and works "to acquit him of all corporal penalties and forfeitures annexed to the offense for which he obtains his pardon, and not so much to restore his former [*sic*], as to give him a new *credit* and *capacity*." *Id.* at 69 (quoting cases) n5 (emphasis in original). In *Foley*, the court found that a pardon restored a person's competency as a witness. We presume that "full pardon" includes a restoration of civil rights, as well as just a release from any attendant punishment.¹

Op. Nev. Att'y Gen. No. 83-13 (September 14, 1983) at 51-52 (footnotes omitted). This opinion went on to add, however, that:

Even in light of such language concerning the effect of a pardon, more recently, many courts have held that a pardon does not obliterate the conviction or restore a person's good character. See Project, *The Collateral Consequences of a Criminal Conviction*, 23 Vanderbilt L. Rev. 929, 1145 (1970) [hereinafter cited as *Project*]. And some authorities indicated that the effect of a pardon is to forgive and not to forget. See 67A C.J.S. *Pardon & Parole* § 18 at 24 (1978) (citing cases). This appears to be the state of the law in Nevada in light of the *Patt* [*Patt v. Nevada State Board of Accountancy*, 93 Nev. 548, 571 P.2d 105 (1977)] and *Hayes* [*State v. Hayes*, 94 Nev. 366, 580 P.2d 122 (1978)] cases cited above. Because the conviction is not obliterated, it may be utilized in a new prosecution to prove an element. . . .

We also believe that a conviction which has been the subject of a pardon with a restoration of civil rights may be used to enhance the punishment for a new conviction

¹ A "civil right" has been defined as a privilege accorded to an individual, as well as a right due from one individual to another, the violation of which is a civil injury for which redress may be sought in a civil action. Thus a civil right is a legally enforceable claim of one person against another. "Civil rights" have also been defined simply as such rights as the law will enforce, or as all those rights which the law gives a person. The right to vote has been characterized as a civil right of the highest order. The right to acquire, enjoy, own, and dispose of property is also a civil right.

However, in a more restricted sense, the term "civil rights" refers to the enjoyment of such guarantees as are contained in constitutional or statutory law, such as the First Amendment right of free expression, and the rights of personal liberty which such Amendment protects, and, more specifically, to guarantees found in particular amendments to the United States Constitution and federal statutes enacted pursuant thereto, as well as similar state constitutional and statutory provisions which are designed to prevent discrimination in the treatment of persons by reason of characteristics such as their race, color, sex, religion, or national origin. "Civil rights" in this sense do not exist at common law, but rather are constitutional and statutory in nature. 15 AM. JUR. 2D *Civil Rights* § 1 (2003) (footnotes omitted).

[A] sentencing body, in determining the punishment for a new offense, should be able to consider the prior actions of a person who received a pardon. *Carlesi v. New York*, 233 U.S. 51, 57-59 (1914); *People v. Biggs*, 9 Cal.2d 508, 511-14, 71 P.2d 214, 216-18 (1937). Similarly, for the purposes of many professional licensing requirements, a pardon should not preclude consideration of the underlying offense. See *Project, supra* at 1146. Cf. *Grossgold v. Supreme Court of Illinois*, 557 F.2d 122, 125 (7th Cir. 1977) (federal pardon does not "wipe out the moral turpitude" of a conviction).

If the above analysis holds true for a full pardon, which would include a restoration of civil rights, it should also apply to the simple restoration of civil rights to those who successfully complete their parole or sentence. . . . The Nevada Legislature has provided the opportunity for these individuals to obtain a restoration of general, unenumerated civil rights. There is no indication that such a general grant releases these individuals from the strictures of more specific statutes.²

A pardon relieves a person from any further punishments for a crime while a restoration of civil rights allows a convicted person to vote, hold office, and avoid certain requirements to register as a convicted person. Such restoration does not allow a convicted person to carry a concealed firearm, enable the individual to avoid professional licensing restrictions, or relieve the individual of statutory enhancements based upon the underlying conviction.

Id. at 52-53 (footnote omitted). This office noted that according to NRS 197.230, which has not changed, "a public employee convicted of a felony or malfeasance in office is forever disqualified from holding any public office." *Id.* at 53, n.7.

AM. JUR. 2D is consistent with the foregoing analyses of the effect of a pardon. It states:

By the modern view, the granting of a pardon is in no sense an overturning of a judgment of conviction by some other tribunal, but rather is an executive action that mitigates or sets aside the punishment for a crime. Pardons do not

² NRS 213.090, amended in 2003, identifies or enumerates the rights to vote, serve as a juror, and hold office.

erase the fact that one was once convicted of a crime; instead, pardons eliminate any further effect of having been convicted. . . . A pardon does not substitute a good reputation for one that is bad, does not obliterate the fact of the commission of the crime, does not wash out the moral stain, and does not wipe the slate clean, but rather involves forgiveness, not forgetfulness.

59 AM. JUR. 2D *Pardon and Parole* § 53 (2003) (footnotes omitted). It adds:

Generally, a full and unconditional pardon restores to the offender the customary civil rights which ordinarily belong to a citizen, including voting or suffrage rights, and the right to be a witness. . . .

A pardon does not restore one to property or interests which have vested in others in consequence of the conviction and judgment.

59 AM. JUR. 2D *Pardon and Parole* § 60 (2003) (footnotes omitted). Thus a pardon “does not obliterate the conviction or restore a person’s good character.” Op. Nev. Att’y Gen. No. 83-13 (September 14, 1983) at 52. The “effect of a pardon is to forgive and not to forget.” *Id.* A full, free, and unconditional pardon, however, “cannot erase the basic fact of a conviction, nor can it wipe away the social stigma that a conviction inflicts.” *Bjerkan v. United States*, 529 F.2d 125, 126 (7th Cir. 1975). Furthermore,

[I]t does not make amends for the past. It affords no relief for what has been suffered by the offender in his person by imprisonment, forced labor, or otherwise; it does not give compensation for what has been done or suffered, nor does it impose upon the government any obligation to give it. The offence being established by judicial proceedings, that which has been done or suffered while they were in force is presumed to have been rightfully done and justly suffered, and no satisfaction for it can be required. Neither does the pardon affect any rights which have vested in others directly by the execution of the judgment for the offence, or which have been acquired by others whilst that judgment was in force.

Knote v. United States, 95 U.S. 149, 153-54 (1877).

Question One B pertains to a pardon removing disabilities and the power of the Pardons Board in this respect. We reiterate that Article 5, section 14 of the Nevada Constitution empowers the Pardons Board to condition, limit, and restrict a pardon “as

they may think proper.” The nature of the kinds of disabilities that may flow from a conviction were identified by the United States Supreme Court to include restriction from engaging in certain businesses, serving as an official of a labor union, voting, and serving as a juror. See *Carafas v. LaVallee*, 391 U.S. 234, 237 (1968). The *Carafas* Court referred to such “disabilities” suffered by an offender as the “collateral consequences” of a conviction. See *id.* “Modern cases have held that a pardon simply restores a person’s civil rights and eliminates the collateral consequences stemming from the loss of those civil rights.” *Lettsome v. Waggoner*, 672 F. Supp. 858, 863 (D.V.I. 1987) (holding a governor’s pardon cannot expunge a criminal conviction from a court record).

The rights enjoyed by citizens that may be affected by a pardon are quite broad.

The theory upon which our political institutions rest is, that all men have certain inalienable rights—that among these are life, liberty, and the pursuit of happiness; and that in the pursuit of happiness all avocations, all honors, all positions, are alike open to every one, and that in the protection of these rights all are equal before the law. Any deprivation or suspension of any of these rights for past conduct is punishment, and can be in no otherwise defined.

Cummings v. State of Missouri, 71 U.S. 277, 321-22 (1866). “Therefore, any deprivation of a person’s basic civil rights, including the right to vote, the right to serve on juries and the right to work in certain professions, by a state on account of a federal conviction would constitute punishment.” *Bjerkan*, 529 F.2d at 128 (holding a presidential pardon restores state as well as federal civil rights). The Court in *Bjerkan* noted, however: “A pardon does not ‘blot out guilt’ nor does it restore the offender to a state of innocence in the eye of the law as was suggested in *Ex Parte Garland*, 71 U.S. (4 Wall.) 333, 380 18 L. Ed. 366 (1866). See *Burdick v. United States*, 236 U.S. 79, 91 (1915) (suggesting that, far from blotting out guilt, the acceptance of a pardon may constitute a confession of guilt).” *Bjerkan*, 529 F.2d at 128, n.2; see also *United States v. Noonan*, 906 F.2d. at 558-59.

As for removing the disabilities associated with a conviction, this office pointed out: “There are several statutory mechanisms in place for restoration of civil rights to Nevada felons depending on whether the felon is on probation, receives a pardon, successfully completes probation, or serves a sentence.” Op. Nev. Att’y Gen. No. 96-27 (September 25, 1996). The 1996 opinion directed readers to NRS 213.090, noting that the Pardons Board “may restore civil rights of felons at the time a pardon is granted or at a later date.” *Id.* at 147. After the 2003 regular legislative session, NRS 213.090 was significantly changed by Assembly Bill 55, Act of June 11, 2003, ch. 447, § 13, 2003 Nev. Stat. 447 (effective July 1, 2003). It now reads as follows:

1. Except as otherwise provided in subsection 2, a person who is granted a pardon for any offense committed:

(a) Is immediately restored to the following civil rights:

- (1) The right to vote; and
- (2) The right to serve as a juror in a civil action.

(b) Four years after the date that his pardon is granted, is restored to the right to hold office.

(c) Six years after the date that his pardon is granted, is restored to the right to serve as a juror in a criminal action.

2. Except as otherwise provided in this subsection, the civil rights set forth in subsection 1 are not restored to a person who has been granted a pardon if the person has previously been convicted in this state:

(a) Of a category A felony.

(b) Of an offense that would constitute a category A felony if committed as of the date that his pardon is granted.

(c) Of a category B felony involving the use of force or violence that resulted in substantial bodily harm to the victim.

(d) Of an offense involving the use of force or violence that resulted in substantial bodily harm to the victim and that would constitute a category B felony if committed as of the date that his pardon is granted.

(e) Two or more times of a felony, unless a felony for which the person has been convicted arose out of the same act, transaction or occurrence as another felony, in which case the convictions for those felonies shall be deemed to constitute a single conviction for the purposes of this paragraph.

A person described in this subsection may petition the court in which the person was convicted for an order granting the restoration of his civil rights as set forth in subsection 1.

3. Except for a person subject to the limitations set forth in subsection 2, upon receiving a pardon, a person so pardoned must be given an official document which provides:

(a) That he has been granted a pardon;

(b) That he has been restored to his civil rights to vote and to serve as a juror in a civil action as of the date that his pardon is granted;

(c) The date on which his civil right to hold office will be restored to him pursuant to paragraph (b) of subsection 1; and

(d) The date on which his civil right to serve as a juror in a criminal action will be restored to him pursuant to paragraph (c) of subsection 1.

4. Subject to the limitations set forth in subsection 2, a person who has been granted a pardon in this state or elsewhere and whose official documentation of his pardon is lost, damaged or destroyed may file a written request with a court of competent jurisdiction to restore his civil rights pursuant to this section. Upon verification that the person has been granted a pardon and is eligible to be restored to the civil rights set forth in subsection 1, the court shall issue an order restoring the person to the civil rights set forth in subsection 1. A person must not be required to pay a fee to receive such an order.

5. A person who has been granted a pardon in this state or elsewhere may present:

(a) Official documentation of his pardon, if it contains the provisions set forth in subsection 3; or

(b) A court order restoring his civil rights, as proof that he has been restored to the civil rights set forth in subsection 1.

This statute, however, cannot be read to restrict the Pardons Board's ability to limit, restrict, or condition a pardon. See NEV. CONST. ART. 5, § 14. Statutes imposing disabilities and penalties on those convicted of a crime cannot be applied to one pardoned of the crime if it interferes with the executive's plenary power. Furthermore, the Pardons Board may limit, restrict, or condition a pardon so as to preclude relief from certain collateral consequences of the conviction. *Schick v. Reed*, 419 U.S. at 266; NEV. CONST. ART. 5, § 14. For example, the Pardons Board may wish to condition the pardon of a crime of voter fraud on the offender not being restored to his civil right to vote, or condition the pardon of a crime of jury tampering, witness intimidation, or perjury on the offender not being restored to his civil right to serve as a juror. If a pardon, however, does not specifically address the restoration of civil rights or specify what legal disabilities have been released, the pardoned offender may obtain the restoration of certain rights pursuant to NRS 213.090. In any event, the offender would be released from the penalties and legal disabilities stemming from the pardoned conviction except for strictures otherwise stated in the pardon or covered by specific statutes.

As for the judiciary and legislative branches of government involvement with the removal of disabilities that flow from a pardon,

In accordance with the principle of separation of governmental powers, the coordinate departments of

government have nothing to do with the pardoning power. Otherwise stated, where the state constitution clothes an executive with the power to grant or deny pardons, this power is beyond the control, or even the legitimate criticism, of the judiciary. Thus, whatever may have been the reasons for executive's decision to grant or deny a pardon, courts cannot decline to give the decision effect, and no court has power to interfere with governor in exercise of pardoning power, unless granted the power by competent authority or unless fraud has entered the case. *Additionally, a statute purporting to give the judiciary the power of commutation is a violation of the doctrine of separation of powers under a state constitution which gives the governor the exclusive power of commutation.*

The benign prerogative of mercy reposed in the executive by constitutional grant cannot be taken away or fettered by any legislative restrictions, nor can like power be given by the legislature to any other officer or authority.

Where, as is generally the case, a state constitution fixes absolutely the power to pardon, that power is not subject to legislative control except as provided by the constitution itself. The legislature can neither limit the effect of a pardon nor exclude from its exercise any class of offenders.

59 AM. JUR. 2D *Pardon and Parole* § 33 (2003) (emphasis added) (footnotes omitted).

Question One C deals with a pardon's effect on licensing requirements for certain businesses and professionals. The Nevada Revised Statutes address many disqualifications resulting from a conviction of a felony, including such things as businesses and professions, voting, and serving as a juror. A cursory review of approximately sixty-two such sections uncovered no reference to pardons or restorations of civil rights. A full pardon would keep the pardoned conviction from being used to disqualify the offender from collateral consequences of his conviction. However, where a statute limits rights based on the underlying conduct and not the pardoned conviction itself, a pardon would not remove or erase the disability of past conduct. For example, focusing on misconduct of a licensed attorney, 7 AM. JUR. 2D *Attorneys at Law* § 95 (2003) (footnotes omitted) states the following:

Generally a pardon for a criminal offense committed by an attorney is not a defense in disciplinary proceedings against the attorney based on the conviction or on the acts constituting the criminal offense, especially where the misconduct was connected with the attorney's professional capacity or employment and evidences moral turpitude, or

indicates lack of good moral character and unfitness for the profession. Disciplinary proceedings may be dismissed or the punishment lessened where the attorney's conduct after the conviction and pardon show a reformation. A pardon for the crime of which an attorney has been convicted and disbarred may not automatically restore the attorney's license to practice law

For instance, a law requiring licensure of private investigators cannot preclude the licensing of an applicant because of a pardoned felony conviction; it could only preclude licensing based on moral turpitude. Otherwise, the law could be construed as creating additional punishment for the pardoned offender. The applicant for the business or professional license could be denied a license or disciplined as a licensee based on the underlying conduct regardless of whether he was ever convicted or, if convicted, pardoned. *Carlesi v. People of New York*, 233 U.S. at 57.

In 1983 this office analyzed a Nevada statute, NRS 176.225 (*now see* NRS 176A.850), that released a person placed on probation from the penalties and disabilities of his conviction upon being honorably discharged from his probation. We noted,

All of these provisions of law are important when determining who must register as a convicted felon, . . . who may not carry or own a . . . weapon, . . . and who may not be eligible to obtain or retain certain business and professional licenses, . . . These statutory provisions may also affect a person's ability to vote, hold office or serve as a juror. An analysis of the rights or opportunities which may be affected by these laws depends upon the statute providing relief.

Op. Nev. Att'y Gen. No. 83-13 (September 14, 1983). Based on the foregoing, this office opined, and still maintains, that proceedings to deny, suspend, or revoke business or professional licenses are not "penalties or disabilities" from which a person may be released under chapter 213 of NRS. See Op. Nev. Att'y Gen. No. 83-13 (September 14, 1983), citing *Patt v. Nevada State Board of Accountancy*, 93 Nev. 548, 571 P.2d 105 (1977).³

³ After this 1983 opinion, the law changed. NRS 202.360(2) was changed by Act of ____, 1985, ch. 160, § 3, 1985 Nev. Stat. 1 to read, "A person who has been convicted of a felony . . . , unless he has received a pardon and his right to bear arms was specifically restored, shall not own or have in his possession or under his custody or control any firearm." This would have affected the analysis and conclusion to question three of Op. Nev. Att'y Gen. No. 83-13 (September 14, 1983).

Question One D addresses sex offender registration covered by chapter 179D of NRS. As with licensing discussed above, such registration requirements are not disabilities or punishment. In *Doe v. Otte*, 259 F.3d 979 (9th Cir. 2001) the Ninth Circuit Court of Appeals concluded that Alaska's sex offender registration laws created an affirmative disability and restraint. The United States Supreme Court, however, reversed the *Otte* court concluding that the sex offender registration laws created neither an affirmative disability nor a restraint. The primary governmental interest is the protection of the public. See *Smith v. Doe*, ___ U.S. ___, 123 S. Ct. 1140, 155 L. Ed. 2d 164 (2003) (holding the Alaska Sex Offender Registration Act's retroactive application to convicted sex offenders and child kidnapers did not violate the *Ex Post Facto* Clause, U.S. CONST., ART. I, § 10, cl. 1). Such registration requirements are non-punitive, regulatory in nature, and designed to protect the public. Therefore, the registration requirement cannot be deemed to be punishment attached to the conviction. *Carlesj*, 233 U.S. at 57. If the Pardons Board granted a full pardon, the pardon would not relieve a sex offender of his obligation to register as a sex offender. Accordingly, the Pardons Board must defer to the Legislature. A pardoned sex offender desirous of having his registration requirement lifted under chapter 179D of NRS needs to petition a court of competent jurisdiction pursuant to NRS 179D.490.

Registration is required of certain other convicted persons. NRS 179C.100(5) authorizes the district court in which the conviction was obtained, the Parole Board, or the Pardons Board to restore such an offender's civil rights and to order that he need not comply with the registration requirements of NRS 179C.⁴ The pertinent language of the statute reads, "When so ordered . . . by the state board of pardons commissioners . . . the provisions of this section do not apply to a convicted person who has had his civil rights restored." NRS 179C.100(5). Thus the Pardons Board must state that the registration requirements of chapter 179C of NRS do not apply to the pardoned offender if that is its intent.

As for the right to bear arms, which is raised in Question One E:

A person shall not own or have in his possession or under his custody or control any firearm if he: (a) has been convicted of a felony in this or any other state, or in any political subdivision thereof, or of a felony in violation of the laws of the United States of America, *unless he has received a pardon and the pardon does not restrict his right to bear arms.*

NRS 202.360(1)(a) (emphasis added). Accordingly, the Pardons Board, in granting a pardon, must expressly restrict the offender's right to bear arms if that is what it intends; otherwise, the offender may own a firearm following the pardon.

⁴ Chapter 179C of NRS addresses the registration requirements of certain convicted persons.

Considering federal firearm laws, in 1996 this office discussed *Beecham v. United States*, 511 U.S. 368 (1994). See Op. Nev. Att'y Gen. No. 96-27 (September 25, 1996). *Beecham* involved federal felons who obtained state restorations of their civil rights. They were subsequently convicted of being felons in possession of firearms in violation of 18 U.S.C. § 922(h). The *Beecham* Court concluded that the law of the convicting jurisdiction governed. *Beecham*, 511 U.S. at 371. The state restoration of a federal felon's civil rights could not undo the federal disabilities imposed under the federal firearms statute flowing from the federal conviction since only a federal restoration of civil rights could undo such disabilities.

The opposite situation was addressed by the Ninth Circuit in *United States v. Laskie*, 258 F.3d 1047 (9th Cir. 2001). Mr. Laskie pleaded guilty in Nevada to possession of a controlled substance and was sentenced to a suspended prison term and given probation. After completing his probation, Mr. Laskie obtained an order honorably discharging him. Mr. Laskie was not subject to indictment for possessing a firearm in violation of 18 U.S.C.S. § 922(g)(1) because, under 18 U.S.C.S. § 921(a)(20), his honorable discharge had operated to remove his prior conviction from the reach of 18 U.S.C.S. § 922(g)(1). The order discharging Mr. Laskie did not contain any express reservation forbidding him from possessing firearms, and the court concluded that the fact that the law in Nevada did not allow a pardoned felon to possess firearms was not relevant because, under 18 U.S.C.S. § 921(a)(20), it only mattered whether the conviction had been "set aside" and whether the order expressly provided that he could not carry firearms. See *id.* A pardoned conviction, which releases the offender from all penalties and disabilities resulting from the underlying crime, cannot serve as a predicate felony for a conviction under 18 U.S.C. § 922(g)(1). *Id.* at 1052-53 (9th Cir. 2001).

Finally, Question One F requires analysis on the Pardons Board's ability to condition a pardon. As stated above Article 5, section 14 of the Nevada Constitution empowers the Pardons Board to condition, limit, and restrict a pardon "as they may think proper." As for the validity of particular conditions:

It is a valid condition that the grantee of a pardon shall not be convicted of a violation of any of the criminal laws of the state. It is valid to condition a pardon to require the grantee to report periodically to a probation officer, to remain of good behavior, sober, and industrious, and not to claim any property, or the proceeds thereof, that was sold under confiscation laws. A pardon granted to one convicted of murder on condition that the grantee be confined and kept continuously in a state or private institution for the care and treatment of the insane is not invalid, nor is the condition void.

It may be provided as a condition precedent to the taking effect of a pardon that the grantee shall pay the county a sum of money to reimburse it for the expense of his or her trial, or that the grantee shall pay the costs, or a specified fine. Similarly, a pardon may be granted to a person convicted of defrauding the government of certain public lands, and charged with fraud in regard to others, upon condition that full restitution must first be made to the satisfaction of the district attorney.

Moreover, an executive may substitute, with the consent of the prisoner, any punishment recognized by statute or the common law as enforced in the state, provided, however, that the punishment substituted is no greater than that originally imposed. Thus, where a person is convicted by a consular court having jurisdiction, and sentenced to death for murder, and is pardoned on condition that he be imprisoned for life in a penitentiary, the condition is valid. It is permissible to grant an indeterminate commuted sentence even if the applicable statutes preclude the imposition of indeterminate sentence for the underlying offense.

A pardon may, as one of its restrictions and limitations, designate the time for the observance of its conditions.

59 AM. JUR. 2D *Pardon and Parole* § 69 (2003) (footnotes omitted).

There are some conditions, however, that may not withstand challenge in the courts. For example, looking at conditions for an augmented sentence upon a breach or a forfeiture of good conduct credits, AM. JUR. 2D provides:

A governor cannot impose a condition which, in effect, operates as an increase of sentence on breach and revocation of the pardon. Thus, in the absence of statutory authority, the governor cannot stipulate as a condition that in case of violation of the terms of the pardon, the offender shall forfeit his statutory credits for good conduct, even though the latter has assented to such condition. Although it is held by some courts that conditions to be performed after the expiration of the term for which the offender was sentenced are illegal and unenforceable, a condition in a pardon requiring the prisoner, upon breach of the condition, to serve out the portion of his term of sentence remaining unserved at the date of the granting of the pardon has been held valid, even though it may have the effect, in certain circumstances, of making the condition operative beyond the

term of the sentence. Such a condition as a consequence of the revocation of a pardon would in effect require the petitioner to serve a longer term of imprisonment than originally sentenced, for it is the rule that an act of the legislature specifically defining credits for good behavior, in existence at the date of the judgment against the prisoner, becomes a part of the sentence and inheres in the punishment assessed. Such condition cannot be said to be immoral, or impossible of performance during the life of the petitioner; nor can it be illegal, since the particular period of time within which the sentence is to be suffered by the convict as specified in the sentence is not a part of the legal sentence, except so far as it fixes the quantum of time that he or she must suffer such penalty, and the condition imposed is not forbidden and does not increase the punishment imposed by the court in its sentence.

59 AM. JUR. 2D *Pardon and Parole* § 71 (2003) (footnotes omitted).

AM. JUR. 2D discusses the operation and effect of a Pardons Board's conditions stating:

The acceptance of a conditional pardon necessarily carries with it the acceptance of the conditions upon which it is granted, and binds the person accepting it to all conditions, limitations, and restrictions contained therein that are legal, moral, and possible of performance.

Where a pardon is granted on a condition precedent, and the condition upon which it is granted is void in its nature, the pardon is also void and of no force whatever, but where the pardon is granted on a condition subsequent, and the condition is void, the pardon becomes operative in the same manner as though it were unconditional.

Performance of the conditions of a pardon, whether they are precedent or subsequent, in legal effect renders the pardon a full and complete one. Where a prisoner has accepted a pardon on conditions precedent and has been released from imprisonment by virtue thereof, but has violated or failed to perform any of the conditions, the pardon does not take effect, and the prisoner is in the same position as though no pardon had been granted. If the condition imposed is subsequent in its nature, the pardon takes effect as soon as it is delivered and accepted, but any subsequent violation of the condition will work a forfeiture of

the pardon and will render the grantee liable to rearrest and to recommitment under the original sentence. Acceptance alone, without performance of the condition, gives the convict no right to contend that the pardon is absolute. While a pardon on condition subsequent may sooner or later render the convict a free person, it is not a remission of guilt, and all the disabilities attending a conviction remain. If the judgment were removed there would be nothing to support further execution of the sentence on breach of condition.

59 AM. JUR. 2D *Pardon and Parole* § 72 (2003) (footnotes omitted).

Finally, and more specifically addressing whether the Pardons Board may impose any condition, including one that extends beyond the term of the sentence, AM. JUR. 2D states the following:

Unless death or legal authority intervenes, a sentence of imprisonment is satisfied only by actual imprisonment. Therefore, if the time of sentence elapses without imprisonment, the sentence is still valid, subsisting, and unexecuted. Therefore, where a prisoner is conditionally pardoned, upon breach of the condition, the time the prisoner was at liberty under the pardon is not to be considered as time served on the original sentence, and he or she may be compelled to serve out the term which remained unserved at the time the pardon was granted and accepted. By breach or nonperformance of the conditions, the pardon becomes void, and the status of the prisoner is the same as it was before the pardon was granted, or as is sometimes said, the position of the prisoner on a violation of the conditions of the pardon is similar to that of an escaped convict. The prisoner cannot complain of the interruption of the execution of the sentence during the time that he or she enjoyed this liberty, for it was secured by an acceptance of the conditional pardon. However, there is authority to the effect that the time a convict is at liberty under a conditional pardon is to be taken as a part of the term of the sentence, and that on the subsequent arrest for breach of condition, he or she is entitled to be discharged at the expiration of the term of the sentence.

A condition in a pardon that the convict shall be required to serve out the unserved portion of the term of the original sentence if he or she violates the terms of the pardon does not terminate with the expiration of the original term of

sentence. Accordingly, a convict who has violated the conditions of a pardon may be compelled to serve out the unexpired term of the original sentence, even though the breach occurred after the date upon which the sentence as originally fixed by the court would have expired. Some courts hold, however, that a convict cannot be compelled to serve the full term of the original sentence unless breach of the conditions amounts to a crime for which such penalty is imposed, and he or she is tried and convicted in the regular manner, and that time previously earned for good conduct cannot be forfeited by breach of a conditional pardon.

59 AM. JUR. 2D *Pardon and Parole* § 153 (2003) (footnotes omitted).

CONCLUSION TO QUESTION ONE A

A pardon must state the convictions being pardoned. If the Pardons Board's intent is that an offender's civil rights be fully restored, it should so state. If the Pardons Board's intent is to limit, restrict, or condition a pardon, it should specifically express its intent. If the intent of the Pardons Board is that a pardoned offender's right to bear arms not be restored, it must express this intent. If the Pardons Board's intent is that a pardoned offender need not comply with the registration requirements of chapter 179 of NRS, it must express this intent.⁵ A pardon that does not specify the disabilities removed releases all legal disabilities flowing from the conviction pardoned except the following: those that remain in effect by the limitations, restrictions, or conditions expressed by the Pardons Board; those that are not legal "disabilities" flowing from the pardoned conviction such as licensing and registration limitations based on conduct; and those that are strictures covered by specific statute, such as registration as a felon or as a sex offender.

CONCLUSION TO QUESTION ONE B

The power to pardon is limited only by the Constitution. The Pardons Board has plenary power to set the limitations, restrictions, and conditions of a pardon. Therefore, the Pardons Board is not restricted in its ability to remove any specific legal disability flowing from any conviction, except a conviction for treason or impeachment. It cannot, however, restore a person's good reputation, good character, decency, morals, or suitability. A pardon does not erase the disability of past conduct.

CONCLUSION TO QUESTION ONE C

⁵ The registration requirements of sex offenders under chapter 179D of NRS are governed by statute. A pardoned sex offender would have to direct his attention to NRS 179D.490, which addresses the court petition process necessary to be relieved of the obligation to register. Such a registration requirement is not an affirmative disability.

Regardless of the wording of a pardon, it cannot remove the moral guilt associated with criminal conduct or the fact of a conviction. A pardon only precludes future punishment for the conviction pardoned.

CONCLUSION TO QUESTION ONE D

A sex offender required to register under chapter 179D of NRS must, regardless of a pardon, continue to register unless he successfully petitions a court of competent jurisdiction pursuant to NRS 179D.490.

CONCLUSION TO QUESTION ONE E

A pardoned conviction, which releases the offender from all penalties and disabilities resulting from the underlying crime, cannot serve as a predicate felony. If the Pardons Board's intent is not to restore the right to carry a firearm, it must specifically express that intent.

CONCLUSION TO QUESTION ONE F

The power conferred on the Pardons Board by the Nevada Constitution is "practically unrestricted." Such power cannot be limited or restricted in any way by the Legislature. Conditions must be legal and not offend the Nevada Constitution or the Constitution of the United States.

QUESTION TWO A

May a certificate of good conduct be used to restore the civil rights of a person, and must the certificate specifically indicate which legal disabilities are removed?

QUESTION TWO B

Is the Pardons Board restricted in its ability to remove any specific legal disabilities via certificate of good conduct?

QUESTION TWO C

May the Pardons Board issue a certificate of good conduct and restore the right to carry a firearm without issuing a pardon? If not, can a certificate of good conduct restore the right to bear arms if the wording reads, "The certificate of good conduct shall not be construed as a pardon except for limited purposes of the applicability of NRS 202.360 and 18 U.S.C. 921(a)(20) and (33)."

ANALYSIS

Pursuant to NAC 213.130:

The [Pardons] board may issue to a person who has been convicted of a crime a certificate of good conduct:

1. To remove a legal disability incurred through a 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 service or if there is unusual and compelling evidence of his rehabilitation.

Those civil rights to be restored are limited to the right to vote, the right to hold public office, and the right to serve on a jury. NRS 179.285(1)(b) [rev. 2003]; see also *United States v. Breckenridge*, 899 F.2d 540, 542 (6th Cir. 1990).

Many legal disabilities exist under the law upon the conviction of a felony. Sixty-two such legal disabilities are listed in the index to NRS. See pages 747-48 of the index. Several other legal disabilities exist, such as the right to possess firearms (NRS 202.360), the requirement to register as a convicted felon (NRS 179C.100), the requirement to register as a convicted sex offender (NRS 179D.450), and others. A certificate of good conduct is not intended to carry the weight of a full pardon as evidenced by the language of NAC 213.130 that sets out fairly limited uses. It may be used "[t]o remove a legal disability incurred through a conviction." NAC 213.130(1) (emphasis added). However, only a pardon may remove the legal disability of the right to bear arms pursuant to NRS 202.360. Also, the issuance of a certificate does not limit an offender's ability to seek a pardon. See NAC 213.160. While the regulation does not limit the number of legal disabilities that may be removed via a certificate of good conduct, the large number of disabilities in issue and the apparent limited intended use of the certificate counsel in favor of listing each of the legal disabilities to be removed.

CONCLUSION TO QUESTION TWO A

A certificate of good conduct can be used to restore an offender's civil rights. The certificate of good conduct should identify which legal disabilities the Pardons Board intends to remove.

CONCLUSION TO QUESTION TWO B

A certificate of good conduct may not release the legal disability of the right to bear arms. See NRS 202.360. The authority to issue certificates of good conduct is not conferred by the Nevada Constitution. Instead, the authority flows from regulation. Because the authority to issue certificates is not conferred by the Nevada Constitution, the Legislature may limit that authority. As stated above, the restriction on a convicted

felon's right to bear arms is controlled by NRS 202.360 which bars a convicted felon's right to bear arms unless he has received a pardon and the pardon does not restrict his right to bear arms. Conversely, a convicted felon does not have to register pursuant to NRS 179C.100, if his civil rights have been restored and the Pardons Board so orders.

As discussed above, an offender's conviction is not erased merely because he receives a pardon or a certificate of good conduct. The fact of his conviction may be subject to certain uses that adversely affect the offender but are not considered additional punishment for the subject conviction. For instance, the fact of a conviction may be used to enhance the penalty of a future offense. A licensing board may deny a license, notwithstanding a pardon or certificate of good conduct for the conviction, because the board looks to the conduct and not the conviction. Finally, convicted sex offenders required to register under chapter 179D of NRS must register notwithstanding a pardon or the issuance of a certificate of good conduct.

CONCLUSION TO QUESTION TWO C

As discussed in the conclusion to Question Two B above, while the Legislature cannot limit the constitutional authority of the Pardons Board in issuing a pardon, the Legislature can limit the Board's authority derived from statute. The Legislature does not permit a convicted felon the right to bear arms "*unless he has received a pardon and the pardon does not specifically restrict his right to bear arms.*" NRS 202.360(1) (emphasis added).

QUESTION THREE A

If a criminal record is sealed in accordance with NRS 179.245, 179.255, or 179.259, does the effect of the sealing of a record as provided for in NRS 179.285 include the restoration of the right to bear arms?

QUESTION THREE B

If so, does the federal government allow for the full faith and credit of this restoration, or do other federal gun restrictions apply?

ANALYSIS

Pursuant to Assembly Bill 55, Act of June 11, 2003, ch. 447, § 13, 2003 Nev. Stat. 447, which revised NRS 179.285, a restoration of civil rights is limited to the right to vote, right to hold office, and the right to serve on a jury. The right to bear arms is not included in the civil rights restored as a result of a court sealing a record. Additionally, pursuant to NRS 202.360(1), a convicted felon may not possess arms unless his conviction has been pardoned and the pardon does not restrict his right to bear arms. Therefore, the mere sealing of a record pursuant to statute does not permit

the restoration of a convicted felon's right to bear arms pursuant to NRS 202.360. In 1983 this office addressed the effect of records sealing under NRS 179.245. See Op. Nev. Att'y Gen. No. 83-13 (September 14, 1983). It is important to note, however, that the more pertinent and specific law addressing the right to carry a firearm changed in 1985. NRS 202.360(1) provides,

A person shall not own or have in his possession or under his custody or control any firearm if he: (a) has been convicted of a felony in this or any other state, or in any political subdivision thereof, or of a felony in violation of the laws of the United States of America, *unless he has received a pardon and the pardon does not restrict his right to bear arms.* [Emphasis added.]

Additionally, the Ninth Circuit requires a pardon, expungement, or restoration of civil rights to expressly provide that the person "may not ship, transport, possess, or receive firearms" pursuant to 18 U.S.C. § 921(a)(20) as a condition in applying the felon in possession of a gun law (18 U.S.C. § 922(g)(1)). *United States v. Laskie*, 258 F.3d at 1052. Section 921(a)(20) is an "anti-mousetrapping rule to protect a felon whose civil rights have been restored from wrongly believing his right to bear arms was also restored along with his civil rights." *United States v. Herron*, 45 F.3d 340, 343 (9th Cir. 1995). The *Herron* court sought to protect an offender receiving an order instructing him that "all penalties and disabilities resulting from the crime of which he had been convicted" had been eliminated, yet still potentially be in violation of NRS 202.360 for possessing a firearm. See *United States v. Simpson*, 27 F.3d 355 (9th Cir. 1994).

The Ninth Circuit looks to the method by which an offender's civil rights were restored to determine whether or not his right to bear arms was also restored. "If the pardon, expungement, or restoration of civil rights occurred by operation of law, then it must 'look to the whole of state law' to determine whether the state also had expressly prohibited the defendant from possessing firearms." *Herron*, 45 F.3d at 342. "But if . . . the 'pardon, expungement, or restoration of civil rights' occurred by a certificate or other written document, then the express reservation must be contained in the document itself." *Id.* at 343. In other words, if an offender's rights are restored by statute, a court looks to all relevant statutes to determine if his rights were restored. However, if an offender's rights are restored by a document such as a pardon, the court looks only to the four corners of the document.

While the restriction of an offender's right to bear arms must be clear to invoke federal law, even a partial state restriction on an offender's right to bear arms is sufficient to trigger a restriction under federal law. The purpose of the federal gun law is "to keep guns away from all offenders who, the federal government feared, might cause harm, even if those persons were not deemed dangerous by *States.*" *Caron v.*

United States, 524 U.S. 308, 315 (1998) (emphasis added). The Federal Government's interest is to provide "a single, national, protective policy, broader than required by state law." *Id.* at 316.

The *Caron* Court had to decide whether federal law disqualified an offender from possessing firearms notwithstanding Massachusetts' partial restoration of his right to bear arms. Under Massachusetts law, a convicted felon could possess rifles and shotguns so long as his felony convictions were more than five years old and he possessed the requisite firearms permit. However, Massachusetts law also forbade convicted felons from possessing handguns outside their homes or businesses. After the offender's right to bear arms was partially restored under Massachusetts law, he entered a victim's house with a semiautomatic rifle and threatened the victim and his family. Federal agents subsequently served a search warrant on the offender and seized six rifles and shotguns and 6,823 rounds of ammunition. The *Caron* Court

determined that because Massachusetts restricted the offender's right with regard to handguns, Massachusetts treated him as too dangerous to possess handguns. "Federal law uses this state finding of dangerousness in forbidding petitioner to have any guns." *Id.* at 317. Unlike Massachusetts, Nevada does not break firearms into sub-categories for the purpose of limiting a convicted felon's right to bear arms. However, even if Nevada elected to do so, the *Caron* decision demonstrates that a partial restoration of the right to bear arms on a convicted felon would not restore his right to bear arms under federal law.

CONCLUSION TO QUESTION THREE A

The rights specifically restored by the revised NRS 179.285 are only the right to vote, hold office, and serve on a jury.

CONCLUSION TO QUESTION THREE B

Since the answer to Question Three A is no, we need not address this question.

Sincere regards,

BRIAN SANDOVAL
Attorney General

By:

LOUIS F. HOLLAND
Deputy Attorney General
Litigation Division

Dorla M. Salling
November 18, 2003
Page 25

(775) 684-1256

LFH:kh