

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).