

JUNE 7, 2008

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 state offenders are determined by the jurisdiction in which they were convicted, but federal offenders convicted in other states must apply to have rights restored by governor.) Under the Rules of Executive Clemency, as revised on April 5, 2007, certain less serious felony offenders^{*} are eligible for automatic restoration of all civil rights, including certain licensing eligibility but not including firearms rights, 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:

^{*} 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)

<http://www.state.fl.us/fpc/Policies/ExecClemency/ROEC12092004.pdf>. The 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 asked his 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.”