

MARCH 10, 2007

MONTANA

I. Automatic Restoration of Rights:

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

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

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

II. Discretionary Restoration Mechanisms:

A. Executive pardon:

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

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

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

- *Administration:* Board has three regular members and four “auxiliary” members who are required to attend meetings that regular members cannot. Mont. Code Ann. §§ 2-15-2302(2), 2-12-2303(3). All are appointed by the Governor, and serve effectively as volunteers. A majority of the Board constitutes a quorum and all decisions are by majority vote. Rules set forth at Mont. Admin. R. 20-25-901 to 904. History of Board (including merging of pardon and parole function in 1955) at <http://www.discoveringmontana.com/bopp/history.asp>
 - *Eligibility:* No eligibility requirements, except that federal and out-of-state offenders ineligible. Misdemeanants may apply. Board may not postpone consideration of an application for executive clemency on grounds that the applicant has not exhausted the appeal and sentence review processes. 37 Mont. Op. Att’y Gen. 183 (1977).
 - *Effect:* Removes “all legal consequences” of conviction, Mont. Code Ann. § 46-23-301, and licensing bars, e.g., § 37-60-303 (private investigators and patrol officers). *See also* Mont. Admin. R. 20-25-901A(1) (“Pardon is a declaration of record that an individual is to be relieved of all legal consequences of a prior conviction.”). Pardon is grounds for judicial expungement.
 - *Process:* *See generally* Mont. Code Ann. §§ 46-23-301 to 46-23-307, 46-23-315, 46-23-316 (governing executive clemency process), and Mont. Admin. R. 20-25-901 to 20-25-904. Board may hold a hearing in meritorious cases where all sides are heard and a record made, though it is required to hold hearings only in capital cases. Hearing must be publicized at least once a week for two weeks. Mont. Code Ann. §§ 46-23-303, 46-23-304. Favorable recommendations forwarded to the Governor, § 46-23-307; if a majority of Board recommends denial in non-capital case, the case may not be sent to the Governor. § 46-23-301(3). Records of the Board’s acts and decisions public. § 46-23-108.
- NB: *Board regulations do not appear to contemplate applications for clemency by persons no longer under sentence, but according to Board director hearing requirement does apply to pardon applicants. Published standards appear to apply only to commutation cases.*
- *Report:* Mont. Code Ann. § 46-23-316. Governor's report to legislature: The governor shall “report to the legislature each case of remission of fine or forfeiture, respite, commutation, or pardon granted since the last previous report, stating the name of the convict, the crime of which he was convicted, the sentence and its date, the date of remission, commutation, pardon, or respite, with the reason for granting the same, and the objection, if any, of any of the members of the board made thereto.”

- *Frequency of Grants:* Statistical data on annual clemency actions published at http://www.discoveringmontana.com/bopp/statistical_data.asp. In 2002, three pardons granted and 16 denied; in 2003, five granted and 21 denied; in 2004 (through November) four granted and 16 denied. Only one grant from 1999-2001. Approximately 1/3 of applications are from misdemeanants. Source: Montana Board of Pardons and Parole.
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B. Judicial sealing or expungement of adult felony convictions:

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

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

C. Administrative certificate: N/A

III. Nondiscrimination in Licensing and Employment:

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