

MARCH 11, 2007

SOUTH DAKOTA

I. Automatic Restoration of Rights:

- A. *Civil Rights*: Civil rights are suspended upon a sentence to imprisonment, and regained only when prison sentence fully discharged, including parole. *See* S.D. Codified Laws § 23A-27-35: “A sentence of imprisonment in the state penitentiary for any term suspends the right of the person so sentenced to vote, to hold public office, to become a candidate for public office and to serve on a jury, and forfeits all public offices and all private trusts, authority, or power during the term of such imprisonment.” *See also* S.D. Const. art. 3, § 3 (disqualifying from legislative office those who cannot vote); S.D. Codified Laws § 16-13-10 (convicted felons may not sit on jury unless civil rights restored). Rights are lost even if prison sentence is suspended by court, and are not restored until “the termination of the time of the original sentence or the time extended by order of the court.” § 23A-27-35. Upon issuance of discharge certificate by Secretary of Corrections, a person is considered “restored to the full rights of citizenship.” §§ 24-5-2, 24-15A-7. Discharge certificate not issued until entire prison sentence completed, including any period of parole. *Id.* People not sentenced to penitentiary do not lose any civil rights.
- B. *Firearms*: Firearms rights not lost unless convicted of a “crime of violence,” in which case rights restored automatically after 15 years without another conviction for a crime of violence or certain drug felonies. S.D. Codified Laws § 22-14-15, *amended by* 2005 S.D. Laws 120. Crime of violence defined in § 22-1-2(9). Earlier relief by pardon only if specified in pardon document. § 24-14-12.

II. Discretionary Restoration Mechanisms:

A. Executive pardon:

- Authority: According to the Supreme Court of South Dakota, there are two legally distinct types of pardons in South Dakota. The Governor may act independently under S.D. Const. art. 4, § 3. Alternatively, Governor may pursue advisory route recognized in S.D. Codified Laws § 24-14-1 and delegate by executive order advisory authority to Board of Pardons and Paroles.* *See Doe v. Nelson*, 680 N.W.2d 302, 313 (S.D. 2004). The

* Under § 5 of 1898 S. D. Constitution, the Board of Pardons consisted of the presiding judge, the secretary of state and the attorney general, and its approval was required for executive clemency except in cases where the sentence was two years in prison, or less than \$200. The 1960 amendment of § 5 reconstituted this board as the Board of Pardons and Paroles, required its approval for all cases of executive

Board may also recommend to the Governor first offender “exceptional pardons.” See § 24-14-8, discussed below. The history of the pardon power in South Dakota, including its regulation by the legislature beginning in 1960, is reviewed in Eric R. Johnson, *Doe v. Nelson, The Wrongful Assumption of Gubernatorial Plenary Authority over the Pardoning Process*, 50 S.D. L. Rev. 156 (2005).

- *Administration:* The Board of Pardons and Paroles is a nine member appointed board charged with the authority to make decisions of parole, the revocation of parole, and parole policy and procedure. S.D. Codified Laws §§ 24-13-1, 24-13-2. Three of the board members are appointed by the Governor, three are appointed by Attorney General, and the remaining three are appointed by the South Dakota Supreme Court. One of the appointees by each appointing authority must be an attorney. Each member of the board must be a resident of South Dakota and be appointed for a four-year term with the advice and consent of the Senate, and may be reappointed. The Board is required by law to meet at least every three months, and names its own chair. §§ 24-13-4, 24-13-6. The Board is administered under the jurisdiction and direction of the Department of Corrections but retains “quasi-judicial, quasi-legislative, advisory and other non-administrative functions” independent of the Department of Corrections. § 24-13-3.
- *Eligibility:* Ordinarily no eligibility period, except that first offenders must wait five years after release to apply for “exceptional pardon” under § 24-14-8. Out of state convictions ineligible. *United States v. Capito*, 992 F.2d 218, 219-20 (8th Cir. 1993); *Thompson v. United States*, 989 F.2d 269, 270-71 (8th Cir. 1993).
- *Effect:* Relief from disabilities and sealing. Persons pardoned pursuant to statutory provisions are “released from all disabilities consequent on the person's conviction [except for firearms privileges if not specified, SDCL § 24-14-12] The pardon restores the person, in the contemplation of the law, to the status the person occupied before arrest, indictment, or information. No person as to whom such order has been entered may be held thereafter under any provision of any law to be guilty of perjury or of giving a false statement by reason of such person's failure to recite or acknowledge such arrest, indictment, information, or trial in response to any inquiry made of such person for any purpose.” § 24-14-11.

In addition, upon the granting of a pardon under the provisions of the statute, the records are sealed: “the Governor shall order that all official

clerical, and gave the Board the power to parole. In 1972, the Board's statutory role in advising the Governor was eliminated, as was the requirement that the Governor report all pardons to the legislature. See Historical Notes following S.D. Const. art. 4, § 3, S.D.Codified Laws. In *Doe*, 680 N.W.2d at 313, the South Dakota Supreme Court held that the state has a “two-prong” pardon system: (1) a pardon granted by the Governor with input from the Board of Pardons and Paroles, which may be sealed pursuant to statute; and (2) a pardon granted solely by the Governor with no advice from the Board, which must be open to public inspection.

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records relating to the pardoned person's arrest, indictment or information, trial, finding of guilt, application for a pardon, and the proceedings of the Board of Pardons and Paroles shall be sealed. The Governor shall file a public document with the secretary of state certifying that the Governor has pardoned the person in compliance with the provisions of this chapter. The document shall remain a public document for five years and after five years that document shall be sealed.” § 24-14-11 The pardoned offense shall be considered a prior conviction for the sole purpose of sentencing for subsequent offenses, determination of habitual offender status under chapter 22-7, or whether the defendant has prior driving under the influence convictions.

The Supreme Court of South Dakota held in the *Doe* case, *supra*, that records of a pardon issued by the Governor alone pursuant to his constitutional power, “without following the provisions of this chapter,” may not be sealed. *See Doe*, 680 N.W.2d at 309 n.8, 313 (quoting S.D. Codified Laws § 24-14-11). *See also* 3 S.D. Op. Att’y Gen. 01 (2003), 2003 WL 21406288.

- *Process:* In cases where a pardon application is referred to the Board for advice, pursuant to the procedure set forth in S.D. Codified Laws §§ 24-14-1 through 5, the Board investigates the case and refers it back to Governor with a non-binding recommendation for action. The Board meets in open session at facilities provided by the Department of Corrections “at least every three months” to hear applications for parole, for the discussion and adoption of policy, for revocation decisions, “and upon request of the Governor, [to] make recommendation for pardon, commutation, reprieve, or remission of fines or forfeitures.” § 24-13-6. Board is required to “publish annually a schedule of hearing dates and locations for the next calendar year.” S.D. Admin. Code § 17:60:01:04.

Clemency applicants must give notice to the prosecutor, Attorney General, and sentencing judge 30 days before application is considered, § 24-14-3, *amended by* 2005 S.D. Laws 132, § 5, and also to the victim. § 24-14-4.1. They must also publish notice of application in newspaper of general circulation in the county where crime was committed once a week for three weeks. § 24-14-4, *amended by* 2005 S.D. Laws 132, § 6. (Board website advises that if no newspaper, must post notice on door of county courthouse. *See*

<http://www.state.sd.us/corrections/Executive%20Clemency%20Application.pdf>.) Two-step hearing: hearing panel makes recommendation to Board after interviewing applicant, then public hearing before the Board. Board has subpoena power. § 24-13-8. Whenever the Board of Pardons and Paroles recommends clemency to the Governor, the recommendation shall be in writing. § 24-14-7. The board shall keep a record of its findings and the reasons for its recommendation. *Id.* Instructions and application form:

[http://www.state.sd.us/corrections/Executive%20Clemency%20Application](http://www.state.sd.us/corrections/Executive%20Clemency%20Application.pdf)

n.pdf. Favorable pardon recommendations must be by majority. S.D. Codified Laws § 24-13-4.6.

- *Exceptional Pardons:* Applicants for first offender “exceptional pardons” under S.D. Codified Laws § 24-14-8, *amended by* 2005 S.D. Laws 132, § 7, must wait for five years following release from confinement, and are required to comply with all procedures applicable to ordinary pardons except for requirements of publication in § 24-14-4. § 24-14-9.
- *Criteria:* Factors to be considered by Board in regulations that are relevant to post-sentence pardon include: “The applicant has shown remarkable rehabilitation;... review of the totality of applicant's circumstances indicates that applicant has carried the stigma of the crime for a long enough period to justify its removal;...the applicant wishes to pursue a professional career from which society can benefit, but a felony conviction prevents it.” *See* S.D. Admin. R. 17:60:05:12.
- *Frequency of Grants:* 279 pardons issued between 1995 and 2002, many by Governor alone without involvement of Board. Board receives 60-70 applications annually – better than 50% granted. A lot of minor indiscretions as well as those involving guns cause employment problems. Source: South Dakota Board of Pardons and Paroles
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B. Judicial sealing or expungement of adult felony convictions:

First offender sealing: Deferred adjudication procedure available for first offenders, which results in no conviction. Under S.D. Codified Laws § 23A-27-13, court may suspend imposition of sentence and place on probation person with no prior felony convictions. Upon successful completion of sentence person is discharged without adjudication of guilt, and court records are sealed. § 23A-27-14. Records other than those available to law enforcement are sealed. § 23A-27-17. “The effect of such order is to restore such person, in the contemplation of the law, to the status he occupied before his arrest or indictment or information. No person as to whom such order has been entered shall be held thereafter under any provision of any law to be guilty of perjury or of giving a false statement by reason of his failure to recite or acknowledge such arrest, indictment or information, or trial in response to any inquiry made of him for any purpose.”

Proceeding shall not be deemed a conviction for purposes of disqualification from licenses and employment, except for sex offenders seeking to obtain teaching certificates. . Proceeding in probation without adjudication may be considered by court in imposing subsequent sentence.

“Destruction” of Misdemeanor Records: Director of the Bureau of Criminal Statistics may authorize the destruction of information and records of misdemeanor offenses whose final date of disposition occurred at least ten years prior to authorized destruction date. § 23-6-8.1. Also records of persons seventy-five years of age or older who have been crime-free for at least 10 years. Id.

C. Administrative certificate: N/A

III. Nondiscrimination in Licensing and Employment: N/A