



ALAN WILSON
ATTORNEY GENERAL

August 2, 2013

Mark Keel, Chief
State Law Enforcement Division
Post Office Box 21398
Columbia, South Carolina 29221

Dear Chief Keel,

You seek an opinion of this Office as to whether an individual who was required to register as a sex offender but was pardoned for the underlying offense in 2004 is entitled to have his information removed from the Sex Offender Registry. By way of background, you provide the following information:

Kenneth Williams was convicted of CSC 3rd Degree, Open Container and Illegal Possession of Alcohol on July 15, 1997. On September 1, 2004, he received a pardon for all three of these convictions.

On May 29, 2013, SLED received a letter from Mr. Williams' attorney requesting that Mr. Williams' information be removed from the Sex Offender Registry based on the 2011 Supreme Court Ruling in Edwards v. SLED.

Edwards v. SLED appears to be the leading case in South Carolina on the effect of a pardon on sex offender registration. In this case, Jeremy Edwards pled guilty to two counts of Peeping Tom in 1998. In 2004, Edwards received a pardon from the South Carolina Department of Probation, Parole, and Pardon Services. In 2009, Edwards requested that the circuit court issue an order mandating that he was no longer required to register as a sex offender. The Supreme Court found that the 2004 pardon relieved Edwards from the requirement to register as a sex offender. The Court said, "In light of the command of section 24-21-940 of the South Carolina Code, the circuit court correctly held that the pardon relieved Respondent from all direct and collateral consequences of his pardoned crime, which would necessarily include placement on the sex offender registry and continuous compliance with its registration requirements." The Court further found that "The General Assembly's 2005 and 2008 amendments to section 23-3-430 of the South Carolina Code cannot be applied retroactively to the Respondent's case." See Edwards v. State Law Enforcement Div., 395 S.C. 571, 720 S.E.2d 462 (2011).

Based on this Supreme Court case, it appears that Mr. Williams should be relieved of the requirement to register as a sex offender because he received his pardon in 2004, before the 2005 and 2008 amendments. The case, however, does

not clearly address whether or not SLED is required to remove the information Mr. Williams already provided to the Sex Offender Registry.

Law/Analysis

The South Carolina Code of Laws (1976, as amended) provides that the Department of Probation, Parole and Pardon Services is responsible for issuing an order of pardon "which provides for the restoration of the pardon applicant's civil rights." S.C. Code § 24-21-930 (Supp. 1993). An individual receiving such an order "is fully pardoned from all the legal consequences of his crime and of his conviction, direct and collateral, including the punishment, whether of imprisonment, pecuniary penalty or whatever else the law has provided." § 24-21-940 (Supp. 1981). As for the specific civil rights restored by a pardon, § 24-21-990 states:

A pardon shall fully restore all civil rights lost as a result of a conviction, which shall include the right to:

- (1) register to vote;
- (2) vote;
- (3) serve on a jury;
- (4) hold public office, except as provided in Section 16-13-210;
- (5) testify without having the fact of his conviction introduced for impeachment purposes to the extent provided by Rule 609(c) of the South Carolina Rules of Evidence;
- (6) not have his testimony excluded in a legal proceeding if convicted of perjury; and
- (7) be licensed for any occupation requiring a license.

§ 24-21-990 (Supp. 1995).

The placement of persons convicted of certain offenses on the state sex offender registry is generally governed by § 23-3-430. In its current form, subsection (A) of that section provides, in part:

(A) Any person, regardless of age, residing in the State of South Carolina who in this State has been convicted of, adjudicated delinquent for, pled guilty or nolo contendere to an offense described below, or who has been convicted, adjudicated delinquent, pled guilty or nolo contendere, or found not guilty by reason of insanity in any comparable court in the United States, or a foreign country, or who has been convicted, adjudicated delinquent, pled guilty or nolo contendere, or found not guilty by reason of insanity in the United States federal courts of a similar offense, or who has been convicted of, adjudicated delinquent for, pled guilty or nolo contendere, or found not guilty by reason of insanity to an

offense for which the person was required to register in the state where the conviction or plea occurred, shall be required to register pursuant to the provisions of this article....

§ 23-3-430 (Supp. 2012). The offenses for which a person is placed on the registry if convicted are set forth in subsection (C). In addition, a judge may order a person convicted of any other offense not listed in subsection (C) to be included in the registry if good cause is shown by the solicitor. § 23-3-430(D).

With regards to the removal of a person from the sex offender registry, subsections (E), (F), and (G) of § 23-3-430 currently state:

(E) SLED shall remove a person's name and any other information concerning that person from the sex offender registry immediately upon notification by the Attorney General that the person's adjudication, conviction, guilty plea, or plea of nolo contendere for an offense listed in subsection (C) was reversed, overturned, or vacated on appeal and a final judgment has been rendered.

(F) If an offender receives a pardon for the offense for which he was required to register, the offender must reregister as provided by Section 23-3-460¹ and may not be removed from the registry except:

(1) as provided by the provisions of subsection (E); or

(2) if the pardon is based on a finding of not guilty specifically stated in the pardon.

(G) If an offender files a petition for a writ of habeas corpus or a motion for a new trial pursuant to Rule 29(b), South Carolina Rules of Criminal Procedure, based on newly discovered evidence, the offender must reregister as provided by Section 23-3-460 and may not be removed from the registry except:

(1) as provided by the provisions of subsection (E); or

¹ § 23-3-460(A) states:

(A) A person required to register pursuant to this article is required to register biannually for life. For purposes of this article, "biannually" means each year during the month of his birthday and again during the sixth month following his birth month. The person required to register shall register and must reregister at the sheriff's department in each county where he resides, owns real property, is employed, or attends any public or private school, including, but not limited to, a secondary school, adult education school, college or university, and any vocational, technical, or occupational school. A person determined by a court to be a sexually violent predator pursuant to state law is required to verify registration and be photographed every ninety days by the sheriff's department in the county in which he resides unless the person is committed to the custody of the State, and verification will be held in abeyance until his release.

(2)(a) if the circuit court grants the offender's petition or motion and orders a new trial; and

(b) a verdict of acquittal is returned at the new trial or entered with the state's consent.

§ 23-3-430(E) - (G) (Supp. 2012). Subsections (F) and (G) were added via amendment in 2005. See Act No. 141 of 2005. The portion of subsection (F) indicating an offender "must reregister as provided by Section 23-3-460" was added via amendment in 2008. See Act No. 335 of 2008.

As you indicate in your letter, the S.C. Supreme Court in Edwards v. State Law Enforcement Division, 395 S.C. 571, 720 S.E.2d 462 (2011) held the 2005 and 2008 amendments to § 23-3-430 did not apply retroactively to a convicted sex offender that was pardoned in 2004, thus relieving him of the requirement that he be placed on the sex offender registry. In support of its holding, the Court found:

SCDPPPS pardoned Respondent in 2004. Thus, in light of the command of section 24-21-940 of the South Carolina Code, the circuit court correctly held that the pardon relieved Respondent from all direct and collateral consequences of his pardoned crime, which would necessarily include placement on the sex offender registry and continuous compliance with its registration requirements.

Id. at 576, 720 S.E.2d at 464. The Court also found the 2005 and 2008 amendments to § 23-3-430 changed, rather than clarified, the law as it applied to pardoned sex offenders:

These amendments to section 23-3-430 occurred subsequent to the General Assembly's creation of the state's pardon statute. That statute provides, "[A]n individual is fully pardoned from all the legal consequences of his crime and of his conviction, direct and collateral, including the punishment, whether of imprisonment, pecuniary penalty, or whatever else the law has provided." S.C.Code Ann. § 24-21-940 (2007).

It is clear that the General Assembly's amendments to the sex offender registry statute changed rather than clarified the law. The statute was silent regarding pardons at its creation in 1994. In 2004, the General Assembly mandated, via section 24-21-940, that a pardon relieved an individual of all criminal and civil penalties accompanying her crime. **In 2005 and 2008, the General Assembly ensured that the broad application of the pardon statute would not relieve sex offenders of their registration obligation.**

Id. at 577, 720 S.E.2d at 465 (emphasis added). Furthermore, the Court found the 2005 and 2008 amendments to § 23-3-430 were not procedural or remedial in nature, and thus could not be applied retroactively to Edward's case. Id. at 579-82, 720 S.E.2d at 467.

In light of the Court's holding in Edwards, it is clear that a sex offender is relieved of the sex offender registration requirement if he or she is pardoned for the underlying offenses prior to the effective date of the 2005 and 2008 amendments to § 23-3-430. Conversely, one pardoned for such offenses after the effective date of the 2005 amendment is not relieved of the requirement to register unless "the pardon

is based on a finding of not guilty specifically stated in the pardon," and is required to reregister as a sex offender pursuant to § 23-3-460 if pardoned after the effective date of the 2008 amendment. § 23-3-430(F). Consistent with these general rules, the individual in question was pardoned in 2004 of the offense for which he was required to register; consequently, he is relieved of this requirement. As you indicate, however, the more difficult question is whether the information such individual has already provided to the sex offender registry prior to his pardon must be removed.

While this issue has not specifically been addressed by the appellate courts of this State, our Office specifically addressed this issue in a 2002 opinion. See Op. S.C. Att'y Gen., 2002 WL 1340410 (April 22, 2002). Similar to the holding in Edwards, we concluded a pardoned sex offender is no longer required to be placed upon the sex offender registry pursuant to § 23-3-430 (Supp. 2000). Our conclusion was based on then recent decisions issued by the Supreme Court and Court of Appeals addressing the rights restored to an individual upon having a conviction pardoned.² However, we also concluded that "the pardoning of such an offender would not ... require the removal of his name and other information from the sex offender registry." Noting that the General Assembly specifically addressed the removal of a convicted sex offender's information from the registry in subsection (E) of § 23-3-430, we stated "[o]nly those offenders who have had their convictions reversed, overturned, or vacated on appeal are entitled to have their name and other information removed from the sex offender registry." Furthermore, we found that maintaining the pardoned sex offender's information in the sex offender registry would advance the general goal of the registry of promoting the "state's fundamental right to provide for the public health, welfare, and safety of its citizens" as stated in § 23-3-400.

We also note that clerks of court are charged pursuant to § 14-17-540(14) with maintaining "A Record Book of Pardons" containing the names of persons pardoned, the offenses for which they were convicted, and the dates of the conviction and pardon. As we stated in a prior opinion, § 14-17-540(14) makes it "readily apparent that the pardon, as well as the pardoned offense, are intended to be matters of public record." Op. S.C. Att'y Gen., 1980 WL 81950 (June 12, 1980). Thus, we presume that if the Legislature intended in 2004 for all information concerning a pardoned sex offender's conviction to be removed or expunged from the public record, including the sex offender registry, it would have expressly stated as much. However, as of 2004 § 23-3-430 provided that a sex offender's information was only to be removed from the sex offender registry if his or her conviction "was reversed, overturned, or vacated on appeal and a final judgment has been entered." § 23-3-430(E). It was not until 2005 that the Legislature added subsection (F) essentially providing that a sex offender may only be removed from the registry as a result of a pardon if "if the pardon is based on a finding of not guilty specifically stated in the pardon." As the Court held in Edwards, however, the 2005 amendment does not apply retroactively.

Conclusion

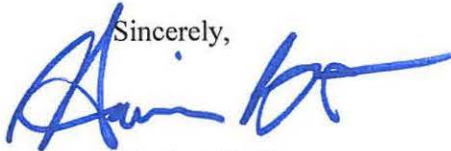
Consistent with Edwards and the aforementioned prior opinions of this Office, it is our opinion that although a sex offender pardoned before the 2005 and 2008 amendments to § 23-3-430 is relieved of the requirements that he or she be placed on the sex offender registry and reregister biannually, this does not require that the pardoned sex offender's information be removed from the sex offender registry. In 2004, such information was only required to be removed from the sex offender registry if the offender's

² See State v. Baucom, 340 S.C. 339, 531 S.E.2d 922 (2000) (pardoned offense could not be used to enhance subsequent offense); Brunson v. Stewart, 345 S.C. 283, 547 S.E.2d 504 (Ct. App. 2001) (individual's right to purchase firearm was restored when conviction for violent offense was pardoned).

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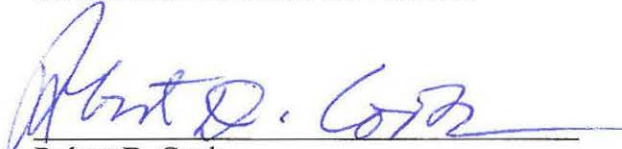
conviction "was reversed, overturned, or vacated on appeal" pursuant to § 23-3-430(E). Thus, we agree with you that the individual in question is no longer required to register as a sex offender as a result of his 2004 pardon. However, it is our opinion that SLED is not required to remove or expunge any information already provided to the sex offender registry unless his conviction for the offense that required registration was reversed, overturned, or vacated on appeal pursuant to § 23-3-430(E).

Sincerely,



Harrison D. Brant
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook
Solicitor General