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OFFICE OF THE ATTORNEY GENERAL

CHARLES MOLONY CONDON
ATTORNEY GENERAL

April 23, 1996

Major J. V. Martin, Assistant Director
South Carolina Law Enforcement Division
P. O. Box 21398
Columbia, South Carolina 29221-1398

Re: Informal Opinion

Dear Major Martin:

You have inquired as to "whether an individual, convicted of a violent crime as defined in Section 16-1-60 and subsequently receiving a pardon in accordance with Title 24, Chapter 21 of the Code of Laws of South Carolina 1976, as amended, would be eligible to purchase a pistol. You further state that:

> [t]he reason for requesting this opinion is the Division instituted a presale handgun background check system on February 28, 1994 in order to comply with the Brady Handgun Violence Prevention Act, often referred to as the Brady Law. This operation was designated as the State Firearms Transaction Center (FTC). In as much as the state was now in a position to restrict the sale of handguns to prohibited individuals prior to the purchase, the Division chose to make decisions pursuant to the most restrictive, applicable law. This was determined to be the Gun Control Act of 1968, 18 U.S.C.A. [§ 921 et seq.]. While this federal legislation is more restrictive than South Carolina laws which deal only with a crime of violence, Section 921 (20), it does authorize an individual who has been granted a pardon to purchase/ possess a handgun.

Request Letter

Moreover, in conjunction with your request, we have received a letter from the Assistant Chief Counsel of the Bureau of Alcohol, Tobacco and Firearms in Atlanta regarding this same issue. Therein, reference was made to a provision in the Gun Control Act of 1968, 18 U.S.C. § 922 (a) (20), which provides in part as follows:

> What constitutes a conviction of such a crime shall be determined in accordance with the law of the jurisdiction in which the proceedings were held. Any conviction which has been expunged or set aside or for which a person has been pardoned or has had civil rights restored, shall not be considered a conviction for purposes of this chapter, unless such pardon, expungement, or restoration of civil rights expressly provides that a person may not ship, transport, possess or receive firearms.

The Assistant Chief Counsel also noted that implementing Treasury regulations, "provide that the person is still considered to be convicted and having Federal firearms disabilities if he or she is still under state disabilities resulting from the conviction with respect to the possession of any type of firearm." He notes that particularly 27 C.F.R. Section 178.11 provides in part as follows:

> [a]ny conviction which has been expunged or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction for the purposes of the Act or this part, unless such pardon, expunction, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms, or unless the person is prohibited by the law of the jurisdiction in which the proceedings were held from receiving or possessing any firearms. (emphasis added).

In addition, the Assistant Chief Counsel correctly observed that Section 24-21-990 provides that a pardon in South Carolina 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;

(5) Testify without having the fact of his conviction introduced for impeachment purposes unless the crime indicates a lack of veracity;
(6) Not have his testimony excluded in a legal proceeding if convicted of perjury;
(7) Be licensed for any occupation requiring a license.

The Assistant Chief Counsel also referenced Section 16-23-30 of our Code to the effect that it prohibits the possession or the sale or distribution to a person who has been convicted of a violent offense. Thus, the question raised is the interrelationship between South Carolina's law regarding the right to possess a weapon upon conviction of a violent offense and 18 U.S.C. § 922 (a) (20) [part of the Gun Control Act of 1968].

Law / Analysis

Based upon the fact that your question touches upon both federal and state law, I will first briefly review the relevant federal statutes and the case law thereunder. There has been considerable confusion since its passage in 1986 of the correct interpretation of 18 U.S.C. § 921 (a) (20). 18 U.S.C. § 922 (g) (1) makes it unlawful under federal law for anyone "who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year ... to possess any firearm." However, § 921 (a) (20), which defines the term "crime punishable by imprisonment for a term exceeding one year" also defines a "conviction" for such purposes:

> What constitutes a conviction of such a crime shall be determined in accordance with the law of the jurisdiction in which the proceedings were held. Any conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction for purposes of this chapter, unless such pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess or receive firearms.

In United States v. Essick, 935 F.2d 28 (4th Cir. 1991), the Fourth Circuit explained that "in every § 922 (g) (1) prosecution, the court must refer to the law of the jurisdiction in which such purported predicate conviction occurred." Said the Court,

> [t]his inquiry requires an analysis of whether and to what extent the jurisdiction in which the prior conviction occurred "restores the civil rights" of ex-felons.

Thus, in Essick, the Court looked to North Carolina law. In North Carolina, the felony Firearms Act forbade possession of a firearm for five years from the date of conviction by those convicted of the crime enumerated. However, "[p]ossession beyond the five-year post-release period is simply not a crime in North Carolina" because "[e]x-felons regain the right to possess a gun in that state by the mere passage of time." 935 F.2d at 30.

The Court cited with approval its previous decision in United States v. McLean, 904 F.2d 216 (4th Cir. 1990), cert. denied, ____ U.S. ____, 111 S.Ct. 203, 112 L.Ed.2d 164 (1991). Essick summarized McLean this way:

> [l]ooking to the "whole of state law" to determine whether any restoration of state civil rights relating to firearm possession would bring the ex-felon outside the reach of § 922 (g) (1), this Court concluded that N.C. Gen. Stat. § 13-1, considered in conjunction with § 14-415.1, clearly restored the general citizenship rights of an ex-felon, and that such restoration of rights included a limited right to possess firearms. Because McLean was carrying a handgun within five years of his release from prison, the court stated that he fell "squarely within the express provisions of [N.C. Gen. Stat. § 14-415.1]."

Id. at 30. In Essick, the government failed to allege that the defendant fell "within the five-year period in which North Carolina law prohibited an ex-felon from possessing a handgun. Thus, the Court reversed the federal conviction for possession of a firearm pursuant to § 922 (g). The Fourth Circuit's reasoning was that

> [i]n enacting the Firearm Owner's Protection Act in 1986, Congress clearly empowered each state to determine if ex-felon would be legally permitted under federal law to possess firearms. In effect, each state is able to carve out exemptions to the general federal proscription against possession of any firearm by any ex-felon. United States v. Cassidy, 899 F.2d 543 (6th Cir. 1990). In North Carolina, the government must prove, at a minimum, that the defendant possessed a firearm within five years of release from the prior North Carolina felony. Otherwise, he would as a matter of law stand in the

> same shoes as any other person who has not been previously convicted of a felony. In North Carolina, an ex-felon who is more than five years beyond his release date by the same civil rights regarding firearms as non-felons; for purposes of § 922 (g) (1), then, his prior conviction does not exist. Proof of a prior "conviction" encompasses more than proof of a discrete event in the defendant's past; the government must show the continuing vitality of the conviction, a matter of proof that, under North Carolina law, necessarily implicates the five-year post release period. Accordingly, the judgment of conviction is reversed.

Id. at 31.

In United States v. Haynes, 961 F.2d 50, (4th Cir. 1992), the Fourth Circuit again examined the effect of § 921 (a) (20), this time in the context of a pardon. In Haynes, at the time the defendant's civil rights were restored by pardon, West Virginia law did not prohibit his possession of firearms. The Court concluded, therefore, that Section 921 (a) (20) was not applicable and that the conviction under § 922 (g) (1) could not stand. Citing United States v. McBryde, 938 F.2d 533 (4th Cir. 1991), as analogous, where the Court had concluded that North Carolina law did not prohibit the possession of a firearm (outside the five year period) and the certificate of discharge did not expressly prohibit McBryde from possessing a firearm, "his prior conviction could not serve as a predicate conviction under section 922 (g) (1).

In Haynes, a West Virginia statute prohibiting possession of firearms by ex-felons has been enacted, but after Haynes civil rights had been restored. Clearly, therefore, Section 922 (g) (1) was not violated, concluded the Fourth Circuit:

> [i]t is undisputed that Haynes restoration of civil rights contained no express limitation on his right to possess firearms. Rather the certificate clearly stated that "any and all" civil rights were thereby restored. It is also undisputed that section 921 (a) (20) was intended "'to give effect to state reforms with respect to the status of an ex-convict' and accordingly, in determining whether [West Virginia] has restored the civil rights of a convicted felon, we must examine the whole state law." McLean, 904 F.2d at 218 (quoting United States v. Cassidy, 899 F.2d 543, 548 (6th Cir. 1990). It is clear that at the time that Haynes' civil rights were

> restored, it was not against West Virginia law for a convicted felon to possess a firearm. Accordingly, when we refer to the whole of West Virginia law in effect at the time that Haynes' civil rights were restored, we find no state law limitation on the defendant's ability to carry a firearm. Thus, since his restoration of civil rights contained no limiting language and since West Virginia law did not provide such a prohibition, we find that, under section 921 (a) (20), the defendant's prior conviction cannot serve as a predicate for conviction under section 922 (g) (1). Our decision today comports with our prior holding in United States v. McBryde, 938 F.2d 533 (4th Cir. 1991). Accord United States v. Traxal, 914 F.2d 119, 123-25 (8th Cir. 1990).

Id. at 52.

In United States v. Whitley, 905 F.2d 163 (7th Cir. 1990), the Court explained that the second sentence of § 921 (a) (20) "does not require a federal court to disregard the state's definition of conviction just because the state has restored any one civil right." Id. at 512. In United States v. Decoteau, 932 F.2d 1205 (7th Cir. 1991), the Seventh Circuit noted that "[w]e must decide whether under North Dakota law the restoration of "civil rights" upon completion of sentence means that Decoteau is no longer "convicted for purposes of these federal laws." Id. at 1208. Finding that "North Dakota law does not allow Decoteau to possess guns ... Decoteau stands convicted of a crime for purposes of § 921 (a) (20)." Id.

And in United States v. Swanson, 947 F.2d 914 (11th Cir. 1991), the Eleventh Circuit examined the question of what effect a pardon had upon a prior state conviction under Alabama law. The pardon certificate in Swanson had purported to restore, without any reservation, "all civil and political rights." The government argues that the Board of Pardon and Parole could restore to Swanson only those "civil and political rights" which it was empowered by Alabama law to restore. A pardon, the government contended, did not erase prior state convictions for "crimes of violence" and Alabama law mandated that anyone convicted of a crime of violence could not possess a pistol. The defendant in Swanson had previously been convicted of manslaughter which was a "crime of violence" in Alabama.

The Swanson Court noted that a previous Alabama case, Mason v. State , 39 Ala. App. 1, 103 So.2d 337 (1956), affd. 267 Ala. 507, 103 So.2d 341 (1958), cert. den. 358 U. S. 934, 79 S.Ct. 323, 3 L.Ed.2d 306 (1959), had held that a pardon in no way vitiates

a prior conviction, because "a pardon cannot wipe out the historical facts of the conviction ... and it involved forgiveness, and not forgetfulness." 103 So.2d at 341. This conclusion was affirmed by the Alabama Supreme Court. 103 So.2d 341 (1958). However, Swanson pointed out that in a subsequent decision, Alabama ex rel. Sokiva v. Burr, ____ Ala. ____, 580 So.2d 1340 (1991), the Alabama Supreme Court overruled Mason, concluding that Ex Parte Garland, 4 Wall. (71 U.S.) 333, 18 L.Ed. 366 (1866) better represented the law with respect to pardons. In Garland, Justice Field had concluded that the effect of a pardon is "to relieve the petitioner from all penalties and disabilities attached to the offense". Thus, Sokiva reinstated its earlier decision in Hogan v. Hartwell, 242 Ala. 646, 7 So.2d 889 (1942) which Mason had overruled. Accordingly, the Eleventh Circuit in Swanson found that Sokiva best represented Alabama law regarding pardons. Said the Court in Swanson,

> [u]nder Alabama law, then, the Board's restoration to Swanson, without express limitation, of "all civil and political rights" means exactly what it says: It nullifies "any and all legal incapacities," including the right to possess firearms. Contrary to appellant's contention, it is not the case that by excepting Swanson from the class of felons under section 922 (g), we relieve from federal firearms disabilities one who, for purposes of interpreting the federal firearms statute, remains under state firearms disabilities because of his conviction for manslaughter or larceny. Following return of "all civil and political" rights under state law, and absent express provision that he may not "ship, transport, possess, or receive firearms," Swanson is under no state firearm disability. Federal and state law are consistent.

947 F.2d at 918.

Therefore, the issue is what is the law in South Carolina concerning the effect of a pardon upon a conviction and to what extent a convicted felon is permitted to possess a handgun in South Carolina. In this State, Section 16-23-30 is controlling with respect to making the possession of a pistol unlawful. That Section provides in pertinent part:

> [i]t shall be unlawful for any person to knowingly sell, offer to sell, deliver, lease, rent, barter, exchange or transport for sale into this state any pistol to:

> (a) Any person who has been convicted of a crime of violence in any court of the United States, the several states, commonwealths, territories, possessions or the District of Columbia ... .

Accordingly, the issue is whether a person who is pardoned for a "crime of violence",[1] remains "convicted" for purposes of Section 16-23-30's prohibition upon the possession of a handgun.

Our Supreme Court has characterized a pardon as "an act of grace." Crocks v. Sanders, 123 S.C. 28, 33, 115 S.E. 760 (1922). The Court has also commented that "[a] pardon ex vi termini presupposes a wrong done, or an offense committed and forgiveness of the offender by the party injured ... ." State v. Smith, 1 Bail. 283 (1829). In Jones v. Harris, 1 Strob. 160, 162 (1846), the Court stated that by action pursuant to the pardoning power, "the sentence is annulled, the punishment remitted, the offender restored to society ... ." These statements are in accord with the general law concerning pardons. It is recognized that

> [i]n general, when a full and absolute pardon is granted, it exempts the individual on whom it is bestowed from the punishment which the law inflicts for the crime which he has committed, the crime being forgiven and remitted and the individual relieved from all its legal consequences in the form of disqualification or disabilities based on his conviction, regardless of whether or not the executive pardon wiped out the judicial finding of guilt.

67A C.J.S. Pardon and Parole, § 18. This being the case, however, the general law does not deem the conviction to be obliterated or wiped away by a pardon. It is also stated that

> ... since the very essence of a pardon is forgiveness or remission of penalty, assessed on the basis of the conviction of the offender a pardon implies guilt; it does not obliterate the fact of the commission of the crime, and the conviction thereof; nor does it wash out the moral stain. As otherwise stated, it involves forgiveness and not forgetfulness.

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[1] Section 16-1-60 provides that "[f]or purposes of South Carolina law, a "violent crime" includes ... ."

Id.

This Office has frequently recognized this general doctrine in determining that a conviction is not expunged by virtue of a pardon. The seminal opinion in this area is Op. Atty. Gen., Op. No. 80-68 (June 12, 1980). Therein, we concluded that a pardon "does not establish the person's innocence nor does it serve to obliterate the conviction record of the pardoned offense." We further opined that "it is readily apparent that the pardon, as well as the pardoned offense, are intended to be matters of public record." Noting that "[o]ther jurisdictions have addressed the issue of expunging criminal records upon the grant of a pardon ...", we stated that such jurisdictions "have generally held, for various reasons, that an act of executive clemency, is limited in effect to a release from consequences of punishment and a restoration of civil rights" and "does not warrant the obliteration of the arrest and conviction records of the pardoned offense." In addition, we recognized:

> [t]he majority of jurisdictions in dealing with the construction and effect of pardons, have concluded that the act of executive clemency does not render a person innocent of the offense for which he was convicted, since neither the executive nor the legislative branch of government have constitutional power to determine the guilt or innocence of a person charged with a crime. These jurisdictions, in concluding that a pardon has no retroactive effect, have also held that a pardon connotes forgiveness, not forgetfulness, and therefore presupposes guilt of the offense charged, since if there is no guilt, there is no reason for forgiveness. ... [citations omitted]. Consequently, a pardon of a conviction does not preclude the conviction record from being considered as a prior offense under a statute increasing the punishment for a subsequent offense ... . [citations omitted].
>
> ... It would appear that our State would be in accord with the above-cited authorities, holding that the question of a person's conviction or acquittal is reserved from the judicial branch of government, whose judgment cannot be changed by the executive act of clemency.

Then, in an Opinion of August 27, 1986, we reiterated that "a pardon would not serves as the basis for the expungement of records of an individual previously convicted." Moreover, in Op. Atty. Gen., Op. No. 88-8 (January 25, 1988), we opined that a person

who subsequently received a pardon would still be required to list the fact that he had been convicted, finding "no law which says a pardon would expunge the fact a felony has been committed."

These conclusions were reiterated in Op. Atty. Gen., Op. No. 88-87 (November 18, 1988). There, we concluded "that any prior conviction, even if a pardon was granted, should be used as a prior offense for charging and sentencing purposes on the current charge." We summarized the law in South Carolina as follows:

> [i]n South Carolina, a pardon is defined as meaning "an individual is fully pardoned from all the legal consequences of his crime and conviction, direct and collateral, including the punishment, whether of imprisonment, pecuniary penalty or whatever else the law has provided." S.C.Code Ann. Sec. 24-21-940 (1987 Supp.). It has been declared by the General Assembly that "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; (5) testify without having the fact of his conviction introduced for impeachment purposes unless the crime indicates a lack of veracity; (6) not have his testimony excluded in a legal proceeding if convicted of perjury; (7) be licensed for any occupation requiring a license." S.C.Code Ann. Sec. 24-21-990 (1987 Supp.). See State v. Merriman, 287 S.C. 74, 337 S.E.2d 218 (S.C.App. 1985). This office has consistently opined that a pardon is essentially intended to relieve an individual from service of a sentence and to restore the pardonee to certain rights of citizenship. 1980 Op. Atty. Gen. 110-111; 1959-60 Op. Atty. Gen. 300. Further, a pardon is not tantamount to an acquittal of the offense charged and the person is still "convicted" of the particular offense. 1980 Op. Atty. Gen. 110. Simply put, a pardon connotes forgiveness, not forgetfulness, and therefore presupposes guilt of the offense charged, since, if there was no guilt, there is no reason for forgiveness. 59 Am.Jur.2d Pardon and Parole Sec. 51. In light of the consistent opinion of our office that even with a pardon the fact of the underlying conviction still exists as a matter of law, we have previously opined that the record of the pardon and conviction should be included in the records maintained by the sheriff's department for criminal history and

> should not be expunged from the records of the Clerk of Court. 1984 Op. Atty. Gen. 268; 1980 Op. Atty. Gen. 110.

Thus, we rejected those cases which have held that a pardon "blots out guilt and wipes out the offense which is regarded as having never been committed ..." and concluded that in South Carolina "a pardon cannot wipe out the historical fact of the conviction ... ." Courts have applied the view taken by this Office as to the legal effect of a pardon in the context of a possession of firearms statute. In Jones v. State, 509 P.2d 924 (Okl. 1973), the question of the validity of a jury instruction was at issue. In Oklahoma, it is a felony to possess firearms after conviction for a felony offense. Defendant Franklin had received a pardon subsequent to his conviction for a felony offense. The Court instructed the jury that the carrying of firearms after conviction of a felony was a crime and could be considered in connection with the motive of the codefendant who knew that defendant Franklin was committing a felony. The instruction was objected to on the ground that Franklin's pardon wiped out the prior conviction.

The Court of Appeals disagreed. The instruction was proper, ruled the Court, because Franklin was violating Oklahoma law by possessing a firearm with a prior felony conviction. Reasoned the Court,

> [t]he thrust of the argument is that since co-defendant Franklin has been previously given a full pardon, the pardon effectively obliterated a prior conviction. With this contention, we cannot agree. In Kellogg v. State, Okl. Cr., 504 P.2d 440 (1972) this Court held that while jurisdictions differ as to the effect of a pardon, as the pardon by the executive power does not blot out the solemn act of the juridical branch of government. It is apparent therefore, that since Franklin's prior conviction had not been obliterated, the instruction given in relation thereto, was valid.

509 P.2d at 927.

Section 16-23-30 makes no exception for a pardon. Nor does Section 24-21-990 refer to the possession of firearms as included within the rights restored by virtue of a pardon.

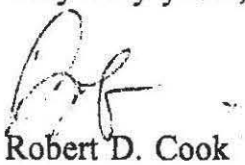
In summary, 18 U.S.C. § 921 (a) (20) has been construed by federal courts as deferring to state law regarding the possession of a firearm for conviction of a felony. In South Carolina, Section 16-23-30 (e) makes unlawful the possession of a pistol by a

person who has been convicted of a "crime of violence". Section 16-23-40 provides for confiscation of such weapon and Section 16-23-50 provides the penalties for such violation. While no South Carolina Supreme Court decision has directly addressed the issue as to what effect a pardon has upon a conviction for such offenses, it has long been the position of this Office that the conviction remains, notwithstanding as pardon therefor. Thus, it is my opinion that if an individual is convicted of a violent offense in South Carolina, he may not purchase or possess a pistol, pursuant to Section 16-23-30, regardless of whether he subsequently receives a pardon pursuant to Title 24, Chapter 21 of the Code of Laws of South Carolina.

This letter is an informal opinion only. It has been written by a designated Assistant Deputy Attorney General and represents the position of the undersigned attorney as to the specific questions asked. It has not, however, been personally scrutinized by the Attorney General nor officially published in the manner of a formal opinion.

With kind regards, I am

Very truly yours,



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RDC/ph