

1980 S.C. Op. Atty. Gen. 110 (S.C.A.G.), 1980 S.C. Op. Atty. Gen. No. 80-68, 1980 WL 81950

Office of the Attorney General

State of South Carolina

Opinion No. 80-68

June 12, 1980

SUBJECT: Criminal Identification and Investigation, Courts, Felons, Identification, Law Enforcement, Courts.

***1** (1) References to ‘contingent docket’, or ‘strike/with leave to restore’ on disposition report forms submitted to the South Carolina Law Enforcement Division merely referred to methods by which a solicitor would handle his trial roster of criminal cases, and they do not represent a dismissal of criminal charges against a defendant under [S.C. Code, Section 17–1–40 \(1976\)](#).

(2) A pardon is an act of executive clemency which relieves a convicted person from the remaining punishment for his offense, and restores to him certain rights of citizenship. It does not establish the innocence of the person pardoned, nor does it serve to obliterate the conviction record of the pardoned offense.

TO: Carl B. Stokes
Lieutenant
South Carolina Law Enforcement Division

QUESTIONS:

1. Should SLED destroy certain criminal records pursuant to [Section 17–1–40](#) upon a report that a criminal case has been placed upon the solicitor's ‘contingent docket’, or that it has been ‘stricken/with leave to restore’?
2. Does a pardon serve to obliterate the conviction record of the pardoned offense?

STATUTES AND CASES:

[South Carolina Constitution, Art I § 8, Art V § 1 \(1976\)](#); [S.C. Code, Sections 7–5–120, 14–17–540\(14\), 16–3–410, 17–1–40 \(1976\)](#). [Donald v. Jones](#), 445 F.2d 601 (5th Cir. 1971), cert.den. 404 U.S. 992, 30 L.Ed.2d 543, 92 S.Ct. 537; [Tatum v. U.S.](#), 114 U.S. App. D.C. 49, 310 F.2d 854 (1962); [U.S. v. Hirsch](#), 440 F.Supp. 977 (E.D.N.Y. 1977); [People v. Glisson](#), 69 Ill.2d 502, 14 Ill. Dec. 473, 372 N.E.2d 669 (1978); [Murray v. Hand](#), 187 Kan. 308, 356 P.2d 814 (1960); [Shankle v. Woodruff](#), 64 N.M. 88, 324 P.2d 1017 (1958); [Com. v. Binder](#), Pa.Super. 407 A.2d 50 (1979); [Com. v. Homison](#), Pa.Super., 385 A.2d 443 (1978); [Cohen v. Barger](#), Pa. Comwlth. 314 A.2d 353 (1974); [Williams, et al. v. Bordon's, Inc.](#), 274 S.C. 275, 262 S.E.2d 881 (1980); [Jones v. State](#), 141 Tex. Cr. 70, 147 S.W.2d 508 (1941); [Dean v. Skeen](#), 137 W.Va. 105, 70 S.E.2d 256, 31 A.L.R.2d 1180 (1952).

DISCUSSION:

1. You have requested of this office an opinion as to whether certain criminal record information must be destroyed pursuant to [Section 17–1–40](#) when disposition reports submitted to your office show that a case has been marked ‘contingent docket’ or ‘strike/with leave to restore.’ Also, you wish to know whether such records must be expunged when a convicted person receives a pardon for the offense.

The South Carolina Expungement Statute, [Section 17–1–40](#), provides as follows:

Any person who after being charged with a criminal offense and such charges discharged or proceedings against such person dismissed or is found to be innocent of such charge the arrest and booking record, files, mug shots, and fingerprints of such persons shall be destroyed and no evidence of such record pertaining to such charge shall be retained by any municipal, county, or state law enforcement agency.

*2 The scope and procedure for effecting this statute have been specified in a prior opinion of this office, a copy of which is enclosed herewith. Op. Atty. Gen. No. ___, February 26, 1979. Also, this office has previously indicated that this statute applies to dispositions which constitute a discharge, dismissal, or acquittal of an outstanding criminal charge against a defendant, such as a nolle prosequi. Op. Atty. Gen. No. ___, December 12, 1978.

It is the opinion of this office that references to the disposition of a case showing that it has been placed on a 'contingent docket', or that it has been 'stricken/with leave to restore', merely indicate the methods by which a solicitor has handled the outstanding charge in his trial roster of criminal cases. Although, in many instances, these references will indicate that a final disposition of the outstanding indictment will be delayed, they do not represent a final discharge, dismissal, or acquittal of the criminal charges against a defendant. Consequently, [Section 17-1-40](#) would not apply in those situations.

2. Also, it is the opinion of this office that a pardon rendered subsequent to conviction will not constitute a discharge or dismissal of criminal proceedings under [Section 17-1-40](#) since the statute is concerned with the discharge of proceedings prior to final judgment, i.e., conviction or acquittal. Likewise, such a pardon would not constitute an acquittal.

This office has previously expressed the opinion that a pardon is essentially intended to relieve an individual from service of a sentence and to restore to the pardonee certain rights of citizenship. 1959-60 Op. Atty. Gen. 300. See also, [S.C. Code, Sections 7-5-120, 16-3-410 \(1976\)](#). Furthermore, this office has recognized, by an opinion of August 28, 1973, enclosed herewith, that a pardon is not tantamount to an acquittal of the offense charged, but, rather, merely serves to suspend the legal consequences arising from the conviction for the wrongful act. It would not warrant the physical obliteration of the criminal record. In fact, the South Carolina Clerks of Court are charged, by [Section 14-17-540\(14\)](#), to keep 'a record book of pardons', in which shall be recorded the names of persons pardoned in the various counties (arranged alphabetically), the offenses for which they were convicted, and the date of conviction. Thus, it is readily apparent that the pardon, as well as the pardoned offense, are intended to be matters of public record.

The 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. 59 Am.Jur. 2d, [Pardon and Parole](#) § 51. See Williston, [Does a Pardon Blot out Guilt?](#), 28 Harv. L. Rev. 647 (1915). 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. See, e.g., [Donald v. Jones](#), 445 F.2d 601 (5th Cir. 1971), cert.den. 404 U.S. 992, 30 L.Ed.2d 543, 92 S.Ct. 537; [Murray v. Hand](#), 187 Kan. 308, 356 P.2d 814 (1960); [Shankle v. Woodruff](#), 64 N.M. 88, 324 P.2d 1017 (1958); [Jones v. State](#), 141 Tex. Cr. 70, 147 S.W.2d 508 (1941); [Dean v. Skeen](#), 137 W.Va. 105, 70 S.E.2d 256, 31 A.L.R.2d 1180 (1952). See cases collected in [Annot.](#), 31 A.L.R.2d 1186. See 39 Am.Jur. 2d, [Habitual Criminals and Subsequent Offenders](#), § 13 page 318. Similarly, a pardon does not preclude the use of the fact of conviction for the purpose of impeaching the credibility of a witness. See cases collected in [Annot.](#), 30 A.L.R. 2d 893.

*3 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 for the judicial branch of government, whose judgments cannot be changed by the executive act of clemency. Our Supreme Court has ruled that powers which are inherent in the exercise of judicial authority cannot be assumed by another branch of government by virtue of [Art I, § 8](#) and [Art V, § 1 of the South Carolina Constitution](#), [Williams, et al. v. Bordon's, Inc.](#), 274 S.C. 275, 262 S.E.2d 881 (1980), and it is the opinion of this office that the determination of one's

guilt or innocence of a criminal charge is such an inherent judicial power. Thus, a pardonee would continue to be one who is 'convicted', and he would not come within the provisions of [Section 17-1-40](#) as a person acquitted of criminal charges.

Other jurisdictions have addressed the issue of expunging criminal records upon the grant of a pardon. They 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. It does not warrant the obliteration of the arrest and conviction records of the pardoned offense. [Tatum v. U.S.](#), 114 U.S. App. D.C. 49, 310 F.2d 854 (1962); [U.S. v. Hirsch](#), 440 F.Supp. 977 (E.D.N.Y. 1977) (amnesty for Vietnam Era draft evader does not warrant expungement); [People v. Glisson](#), 69 Ill.2d 502, 14 Ill. Dec. 473, 372 N.E.2d 669 (1978) (a pardoned person is still 'convicted'); [Com. v. Binder](#), Pa.Super., 407 A.2d 50 (1979); [Com. v. Homison](#), Pa.Super., 385 A.2d 443 (1978); [Cohen v. Barger](#), Pa. Cmwlth., 314 A.2d 353 (1974).

CONCLUSION:

1. References to methods by which a solicitor handles his trial roster of criminal cases do not represent a dismissal of pending criminal charges against a defendant.
2. Generally, a pardon is used to relieve a person from punishment for his offense, and restores to him certain rights of citizenship. It does not establish the person's innocence nor does it serve to obliterate the conviction record of the pardoned offense.

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