

1979 WL 43112 (S.C.A.G.)

Office of the Attorney General

State of South Carolina

October 16, 1979

*1 Faye K. Jones
Chairman
Anderson County Registration Board
Anderson, South Carolina 29621

Dear Ms. Jones:

You have asked the opinion of this Office on whether a person who has been convicted of larceny by a court-martial in the Armed Services is disqualified from voting in South Carolina.

[Section 7-5-120\(5\)\(b\) of the Code of Laws of South Carolina](#), 1976, provides that '[p]ersons convicted of larceny . . . shall be disqualified from being registered or voting, unless such disqualification shall have been removed by pardon' [Emphasis Added].¹ Also see [Article II, § 7 of the South Carolina Constitution](#). To answer the question posed by you, the meaning of conviction as used in this statute first must be determined. See [Parker v. State Highway Department](#), 224 S.C. 263, 270 (1953).

In [Smith v. Todd](#), 154 S.C. 323 (1930), the South Carolina Supreme Court had to construe whether the statutory phrase 'who shall be convicted in any Court of competent jurisdiction of unlawfully killing another person' included within its meaning a verdict of a coroner's jury. The Court concluded that 'it was not the intention of the Legislature to include the verdict of a [coroner's] jury as fulfilling the requirements of . . . a conviction.' [Ibid.](#), 329. To support this conclusion, the Court quoted from the order of the lower court, a portion of which is as follows:

. . . It seems inescapable from the context of the Act of 1924 that the General Assembly used the words 'convicted by a Court of competent jurisdiction' to mean that a person should be convicted after a trial in a Court in which he has had the opportunity to meet and cross examine the witnesses against him, to offer evidence in his own behalf, and to be represented by counsel, and to be tried by a jury of his peers, consisting of twelve jurors. A coroner's jury consists of six persons, the proceedings are wholly ex parte. Rarely is a suspected person represented at an inquest by counsel. He cannot introduce witnesses in his own behalf.

. . . 'Conviction in its legal sense, is the determination of guilt in a criminal prosecution.'

. . . 'The term 'conviction' ordinarily signifies a finding of a jury by verdict that the person is guilty; or a plea of guilty by defendant, constitutes a conviction of him.' [Citations Omitted] [Ibid.](#), 327-328.

The reasoning of [Smith v. Todd](#) should apply to the use of conviction in [§ 7-5-120\(5\)\(b\)](#). The application of this reasoning to that statute would not appear to be affected by whether the particular conviction was rendered by a judicial body in South Carolina or some other jurisdiction. The addition of 'a Court of competent jurisdiction' to the term conviction also would not appear to affect the application of this reasoning thereto. Thus, it next must be determined if a conviction by a military court-martial complies with the meaning of conviction as construed in [Smith v. Todd](#).

*2 The Supreme Court of the United States has recognized and discussed the substantial differences between proceedings before courts-martial pursuant to the Uniform Code of Military Justice, [10 U.S.C § 801](#), et seq., and those

before judicial bodies in the state and Federal criminal justice systems. Two recent explanations of the differences are found in [O'Callahan v. Parker](#), 395 U.S. 258 (1969) and [Parker v. Levoy](#), 417 U.S. 733 (1974).

In [O'Callahan v. Parker](#) the Court noted the following:

'We find nothing in the history of constitutional treatment of military tribunals which entitles them to rank along with Article III [of the United States Constitution] courts as adjudicators of the guilt or innocence of people charged with offenses for which they can be deprived of their life, liberty or property. . . .'

'Moreover, there is a great difference between trial by jury and trial by selected members of the military forces . . .' [Citation Omitted.]

A court-martial is tried, not by a jury of the defendant's peers which must decide unanimously, but by a panel of officers empowered to act by a two-trial vote. The presiding officer at a court martial is not a judge whose objectivity and independence are protected by tenure and undiminishable salary and nurtured by the judicial tradition, but is a military law officer. Substantially different rules of evidence and procedure apply in military trials. . . .

A court-martial is not yet an independent instrument of justice but remains to a significant degree a specialized part of the overall mechanism by which military discipline is preserved. [Footnotes Omitted.] [Ibid.](#), 262-265.

The Court also noted that the access of a defendant to compulsory process for obtaining witnesses and evidence is significantly dependent on the approval of the prosecution. [Ibid.](#), 297, n. 4. These remarks alone demonstrate that a conviction by a court-martial does not contain the elements of a judicial conviction as defined in [Smith v. Todd](#).

Based on the foregoing, it is the opinion of this Office that a conviction by a military court-martial does not constitute a conviction within the meaning of [§ 7-5-120\(5\)\(b\)](#), and a person so convicted would not be disqualified from voting or registering to vote in South Carolina for that reason.²

Sincerely,

James M. Holly
State Attorney

Footnotes

- 1 On October 1, 1965, Attorney General McLeod issued an opinion concluding that a conviction of an offense established by a criminal statute of the United States may suffice as a disqualifying offense pursuant to [§ 7-5-120\(b\)](#) 5. That opinion, however, did not discuss whether a conviction by a court-martial would so suffice.
- 2 It is possible that a guilty plea to an offense before a court-martial would suffice as a conviction under [§ 7-5-120\(5\)\(b\)](#), [supra](#). However, such application of this statute would raise grave equal protection problems under the Fourteenth Amendment to the United States Constitution.

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