

## Opinion No. 59-176

October 29, 1959

**BY:** HILTON A. DICKSON, JR., Attorney General

**TO:** Manuel N. Brown, PhD Director, Board of Parole P. O. Box 1219 Santa Fe, New Mexico

{\*270} This is in reply to your letter of recent date in which our attention is called to Chapter 164, Session Laws of 1957, now Section 41-17-11, N.M.S.A., 1953 Comp., (PS), and Chapter 232, Section 14, Session Laws of New Mexico, now Section 41-17-25, N.M.S.A., 1953 Comp., (PS).

In your letter you pose the following questions:

1. What citizenship rights are lost when a man is convicted of a felony?
2. Are the same rights lost when such a person is placed on probation or given a suspended sentence and never serves imprisonment?
3. How is "pardon" defined?
4. Does a full pardon automatically restore such citizenship rights as were lost by the conviction?
5. What are the effects of a pardon as regards necessity of person telling the facts as to his having been convicted of a felony and later pardoned?
6. What are the effects of a pardon in relation to expunging from records the fact of a felony conviction for which pardoned?

1. Your first question is answered by our Opinion No. 6004 rendered at the request of your department on August 24, 1954, a copy of which is enclosed herewith. {\*271} It would be superfluous for us to elaborate on said opinion. For your convenience, however, you are advised that the present numbers of the sections of the pertinent statutes cited in said opinion are:

Sec. 1450, Code of 1915, is now Sec. 40-1-1, N.M.S.A., 1953 Comp.

Sec. 41-801, 1941 Comp., is now Sec. 40-8-1, N.M.S.A., 1953 Comp.

Sec. 56-503, 1941 Comp., is now Sec. 3-8-3, N.M.S.A., 1953 Comp.

The remaining New Mexico statutes referred to in said opinion have to do with applications for state licenses to engage in specific trades and professions.

2. Our answer to your second question is yes.
3. Our answer to your third question -- see definition in body of this opinion.
4. Our answer to your fourth question is yes.
5. Our answer to your fifth question is -- a person must tell the facts as to his having been convicted of a felony and later pardoned.
6. Our answer to your sixth question is -- none.

The pertinent article of the United States Constitution, the pertinent articles of the New Mexico Constitution and the pertinent New Mexico Statutes are:

The Constitution of the United States, Art. II, Sec. 2, reads in part as follows:

"The President shall be Commander in Chief of the Army and Navy of the United States . . . , and he shall have power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment."

Art. V, Sec. 6, of the New Mexico Constitution, reads as follows:

"Subject to such regulations as may be prescribed by law, the governor shall have power to grant reprieves and pardons, after conviction for all offenses except treason and in cases of impeachment."

Art. VII, Sec. 1, of the New Mexico Constitution, reads as follows:

"Every male citizen of the United States who is over the age of twenty-one years, and has resided in New Mexico twelve months, in the county ninety days, and in the precinct in which he offers to vote thirty days, next preceding the election, except idiots, insane persons, persons convicted of a felonious or infamous crime unless restored to political rights, and Indians not taxed, shall be qualified to vote at all elections for public officers. . . ."

Parenthetically, I might add that this section is inoperative as it regards woman suffrage (19th Amendment to United States Constitution) and Indians not taxed. See **Trujillo v. Garley**, No. 1353, U.S.D.C., N.M., (1948).

Art. XXII, Sec. 5, New Mexico Constitution, states the following:

"The pardoning power herein granted shall extend to all persons who have been convicted of offenses against the laws of the territory of New Mexico."

Sec. 41-17-11, N.M.S.A., 1953 Comp., (PS) states:

"When any convict shall pass the entire period of his sentence within the penitentiary, he shall be entitled to a certificate thereof by the superintendent; or, if he shall complete the period of his sentence while on parole, he shall be entitled to a certificate thereof by the director of {272} parole; and on presenting the same to the governor he may be granted a pardon or restored to rights of citizenship, or both, either at said time or subsequently, but the governor shall not be obliged to grant such pardon or restore such rights of citizenship."

Sec. 41-17-25, N.M.S.A., 1953 Comp., (PS), states:

"Any prisoner who shall be released by authority of the governor under any 'conditional release' or other disposition made under the pardoning power, other than full pardon, shall, upon release, be deemed as released on parole until the expiration of the maximum term or terms for which he was sentenced."

Sec. 3 - 2 - 51, N.M.S.A., 1953 Comp., is practically identical with Article VII, Section 1, New Mexico Constitution, *supra*.

1. We have already answered your question No. 1 by our Opinion No. 6004.

2. In answer to your second question, it can be definitely stated that there is a decided paucity of authority bearing upon the subject.

New Mexico has no statutory or case law which even remotely will assist us in answering this question.

There is a decided variance in the phraseology of the statutes of the several states covering the subjects of **convicts, civil death, suspended sentences** and **pardons** (the subjects which should furnish a clue to the problem).

Art. VII, Sec. 1, New Mexico Constitution, *supra*, states in substance that United States citizens over a certain age and having resided in the state, county and precinct for certain specified periods of time, next preceding an election, **except persons convicted of a felonious crime** unless restored to political rights shall be qualified to vote at all elections of public officers.

The word "convicted" is the key word for the purpose of making answer to this question. That word places a person who receives a suspended sentence in the same category as a person who is actually committed to our penitentiary.

**United States v. Watkinds**, 6 F. 152 (Ore.), states in part:

"In the argument for the defendant it has been assumed that 'conviction' of a crime includes and is the result of the judgment or sentence of the court imposing the punishment prescribed therefor. But this is altogether a mistake. The term conviction, as its composition (convinco, convictio) sufficiently indicates, signifies the act of convicting

or overcoming one, and in criminal procedure the overthrow of the defendant by the establishment of his guilt according to some known legal mode. These modes are, (1) by the plea of guilty, and (2) by the verdict of a jury." . . . "Blackstone (4 Black. 362) says: 'If the jury finds him (the defendant) guilty, he is then said to be convicted of the crime whereof he stands indicted, which conviction may accrue two ways: either by his confessing the offence and pleading guilty, or by his being found so by the verdict of his country.' Again he says: 'After trial and conviction the judgment of the court usually follows.' \* \* \*

"By virtue of section 3 of art. 2 of the constitution, as a consequence of this conviction, the defendant then and thereby forfeited the privilege of an elector, and thereafter had no lawful right to vote at any election in Oregon."

"And even if it were conceded that the term 'conviction' is {\*273} used in the constitution in the sense of or so as to include the sentence of the court, still the conclusion would be the same. It would nevertheless be true that the defendant was convicted of and sentenced for a crime which was then punishable by law by imprisonment in the penitentiary. The fact that he was otherwise punished for it is entirely immaterial, because the forfeiture of his privilege as an elector did not depend upon the kind or measure of punishment actually inflicted, but the kind that might have been -- the kind that the defendant was liable to, and the court was authorized to impose.

So much for the legal aspect of the case. A word as to the moral one.

\* \* \* \*

For reasons of public policy, the constitution of the state conferred the privilege of an elector on the defendant, during good behavior, and for like reasons declared it forfeited -- withdrawn -- upon his conviction of a crime of such character as presumptively proved him no longer fit for its exercise. Nor is this presumption affected by the fact that the court before which the defendant was tried saw proper, in the exercise of that discretion confided to it, to impose a comparatively slight punishment upon him. Under the constitution the conviction of a crime, for which the offender is liable to imprisonment in the penitentiary, works a forfeiture of the privilege of an elector, irrespective of the kind or measure of punishment which the judge, under the circumstances, -- personal, social, political, or otherwise, -- may see proper to impose as a punishment for it.

The law gave and the law had taken away -- subject, it may be, to the operation of a pardon expressly restoring the privilege, and granted in pursuance of an act of the legislature authorizing it."

It is our belief that the **Watkins** case is an excellent presentation of the law applicable to the proposition involved.

Despite the fact that there prevails a very strong tendency toward the end that civil death and its various concomitants be eradicated from the system of jurisprudence of

the several states, the provisions of our Constitution, Art. VII, Sec. 1, make it impossible for us to hold otherwise than that a person receiving a suspended sentence or placed on probation loses the same rights he would lose if he were committed to the penitentiary.

3. In answer to your request that we define the word "pardon", we will say at the onset that we find no definition of the word in the State Constitution, statutes or decisions of our Supreme Court.

Chief Justice Richard H. Hanna who authored the opinion in **Musgrave v. McManus**, supra, stated that he was lead to believe (1, 2) page 231, that our legislature closely followed the Missouri statute. (**Musgrave v. McManus**, 24 N.M. 227).

Many definitions of the word "pardon" are given in Words & Phrases. Inasmuch as our statutes in this connection are probably taken from the Missouri statutes, we will quote a definition from that state. **State v. Jacobson**, 152 S.W. 2d 1061, 1063 (Mo.), gives the following definition of the word "pardon":

"A 'pardon' is a declaration on record by the chief magistrate of a state or country that a person named is relieved from the legal consequences of a specific crime, or an act of grace proceeding from the power entrusted with execution of laws, which exempt {<sup>\*274</sup>} the individual on whom it is bestowed from the punishment the law inflicts for a crime he has committed."

4. In answer to your fourth question, we are compelled to reiterate what we have said above, to-wit, that neither our New Mexico Constitution, statutes or court decisions throw any light on the possible answer to the question.

It is our belief that the following quotation from 39 Am. Jur. 551, Sec. 52, answers your question.

"It was formerly doubted whether a pardon could do more than take away the punishment, leaving the crime and its disabling consequences unremoved, but, with certain exceptions hereinafter noted, it is now the accepted general doctrine that a full pardon absolves one from all legal consequences of his crime. If granted before conviction, it prevents any of the penalties and disabilities consequent upon conviction from attaching: if granted after conviction it removes the penalties and disabilities which ordinarily follow from conviction, and, generally speaking, restores the offender to all his civil rights. This was the effect of the pardons granted by the general amnesty proclamations following the Civil War. When a pardon is given to an offender after his term of imprisonment has expired, it removes all that is left of the consequences of conviction -- his disabilities. Many times the Courts have said that it makes him, as it were, a new man, and gives him a new credit and capacity, but this broad generalization is not accepted by all the courts literally and in its entirety. A full pardon cannot be so restricted, even by express terms, as to leave the person with the legal disabilities still resting upon him. Such a restriction would be repugnant to the grant, and

void, for, although the disabilities are no part of the judgment, they are attached to the convict as the legal marks of infamy resulting therefrom, and, when the offense is pardoned, the judgment, with the legal consequences flowing from it, is removed. . . ."

It follows that our answer to your fourth question is that a full pardon automatically restores such citizenship rights as were lost by the conviction.

5. In answering your fifth question, it is assumed that you are asking as regards the necessity of a person answering questions in court or under oath generally, as to his record. If ordered by a judge to answer, the person would have no alternative but to state the facts. It is further our opinion that in court or out of court, a person would be required to state the facts as they are, no matter how unpleasant.

In Vol. 58, Am. Jur. 397, Sec. 734, under the heading of "Conviction of Crime", it is stated:

"Although the disqualification of witnesses by reason of the conviction of crime has been removed by statute in most jurisdictions, these statutes usually by their express terms subject witnesses to impeachment by proof of their convictions for crime; and it is universally recognized that for the purpose of impeachment of a witness or an attack upon his credibility, the attorney for the adverse party, by cross-examination or otherwise, may bring out the fact of a previous conviction of the witness for a crime, or at least show a previous conviction of a felony or of a crime involving moral turpitude. In general, the rule applies in both civil and in criminal cases. . . ."

Our answer to your fifth question is that a person who has been pardoned after having been {\*275} convicted of a felony is required to tell the true facts as the occasion may demand.

6. In answer to your sixth question, we can merely say that there is no law in this state authorizing the expunging from records the fact of a felony conviction for which pardoned. It is possible that such action is authorized by statute in some sister state or states.

We, however, have been unable to find any law even remotely bearing upon the subject. No such authority exists in New Mexico.

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