

SEPTEMBER 6, 2014

MICHIGAN

I. Restoration of Civil Rights/Firearms Privileges

Civil rights: A person who has been convicted and sentenced “for a crime for which the penalty imposed is confinement in jail or prison” is disqualified from voting “while confined.” Mich. Comp. Laws § 168.758b. *See also* Mich. Const. art. 2, § 2. Disqualification while confined also applies to misdemeanants. *See U.S. v. Wegrzyn*, 305 F.3d 593 (6th Cir. 2002). A person on probation or parole is not considered “confined.”

A person convicted of a felony is permanently disqualified from jury service unless the conviction is pardoned or expunged. Mich. Comp. Laws § 600.1307a(1)(e).¹ Some disqualifications from office expire after a certain period, *see, e.g.*, Mich. Const. Art. 4, § 7 (person convicted of breach of public trust within last 20 years ineligible for either house of legislature), and some are permanent, *see, e.g.*, Mich. Comp. Laws § 750.118 (public officer who accepts a bribe is forever disqualified from public office).

Firearms: Under Mich. Comp. Laws § 750.224f(1), a person convicted of a felony may not possess firearms until three years after completion of all the terms of the sentence, including probation or parole, except that persons convicted of a “specified felony” (generally involving the use of force, explosive or firearm, controlled substances, burglary) remain subject to the disability until 1) five years after the completion of the sentence and 2) their firearm privileges have been restored pursuant to the administrative procedure set forth in Mich. Comp. Laws § 28.424 (see Part IIC). This section “does not apply to a conviction that has been expunged or set aside, or for which the person has been pardoned, unless the expunction, order, or pardon expressly provides that the person shall not possess a firearm.” § 750.224f(4).

Collateral consequences: *See* Miriam Aukerman, *Collateral Consequences of Criminal Convictions, A Legal Outline for Michigan*, Dec. 5, 2008, available at <http://www.sado.org/content/guides/collateral.pdf>. Other Michigan-specific reentry resources are collected at Michigan Reentry Law Wiki, Michigan Poverty Law Program, at http://reentry.mplp.org/reentry/index.php/Main_Page.

II. Discretionary Restoration Mechanisms:

A. Executive pardon:

- **Authority:** The pardon power, except in cases of impeachment, is vested in the governor, “subject to procedures and regulations prescribed by law.” The governor is required to inform the legislature annually of each pardon granted, “stating reasons therefor.” Mich. Const. Art. 5, § 14.
- **Administration:** The governor is required to obtain a recommendation from the Parole Board prior to deciding each case, but is not bound by it. *See* Mich. Comp. Laws §§ 791.243, 791.244. *See also Rich v.*

¹ In 2002 conviction was made a permanent bar to jury service; previously a person was ineligible only while “under sentence for a felony at the time of jury selection.” *See* Mich. Comp. Laws § 600.1307a(1)(e) (2002), amended by 2002 Mich. Pub. Acts 739. Court rules provided that a convicted person could be challenged for cause based on his conviction. Mich. Ct. R. 2.511(D)(2), 6.412(D). *See United States v. Driscoll*, 970 F.2d 1472 (6th Cir. 1992), *cert. denied*, 506 U.S. 1083 (1993) (upholding challenge for cause under Mich. Ct. R. 2.511(D)(2)). *But see Froede v. Holland Ladder & Mfg. Co.*, 523 N.W.2d 849, 851-52 (Mich. Ct. App. 1994) (disagreeing with Sixth Circuit’s conclusion in *Driscoll* that right to serve on a jury is not automatically restored upon completion of sentence); *People v. LeGrone*, 517 N.W.2d 270, 272 n.1 (Mich. Ct. App. 1994), *appeal denied*, 527 N.W.2d 520 (Mich. 1994) (raising question whether Mich. Comp. Laws § 600.1307a(1)(e) takes precedence over Mich. Ct. R. 2.511).

Chamberlain, 62 N.W. 584 (Mich. 1895) (statute providing that a board of pardons will investigate petitions for pardons and report to the governor with such recommendations as they deemed fit, and that the governor, on receipt of such report, might, as he deemed fit, grant or refuse the pardon, did not violate constitution). In 2011, Governor Snyder signed a new executive order that abolished the Michigan Parole and Commutation Board (a 15-member board which had been established by his predecessor), and established a 10 member Michigan Parole Board, consisting of non-Civil Service employees who are appointed by the Director of the Michigan Department of Corrections. See Executive Order 2011-03 (effective April 15, 2011), available at <http://www.legislature.mi.gov/documents/2011-2012/executiveorder/pdf/2011-EO-03.pdf>. See also http://www.michigan.gov/corrections/0,4551,7-119-1435_11601-61290--,00.html (giving history of Parole Board).

- *Eligibility*: No eligibility requirements for Michigan offenders. A person convicted under federal law or the law of another state is ineligible for a gubernatorial pardon.
- *Effect*: A pardon “removes the conviction and the associated penalty from the books.” Directions for Filing an Application for Pardon or Commutation of Sentence, available at http://www.michigan.gov/documents/SI_letter_and_app_for_pardon_after_discharge_122477_7.pdf. In *People v. Van Heck*, 651 N.W.2d 174, 179 (Mich. App. 2002), the court noted that in Michigan a pardon “reaches both the punishment prescribed for the offense and the guilt of the offender. It releases the punishment and blots out of existence the guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offense,” quoting *People v. Stickle*, 121 N.W. 497, 499 (Mich. 1909) and *People ex rel. Forsyth v. Court of Sessions of Monroe County*, 36 N.E. 386, 388 (N.Y. 1894). It contrasted this thorough purging effect with the less comprehensive effect of a first offender set-aside.²
- *Process*: The Executive Clemency Process in Michigan is summarized at http://www.michigan.gov/corrections/0,4551,7-119-1435_11601-223452--,00.html. Mich. Comp. Laws § 791.243 provides that all applications for executive clemency must be filed with the Parole Board. Procedures governing clemency hearings are set forth in § 791.244.³ The contents of the pardon application are specified at Mich. Admin. Code r. 791.7760, which also specifies the procedures for applying for pardon. The Parole Board website provides a single application form for both forms of clemency, whose caption is “Application for Pardon or Commutation of Sentence” (for use by current Michigan prisoners only). See http://www.michigan.gov/documents/SI_letter_and_app_for_pardon_after_discharge_122477_7.pdf. Section 791.244 describes the procedure for investigating pardon applications, setting time limits on each stage. One member of Board must interview any person convicted of murder in the first degree or serving a life sentence without parole at the conclusion of ten years. Mich.Comp. Laws § 791.244(1). Unless upon the initiation of the Board, the Board must initiate a review within 60 days of receiving an application for clemency to determine whether an application has merit, and must make a full investigation and determination on whether or not to proceed to a public hearing within 270 days of initiation by the Board or receipt of a meritorious application. §§ 791.244(2)(a), (e).

A hearing must be held within 90 days. At least 30 days before conducting the public hearing, the Board must provide written notice of the public hearing by mail to the attorney general, the sentencing trial judge, and the prosecuting attorney, or their successors in office, and each victim who requests notice pursuant to the crime victim's rights act. One member of the Board may conduct the hearing, and the public shall be represented by the Attorney General or a member of the attorney general's staff. If the parole board

² The court's comments in *Van Heck* about the effect of a Michigan pardon were dicta, since what was at issue in the case was the effect of a Connecticut pardon for purposes of eligibility under the first offender sealing statute. See Part IIB, *infra*.

³ In *Lewis-El v. Sampson*, 649 F.3d 423 (6th Cir. 2011), the court of appeals held that a change to Michigan's commutation procedures did not implicate ex post facto concerns because the petitioner did not show prejudice: “In fact, [prejudice] would be almost impossible to demonstrate considering that the decision to commute a prisoner's sentence is so tied to the personal predilections of the person occupying the governor's office.”

recommends executive clemency, it shall make all data in its files available to the governor. Except for medical records protected by the doctor-patient privilege of confidentiality, the files of the parole board in cases under this section shall be matters of public record. The recommendation of the Board is a matter of public record. *See generally* §§ 791.244(2)(f)-(j), (3).

- *Frequency of Grants:* Post-sentence pardons have been rare in Michigan in recent years. Between 1969 and 2006, only 34 pardon applications were approved by the governor. As collateral consequences have grown more severe in recent years, the number of applications for pardon filed has steadily increased. While former-Governor Granholm was aggressive in her use of the pardon power to shorten prison sentences,⁴ she granted fewer than twenty pardons during her four years in office. The pardon policy of her successor, Governor Snyder, has not been clarified. Source: Michigan Parole & Commutation Board.
- *Contact:* Chair, Parole Board at 517-373-6391; Clemency Administrator, 517-335-7938.

B. Judicial sealing or expungement:

- *First offender set-aside:* A first offender convicted under Michigan law may seek a court order “setting aside” the conviction five years after either imposition of sentence or completion of any term of imprisonment imposed, whichever is later. Mich. Comp. Laws §§ 780.621(1), (3). This relief (commonly referred to as “expungement”) is available only to persons convicted of a single “offense” or attempt to commit such offense; but a person convicted of any felony or attempt to commit any felony punishable by life in prison is ineligible for a set aside. §§ 780.621(1), (2). *See People v. Blachura*, 440 N.W.2d 1, 2 (Mich. Ct. App. 1989) (person convicted of five counts of perjury ineligible since each count deemed a separate conviction). In 2011, the legislature amended Section 780.621 to add that a person who is otherwise eligible to apply is not disqualified if convicted by not more than two “minor offenses,” defined as an offense punishable by no than 90 days imprisonment, for which the maximum fine does not exceed \$1,000, committed by a person not more than 21 years of age. *See* Mich. Comp. Laws §§ 780.621(1), (10)(b) (as amended by 2011 Mich. Pub. Acts 64). A conviction that has been previously set aside is counted for purposes of determining eligibility for later set-aside, but a conviction that has been the subject of a full and unconditional pardon does not count. *See Van Heck*, 651 N.W.2d at 178-79 (contrasting limited effect of Michigan set-aside with Connecticut pardon, which wipes out all legal disabilities, “erases” conviction). Certain traffic offenses and sex offenses are ineligible for set-aside. Mich. Comp. Laws § 780.621(2).
 - *Effect:* Upon entry of an order, an individual “shall be considered not to have been previously convicted.” Mich. Comp. Laws § 780.622(1), (3). However, a conviction that has been set-aside remains accessible to law enforcement and the judicial branch for a variety of purposes, including professional licensure by the judicial branch, and enhancement of a sentence in subsequent prosecution. Mich. Comp. Laws § 780.623(2). Sex offenders must continue to register even if a conviction is set aside. *Id.* *See also* Mich. Op. Att’y Gen. No. 7133 (2003) (person convicted of a felony whose conviction has been set aside by order of a Michigan court may not be denied a concealed pistol license based on conviction alone, but the conduct may be taken into account). This statute is commonly referred to as the “general expungement statute,” and the record of the arrest is no longer generally accessible to the public. However, the effect of a set-aside under Michigan law is not considered to be as broad as pardon in some other states.
 - *Procedure:* The procedure applicable to set-aside is set forth in full, including notification to the prosecuting attorney and, if an assaultive crime, to the victim, in Mich. Comp. Laws §§ 780.621-624.

⁴ Between 2007 and 2010, Governor Granholm commuted more than one hundred prison sentences. *See, Gov. Jennifer Granholm OKs Clemency for 100 Inmates in 2 years*, Assoc. Press (Jan. 17, 2010), available at http://www.mlive.com/news/index.ssf/2010/01/gov_jennifer_granholm_oks_clem.html (describing over 100 commutations granted by Michigan Governor Granholm to ease prison budget crisis).

Set-aside is discretionary with the court, which must consider the “circumstances and behavior of the applicant” and whether “setting aside the conviction is consistent with the public welfare.” § 780.621(9).

- *Probation before Judgment for Drug First Offenders*: Mich. Comp. Laws § 333.7411 – Discharge and dismissal under this section for a drug offender with no previous drug conviction shall be without adjudication of guilt and, except as provided in subsection (2)(b), is not a conviction for purposes of this section or for purposes of disqualifications or disabilities imposed by law upon conviction of a crime, including the additional penalties imposed for second or subsequent convictions under section 333.7413. See § 333.7411(1). See also § 769.4a (domestic violence deferred adjudication). Nonpublic records are kept by the state police and are available to law enforcement and court. See §§ 333.7411(2), (3).
- *Juvenile Adjudications*: One year after adjudication or release from detention, or upon attaining the age of 18, whichever is later, a person may apply to the adjudicating court to set aside up to three delinquency adjudications, one of which may qualify as a felony if committed by an adult. Mich. Comp. Laws § 712A.18e, as amended by H.B. 5600 (effective December 28, 2012).⁵ Certain adjudications are ineligible (felony-level adjudications punishable by life imprisonment, designated violent and traffic offenses). § 712A.18e(2). A person is ineligible for set-aside if he has a subsequent adult felony conviction. § 712A.18e(1). Before granting a set-aside, the court will consider the applicant’s behavior and circumstances since the adjudication and whether set-aside is consistent with public welfare. § 712A.18e(9). If an adjudication is set aside, a person may deny the existence of a juvenile record, § 712A.18e(11), and the record may not be disclosed or used except for law enforcement purposes, for law enforcement employment, or for licensing by an agency of the judicial branch. § 712A.18e(13). Disclosure of an adjudication that has been set aside is punishable as a misdemeanor. § 712A.18e(16).
- *Destruction of Juvenile records*: Subject to certain exceptions, the court must destroy juvenile diversion records 28 days after the juvenile reaches age 17, and all juvenile records when the person becomes 30 years old. MCR 3.925(E)(3)(a), (c). The sentencing court may consider the juvenile court criminal records of a defendant who has attained the age at which expungement of such records is mandated by court rule since this rule was not intended to bar consideration by a judge when sentencing the offender as an adult. *People v. Smith*, 437 Mich. 293, 470 N.W. 2d 70 (1991).
- *Non-conviction Records*: For first offenders found not guilty, or charges dismissed or not prosecuted, “the fingerprints and arrest card shall be destroyed by the official holding those items and the clerk of the court entering the disposition shall notify the [State Police] of any finding. . . .” Mich. Comp. Laws § 28.243(8), (12).

C. Administrative certificate

Firearms: A person whose firearms privileges were lost because of conviction may regain them by applying to the “concealed weapons licensing board” for the county of his residence. The board “shall, by written order” restore the person’s firearms privileges if it finds by clear and convincing evidence that five years have passed since the person completed his sentence, and that “the person’s record and reputation are such that the person is not likely to act in a manner dangerous to the safety of other persons.” Mich. Comp. Laws § 28.424(3)(c). If the concealed weapons licensing board refuses to restore a right under this section, the aggrieved person may petition the circuit court for review of that decision. *Id.* at § 28.424(3)(d).

⁵ Prior to passage of the 2012 amendments to § 712A.18e, only one misdemeanor-level conviction was eligible for set-aside. To be eligible, the applicant must have attained the age of 24 or have waited at least five years following the disposition of the adjudication or completion of detention.

III. Nondiscrimination in Licensing and Employment:

Regulation of Licensing - Consideration of certain criminal records limited:

A judgment of guilt in a criminal prosecution . . . shall not be used, in and of itself, by a licensing board or agency as proof of a person's lack of good moral character. It may be used as evidence in the determination, and when so used the person shall be notified and shall be permitted to rebut the evidence by showing that at the current time he or she has the ability to, and is likely to, serve the public in a fair, honest, and open manner, that he or she is rehabilitated, or that the substance of the former offense is not reasonably related to the occupation or profession for which he or she seeks to be licensed.

Mich. Comp. Laws § 338.42 (2). This 1974 statute was intended “to encourage and contribute to the rehabilitation of former offenders and to assist them in the assumption of the responsibilities of citizenship; to proscribe the use of the term ‘good moral character’ or similar term as a requirement for an occupational or professional license or when used as a requirement to establish or operate an organization or facility regulated by this state; and to provide administrative and judicial procedures to contest licensing board or agency rulings thereon.” 1974 Mich. Pub. Acts 381 (in Mich. Comp. Laws Ch. 338 (Occupational License for Former Offenders), preceding Mich. Comp. Laws § 338.41). Under § 338.41(1), “the phrase ‘good moral character’, or words of similar import, when used as a requirement for an occupational or professional license or when used as a requirement to establish or operate an organization or facility regulated by this state . . . shall be construed to mean the propensity on the part of the person to serve the public in the licensed area in a fair, honest, and open manner.”

In addition, the following types of records “shall not be used, examined, or requested by a licensing board or agency in a determination of good moral character when used as a requirement to establish or operate an organization or facility regulated by this state, or pursuant to occupational or professional licensure”:

- (a) Records of an arrest not followed by a conviction.
- (b) Records of a conviction which has been reversed or vacated, including the arrest records relevant to that conviction.
- (c) Records of an arrest or conviction for a misdemeanor or a felony unrelated to the person's likelihood to serve the public in a fair, honest, and open manner.
- (d) Records of an arrest or conviction for a misdemeanor for the conviction of which a person may not be incarcerated in a jail or prison.

Mich. Comp. Laws § 338.43(1). See Miriam J. Aukerman, *Barriers to Reentry: Legal Strategies to Reduce Recidivism and Promote the Success of Ex-offenders*, 2 Mich. Crim. L. Ann. J. 4 (2003). A criminal record “shall not be furnished to a licensing board or agency except by the principal department, and shall be furnished only after the director of the principal department or a person designated by the director has determined that the information to be provided to the board or agency meets the criteria set forth in this section.” § 338.43(2).

Each licensing board or agency is required to promulgate rules prescribing “the offenses or categories of offenses which the department considers indicate a person is not likely to serve the public as a licensee in a fair, honest, and open manner.” Mich. Comp. Laws § 338.43(3). The statute provides for a statement of reasons in the event of denial on grounds of good moral character, including a complete record of the evidence upon which the determination was based, and it provides a right to administrative “rehearing if he or she has relevant evidence not previously considered, regarding his or her qualifications.” § 338.45. Judicial review is also provided: “If, in the opinion of the circuit court, the record does not disclose a lack of good moral character, as defined in this act, the court shall so state and shall order the board to issue the license. . . .” § 338.46.

Misdemeanor arrest records: Employers, employment agencies, and labor organizations are prohibited from requesting or “making record of” misdemeanor arrests not leading to conviction in connection with employment application, Mich. Comp. Laws § 37.2205a(1), but they are not prohibited from considering arrest in connection with termination of employment. *See Aho v. Mich. Dep’t of Corrs.*, 688 N.W.2d 104 (2004).