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### Summary of In re Application of Shin, 125 Nev. Adv. Op. No. 10

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**In re Application of Shin,  
125 Nev. Adv. Op. No. 10 (Mar. 26, 2009)<sup>1</sup>**

**CRIMINAL LAW – PARDON POWER; RECORD EXPUNCTION**

**Summary**

Appeal from a district court judgment setting aside as void an order sealing Appellant’s criminal record.

**Disposition/Outcome**

Affirmed the district court judgment, concluding that the district court did not abuse its discretion when it unsealed Appellant’s criminal record.

**Factual and Procedural History**

In 1987, police arrested Sang Man Shin for attempted lewdness with a minor, to which Shin subsequently pled guilty. The district court sentenced him to two years imprisonment and then suspended the sentence, imposing probation, which Shin served successfully.

Shin sought a pardon after maintaining a clean criminal record for approximately fifteen years. The State Board of Pardons Commissioners (Pardons Board) granted Shin a pardon in 2002, restoring all of his civil rights except for the right to possess firearms. In 2006, Shin moved to have his criminal record sealed pursuant to NRS 179.245.<sup>2</sup> The district court granted the motion and ordered Shin’s criminal record sealed.

Upon receiving notice of the district court order, respondent State of Nevada, Department of Public Safety (DPS) moved to set it aside. DPS argued that the district court erred in sealing Shin’s record because, as a convicted sex offender, NRS 179.245(5) expressly precluded the court from sealing his record since it “relat[ed] to a conviction of a crime against a child or a sexual offense.”<sup>3</sup>

The district court agreed with respondent and ordered Shin’s record unsealed. Shin appealed, arguing that his pardon not only restored his civil rights but also entitled him to his record’s expunction. Specifically, Shin argued that NRS 179.245(5), which prohibits Nevada courts from sealing records concerning sexually based offenses, is unconstitutional because the Legislature does not have the power to prevent him from sealing his criminal record.

**Discussion**

The Court applies a de novo standard of review to a district court’s legal conclusions, including matters of statutory constitutionality and statutory interpretation. The Court presumes statutes are valid and the burden is on those challenging them to show their unconstitutionality.<sup>4</sup>

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<sup>1</sup> By Kendal L. Davis

<sup>2</sup> NEV. REV. STAT. § 179.245 (2008).

<sup>3</sup> *Id.* at § 179.245(5).

<sup>4</sup> *Sheriff v. Vlasak*, 888 P.2d 441, 443 (1995).

## Nevada's constitutional and statutory scheme governing pardons and record expunction

In Nevada, the Pardons Board's constitutional power to grant pardons and commutations of sentences is exclusive. Additionally, NRS 213.090 states that when the Board grants a full, unconditional pardon, such pardon restores all of the recipient's civil rights and relieves all disabilities incurred upon conviction.<sup>5</sup>

The Nevada Constitution does not expressly address the expunction of criminal records. The Legislature, pursuant to its power to enact laws in absence of a specific constitutional limitation to the contrary, addressed the expunction of criminal records in NRS 179.245. NRS 179.245 generally grants the district court discretion to seal records of criminal conviction, but expressly prohibits sealing records pertaining to a sexual offense.<sup>6</sup> However, the statute is silent regarding whether a pardon may nevertheless require sealing a sex offender's record.

## Other courts' precedent and other states' jurisprudence

In light of this constitutional and statutory scheme, the Court was required to determine the scope of the pardoning power in Nevada. As Nevada jurisprudence does not resolve the question of whether a pardon includes the right to seal a criminal record, the court considered the United States Supreme Court's precedent, case law from the United States Court of Appeals, and other states' jurisprudence.

**Nevada decisional law.** In an 1880 decision directly considering the scope of the pardoning power, the court held that a full and unconditional pardon removes all disabilities resulting from the pardoned conviction.<sup>7</sup> The court later indirectly considered the scope of the pardoning power, holding that the Executive's constitutional power to grant pardons was not unconstitutionally abridged by a statute providing for an administrative system of parole or by statutes granting the judiciary power over paroles.<sup>8</sup> Explaining in dicta the legal effects of a pardon, the *Pinana* court stated that a pardon erases the very existence of an offender's guilt, leaving him innocent thereafter.<sup>9</sup>

Each of these cases reflect early U.S. Supreme Court interpretations of the federal clemency power, which is no longer the prevailing view of the gubernatorial pardoning power in the majority of United States courts.

**United States Supreme Court decisions.** In *Ex parte Garland*, the U.S. Supreme Court made a sweeping articulation of the pardoning power, holding that a pardon eliminates both the conviction and guilt and therefore places the offender in the same position as if she had never committed the offense.<sup>10</sup> The Court explained that a pardon granted after conviction removes the

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<sup>5</sup> NEV. REV. STAT. § 213.090 (2008).

<sup>6</sup> "A person may not petition the court to seal records relating to a conviction of a crime against a child or a sexual offense." NEV. REV. STAT. § 179.245(5) (2008).

<sup>7</sup> *State of Nev. v. Foley*, 15 Nev. 64 (1880).

<sup>8</sup> *Pinana v. State*, 352 P.2d 824 (1960).

<sup>9</sup> *Id.* at 829 (The court quoted the Supreme Court of Pennsylvania on this point, *Commonwealth v. Cain*, 28 A.2d 897, 899 (Pa. 1942)).

<sup>10</sup> 71 U.S. 333 (1866). This view represented several reconstruction era cases.

penalties and disabilities and restores the offender to all his civil rights.<sup>11</sup> A full pardon “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...it makes him, as it were, a new man.”<sup>12</sup>

Although the Supreme Court has never expressly overruled *Garland*, subsequent Court decisions have eroded its broad articulation of the power by narrowing its scope. Specifically, the Court held that a third-party civil right of action to recover damages remains regardless of a pardon.<sup>13</sup> Further, the Court held that a sentencing board may consider the pardoned offender’s prior actions when determining the punishment for a new offense, indicating that the pardon did not completely erase all the attendant consequences and considerations following conviction.<sup>14</sup> However, the Court later backed away from the theory of a pardon as an admission of guilt or that a recipient could reject a pardon, holding that a pardon is a determination that the public welfare will be better served by inflicting less than what the judgment fixed.<sup>15</sup> This holding implied that a pardon does not blot out all guilt associated with a conviction.

**United States Court of Appeals decisions.** The United States Courts of Appeals for the Third Circuit, Seventh Circuit, and the District of Columbia Circuit have not followed the broad articulation given to the presidential pardoning power by *Garland*. Rather, these courts view *Garland*’s explanation as mere dictum because the Supreme Court had already decided the dispositive issue of whether a particular oath was constitutional.<sup>16</sup> Additionally, the Ninth Circuit disagreed with the proposition that a pardon obliterated the underlying conviction and guilt, and stated instead that the pardon merely abolishes all restrictions upon the pardoned one’s freedom.<sup>17</sup>

**Other courts’ authority.** Lower courts have also concluded that *Garland*’s interpretation of the pardoning power was mere dictum, holding that a pardon’s power does not include the ability to abrogate a conviction’s underlying guilt.

The Court relied heavily on a Florida Supreme Court decision, *R.J.L. v. State*, which held that the issuance of a pardon does not confer innocence or remove the historical fact of the individual’s conviction.<sup>18</sup> There, the Florida court held that the legislature could require certain conditions be met before granting a petition for record expunction. Considering the split of authorities on a pardon’s effect, the Florida Supreme Court determined that although a pardon removes punishment and disability and restores civil rights, expunction is not a civil right.

### Expunction of a criminal record is not a civil right and the pardon in this case did not include record expunction

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<sup>11</sup> *Id.* at 380-81.

<sup>12</sup> *Id.*

<sup>13</sup> *Angle v. Chi., St. Paul, Minneapolis & Omaha Ry. Co.*, 151 U.S. 1, 19 (1894).

<sup>14</sup> *Carlesi v. N.Y.*, 233 U.S. 51, 59 (1914).

<sup>15</sup> *Biddle v. Perovich*, 274 U.S. 480, 486 (1927).

<sup>16</sup> *See U.S. v. Noonan*, 906 F.2d 952 (3d Cir. 1990) (concluding that a pardon can only remove the punishment for a crime, not the fact of the crime itself); *Bjerkan v. U.S.* 529 F.2d 125 (7th Cir. 1975); *In re North*, 62 F.3d 1434 (D.C. Cir. 1994) (concluding that the *Garland* interpretation of the pardoning power was un-controlling dictum).

<sup>17</sup> *Groseclose v. Plummer*, 106 F.2d 311, 313 (9th Cir. 1939).

<sup>18</sup> 887 So.2d 1268, 1281 (Fla. 2004).

The Court concluded that based upon the reasoning of post-*Garland* cases, the U.S. Supreme Court has retreated from that sweeping articulation of the pardoning power. Further, the United States Courts of Appeals for the Third, Seventh, Ninth and District of Columbia Circuits, in addition to the United States District Court for the Northern District of Texas, have all held that *Garland's* recitation of the pardon power was non-controlling dictum. The majority of state courts that have addressed the issue have likewise concluded that the pardoning power does not bestow innocence or erase the historical fact of the underlying criminal act and conviction. The Court adopted the reasoning of these cases limiting the scope of a pardon because the rationale is consistent with Nevada's Constitution. Additionally, the Court retreated from its prior decisions in *Foley* and *Pinana* to the extent that they imply that a pardon blots out guilt and erases the historical fact of the underlying conviction.

Concluding that the effect of the pardon does not erase the historical fact of the conviction, the Court held that nothing in the Nevada Constitution creates a civil right to an expunction of the record of a criminal conviction. Therefore, because expunction of a criminal record is not a civil right, NRS 179.245(5) does not improperly impinge on the Pardons Board's power. The Court further held that NRS 213.090 does not abridge the pardoning power in Article 5, Section 14 of the Nevada Constitution.

### **Conclusion**

The Court concluded that the effect of a pardon does not erase the historical fact that a conviction occurred, and it cannot bequeath innocence. Instead, a pardon is an act of forgiveness that restores civil rights and removes most legal consequences of a criminal conviction. Further, the Court concluded that expunction is not a civil right contemplated within the scope of the constitutional pardoning power. Only the Legislature can remove the historical fact of a criminal conviction by authorizing the expunction of a criminal record. Accordingly, NRS 179.245(5) does, which regulates the expunction of a criminal record of convicted sex offenders, does not improperly impinge on the Pardons Board's power.

Therefore, the Court found that Appellant was unable to demonstrate that the statute unconstitutionally abridges the Executive's pardoning power pursuant to Article 5, Section 14 of the Nevada Constitution. Affirming the district court's decision, the Court concluded that the district court did not abuse its discretion when it unsealed Appellant's criminal record.