

IN THE SUPREME COURT OF FLORIDA

LEONARD DAVID RANDALL,  
Petitioner,

vs.

CASE NO.: SC01-235  
L.T. NO.: 1D00-2169

FLORIDA DEPARTMENT  
OF LAW ENFORCEMENT,  
Respondent.

---

APPEAL FROM DECISION OF THE FIRST DISTRICT COURT OF  
APPEAL EXPRESSLY AND DIRECTLY CONFLICTING WITH DECISION  
OF THE FIFTH DISTRICT COURT OF APPEAL

---

ANSWER BRIEF OF RESPONDENT

---

John P. Booth  
Assistant General Counsel  
Florida Department of Law  
Enforcement  
P.O. Box 1489  
Tallahassee, Florida 32302-1489  
2450  
(850) 410-7676  
Florida Bar No. 291803

William L. Camper  
General Counsel  
Florida Parole Commission  
2601 Blair Stone Road  
Building C, Room C-220  
Tallahassee, Florida 32399-  
(850) 488-4460  
Florida Bar No. 107390

TABLE OF CONTENTS

Table of Citations .....	iii
Statement of the Case and Facts .....	1
Summary of Argument .....	1
Argument	
I. Even if <i>Randall</i> had not been decided, this Court's own precedent would fully warrant overturning <i>Doe</i> and affirming that a pardon does not permit the expunction of the record of a criminal conviction. .....	5
II. Eligibility for expunction is not a civil right lost upon conviction, nor is ineligibility a punishment imposed by conviction.....	31
III. FDLE's since-abandoned practice of issuing certificates of eligibility to expunge the records of pardoned convictions does not estop the State from asserting that this practice was and is in error. .....	35
IV. Both federal precedent and the decisions of other state courts are in line with this Court's "middle ground" approach to pardons, and support <i>Randall's</i> holding that a pardoned conviction is not eligible for expunction. .....	39
Conclusion .....	46
Certificate of Service .....	47
Certificate of Compliance .....	47

Appendix [Attached]

A. Transcript of Meeting of Board of Executive Clemency, October 28, 1999

B. Order Affirming Lower Court in *R.J.L. v. State, Florida Department of Law Enforcement*, \_\_\_ So.2d \_\_\_ (Fla. 1st DCA June 6, 2002)

C. Informal Florida Attorney General's Opinion to Coordinator, Office of Executive Clemency (June 2, 1981)

TABLE OF CITATIONS

United States Supreme Court

<i>Board of County Comm'rs of Bryan County, Oklahoma v. Brown</i> , 117 S.Ct. 1382 (1997) .....	16
<i>Ex Parte Garland</i> , 4 Wall. (71 U.S.) 333 (1866) ..	23,24,25 26,28,29 42,43,44
<i>Hawker v. New York</i> , 170 U.S. 189, 18 S.Ct. 573 (1898) .....	27,28
<i>Public Citizen v. United States Department of Justice</i> , 491 U.S. 440 (1989) .....	26
<i>United States v. Lovett</i> , 328 U.S. 303 (1946) ....	26

Florida Supreme Court

<i>Advisory Opinion of the Governor Civil Rights</i> , 306 So.2d 520 (Fla. 1975) .....	29
<i>Advisory Opinion to the Governor</i> , 14 Fla. 319 (1872) .....	29,30

<i>Branch v. State</i> , 120 Fla. 666, 163 So. 48 (1935)	11,26,27 , 28
<i>Chiles v. Phelps</i> , 714 So.2d 453 (Fla. 1998) .....	37
<i>DeBock v. State</i> , 512 So.2d 164 (Fla. 1987) .....	12
<i>Fields v. State</i> , 85 So.2d 609 (Fla. 1956) .....	18,19,21 , 30
<i>Marsh v. Garwood</i> , 65 So.2d 15 (Fla. 1953) .....	29,30
<i>Michel v. Douglas</i> , 464 So.2d 545 (Fla. 1985) ....	34
<i>Page v. Watson</i> , 140 Fla. 536, 192 So. 205 (1938).	13,14,21 , 30,31,33
<i>Parole Commission v. Lockett</i> , 620 So.2d 153 (Fla. 1993) .....	38
<i>Post-Newsweek Stations, Florida Inc. v. Doe</i> , 612 So.2d 549 (Fla. 1992) .....	34
<i>Sandlin v. Criminal Justice Standards &amp; Training Commission</i> , 531 So.2d 1344 (Fla. 1988) .....	19,20,21 , 22,26,30 , 31,33,38 , 41
<i>Singleton v. State</i> , 38 Fla. 297, 21 So. 21 (1896)	29,30,33 , 38
<i>State, Department of Revenue v. Anderson</i> , 403 So.2d 397 (Fla. 1981) .....	35,36

<i>State v. D.H.W.</i> , 686 So.2d 1331 (Fla. 1996) .....	6,33
<i>State v. Snyder</i> , 136 Fla. 875, 187 So. 381 (1939)	10,11,12 ,13,14,1 8,21,26, 30,31,33
<i>Sullivan v. Askew</i> , 348 So.2d 312 (Fla. 1977) .....	5

**Florida District Courts of Appeal**

<i>Doe v. State</i> , 595 So.2d 212 (Fla. 5th DCA 1992)..	1,2,4,8, 913,23,2 4,26,30, 31,35,36 ,37,38,4 6
<i>Lewis v. State, Department of Health and Rehabilitative Services</i> , 659 So.2d 1255 (Fla. 4th DCA 1995) .....	36
<i>Oymayan v. State</i> , 765 So.2d 812 (Fla. 1st DCA 2000) .....	7
<i>Randall v. Florida Department of Law Enforcement</i> , 791 So.2d 1238 (Fla. 1st DCA 2001) .....	1,3,4,5, 8,9,13, 30,31,32 ,35,37,3 9,40,46
<i>R.J.L. v. State, Florida Department of Law Enforcement</i> , ____ So.2d ____ (Fla. 1st DCA June 6, 2002) .....	30
<i>Rowell v. State, Department of Law Enforcement</i> ,	

700 So.2d 1242 (Fla. 2d DCA 1997) .....	7
<i>State v. Greenberg</i> , 564 So.2d 1176 (Fla. 3d DCA 1990), <i>review denied</i> , 576 So.2d 287 (Fla. 1991) .....	32
<i>State v. Silva</i> , 691 So.2d 529 (Fla. 3d DCA 1997)	6
<i>Tallahassee Furniture Co. v. Harrison</i> , 583 So.2d 744 (Fla. 1st DCA 1991), <i>review denied</i> , 595 So.2d 558 (Fla. 1992) .....	16
<b><u>Federal Circuit Courts of Appeal</u></b>	
<i>In re Abrams</i> , 689 A.2d 6, 11 (D.C. App. 1997) ...	45
<i>In re North (George Fee Application)</i> , 62 F.3d 1434 (D.C. Cir. 1994), <i>amended at</i> 1994 U.S. App. LEXIS 40850 (D.C. Cir. Oct. 21, 1994) .....	40,41,45
<i>United States v. Noonan</i> , 906 F.2d 952 (3d Cir. 1990) .....	40,45
<i>United States v. Schaffer</i> , 240 F.3d 35 (D.C. Cir. 2001) .....	9
<b><u>Courts from Other States</u></b>	
<i>Dean v. Skeen</i> , 137 W. Va. 105, 70 S.E. 2d 256 (1952) .....	44
<i>Delaware v. Skinner</i> , 632 A. 2d 82 (Del. 1993) ...	41,42,45

<i>Illinois v. Glisson</i> , 69 Ill. 2d 502, 372 N.E. 2d 669 (1978)	42
.....	
<i>Indiana v. Bergman</i> , 558 N.E. 2d 1111 (Ind. App. 1990)	45
.....	
<i>Massachusetts v. Vickey</i> , 381 Mass. 762, 412 N.E. 2d 877 (1980)	42,43
.....	
<i>Missouri v. Bachman</i> , 675 S.W. 2d 41 (Mo. App. 1984)	43
.....	
<i>Ohio v. Cope</i> , 111 Ohio App. 3d 309, 676 N.E. 2d 141 (1996)	45
.....	
<i>Pennsylvania v. C.S.</i> , 517 Pa. 89, 534 A. 2d 1053 (1987)	45
.....	
<i>Texas Department of Public Safety v. Moran</i> , 949 S.W. 2d 523 (Texas App. 1997)	45
.....	
<i>Washington v. Cruz</i> , 139 Wash. 2d 186, 985 P. 2d 384 (1999)	44
.....	
<b><u>Florida Constitution</u></b>	
Article I, Section 23, Fla. Const.	34
.....	
Article II, Section 3, Fla. Const.	38
.....	
<b><u>Florida Statutes (2001)</u></b>	

Section 68.096(2), Fla. Stat. .....	16
Section 943.053(3), Fla. Stat. .....	34
Section 943.0542, Fla. Stat. .....	17
Section 943.0585, Fla. Stat. .....	6,7,33
Section 943.0585(1)(b)1, Fla. Stat. .....	7,31
Section 943.0585(1)(b)2, Fla. Stat. .....	7
Section 943.0585(1)(b)3, Fla. Stat. .....	31
Section 943.0585(2)(d), Fla. Stat. .....	7
Section 943.0585(2)(e), Fla. Stat. .....	7
Section 943.0585(4), Fla. Stat. .....	15,21
Section 943.059(4), Fla. Stat. .....	6
<b><u>Laws of Florida</u></b>	
Chapter 92-73, Laws of Fla. .....	8
<b><u>Federal Statutes</u></b>	
42 U.S.C. Section 5119a .....	17
<b><u>Other Authorities</u></b>	
46 C.J. page 1192 .....	13,14

Informal Op. Att’y Gen. Fla. (June 2, 1981)	37
.....	
1980 Op. Att’y Gen. S.C. 80-68	43
.....	

**STATEMENT OF THE CASE AND OF THE FACTS**

The Respondent, Florida Department of Law Enforcement (FDLE), accepts the Petitioner’s Statement of the Case and of the Facts, except to add that the First District Court of Appeal in noting conflict with *Doe v. State*, 595 So.2d 212 (Fla. 5th DCA 1992), expressly “conclude[d] that the *Doe* court failed to consider the impact of certain relevant Florida Supreme Court decisions and, because of that, reached an incorrect result.” *Randall v. Florida Department of Law Enforcement*, 791 So.2d 1238, 1242 (Fla. 1st DCA 2001).

**SUMMARY OF ARGUMENT**

This appeal asks the Court to resolve the question of whether the record of a pardoned conviction can be

expunged notwithstanding the explicit statutory prohibition against expunging the record of a conviction.

The power to pardon offenses is reposed exclusively in the Governor and Cabinet, and may not be curtailed by the Legislature or the Judiciary.

The expunction of agency criminal history records is at the courts' sole discretion, but is not an inherent judicial power. Rather, it is a limited, conditioned legislative grant of authority, which affords the privilege, with a few specific exceptions, of denying the fact of the expunged record and preventing others from accessing it. To be eligible for expunction, by law, the applicant must not have been convicted (adjudicated guilty) of a criminal offense.

The Petitioner contends that *Doe v. State*, 595 So.2d 212 (Fla. 5th DCA 1992), requires Respondent FDLE to treat him as if he had never been convicted, that his pardon "wipes out" the fact of conviction and any consequences attaching to it. *Doe* relies on dicta (not the holdings) from older United States and Florida Supreme Court cases which can be read as inclining toward such an expansive (not to say extravagant) view of the effects of a pardon.

However, this Court's own precedent, properly

construed, firmly establishes that a pardon removes punishment and restores civil rights, but does not obliterate the record fact of the conviction or prevent a licensing or regulatory board from knowing of the conviction and holding the pardoned offender accountable for the conduct which resulted in the conviction. Such knowledge and accountability are not punishment.

If the dicta on which *Doe* depends is given a literal application, as Petitioner urges, no licensing board, court, employer, or entity of any sort could ever inquire into the circumstances of a pardoned conviction because that conviction, and the offense which occasioned it, would have ceased to exist in the eyes of the law.

But that interpretation cannot be reconciled with this Court's understanding of pardons, and is incompatible with the public policy goals animating that understanding: An ex-offender cannot be absolutely barred from entering or remaining in a profession because of a pardoned conviction, but is nonetheless responsible for the *conduct* underlying that conviction, which the board or employer assessing the pardoned offender's fitness for practicing that profession must not be denied access to or awareness of.

Thus, even in the absence of *Randall v. Florida*

*Department of Law Enforcement*, 791 So.2d 1238 (Fla. 1st DCA 2001), the Court's precedent would lead, inevitably, to the conclusion that a pardoned offender is not thereby made eligible to expunge his or her record and erase - with few and limited exceptions - all knowledge of the conviction and underlying conduct from public view.

What *Randall*, 791 So.2d at 1245, does is carefully examine this Court's own prior decisions on the effect of a pardon, scrupulously separating out the law from the dicta to resolve that *Doe* "misinterpreted the ... law ... and arrived at an erroneous conclusion."

*Randall's* reading of the controlling precedent is more closely aligned with this Court's law of pardons, and with the public policy implications of that law.

Eligibility for records expunction is not a civil right that is lost upon conviction and then restored by a pardon, nor is ineligibility (which can stem from any failure to satisfy the prescribed statutory criteria) a punishment which a pardon removes.

Because *Doe* was, for a time, the only appellate decision directly on point on the issue of eligibility to expunge a pardoned conviction, FDLE did issue certificates of eligibility to expunge criminal history records to persons whose convictions had been pardoned.

However, that practice, since discontinued, does not estop the State from now maintaining that *Randall* represents the better view of the law. *Randall* is consistent with the position the State has taken on the effect of a pardon since before *Doe* was decided.

The Legislature's reputed "failure" to amend the expunge statute after *Doe* should not be seen as other than a prudent decision to refrain from attempting to define the effects of a pardon.

Finally, *Randall's* analysis of the effect of a pardon with respect to expunction is in step with federal rulings and the majority trend in other state courts.

In brief, *Randall* is the logical outgrowth of this Court's law of pardons, applied in the context of eligibility to expunge the record of a pardoned conviction, and should be affirmed by this Court.

#### **ARGUMENT**

**I. Even if *Randall* had not been decided, this Court's own precedent would fully warrant overturning *Doe* and affirming that a pardon does not permit the expunction of the record of a criminal conviction.**

The issue presented in this case is purely a legal one: The effect of a pardon on the Petitioner's eligibility to expunge the record of an offense for which he was adjudicated guilty. The standard of review is,

therefore, de novo.

Pardoning convicted offenders is the sole prerogative of the Governor and Cabinet. "By this self-executing constitutional provision, the people of this state chose to vest sole, unrestricted, unlimited discretion exclusively in the executive in exercising this act of grace." *Sullivan v. Askew*, 348 So.2d 312, 315 (Fla. 1977).

\_\_\_\_\_Expunction of agency (nonjudicial) criminal history records is not an inherent power of the Courts in Florida, rather "under the separation-of-powers doctrine, the courts' power to order the sealing [or expunction] of nonjudicial criminal history records not in the custody of the courts derives only from a legislative grant by statute." *State v. D.H.W.*, 686 So.2d 1331, 1335 (Fla. 1996).

The conditions under which an expunction of agency records may be ordered are set out at Section 943.0585, Fla. Stat. (2001). In *D.H.W.*, 686 So.2d at 1334, the Court found that the statutory preconditions for sealing, *including* the requirement that the petitioner for such *relief not have been adjudicated guilty* of any of the acts stemming from the arrest to be sealed, are *constitutional*.

The ruling in *D.H.W.* upholding the constitutionality of the statute governing *sealing*, applies equally to the law concerning *expunction*. See *State v. Silva*, 691 So.2d 529 (Fla. 3d DCA 1997).<sup>1</sup>

To be eligible for expunction, the record subject must be able to attest, under oath, that he or she “has not been adjudicated guilty of ... any of the acts stemming from the arrest or alleged criminal activity to which the petition pertains.” Section 943.0585(1)(b)2., Fla. Stat. In addition, Section 943.0585(1)(b)1., Fla. Stat., requires the petitioner for expunction to affirm that he or she “[h]as never prior to the date on which the petition is filed, been adjudicated guilty of a criminal offense.” The same requirements, with virtually the same wording, apply to FDLE’s issuance of a certificate of eligibility, at Section 943.085(2)(d) and (e), Fla. Stat.

FDLE’s action in issuing or denying a certificate is a ministerial one, *Rowell v. State, Department of Law Enforcement*, 700 So.2d 1242, 1243 (Fla. 2d DCA 1997), while “any request for expunction ... may be denied at the sole discretion of the court.” Section 943.0585, Fla. Stat.

However, it appears that a court’s decision to *grant* expunction when a certificate of eligibility has properly issued is effectively unreviewable. *Oymayan v. State*, 765 So.2d 812

---

<sup>1</sup> The law governing *eligibility* for expunction does not differ from that for *sealing* in any respect material to the issues here. Sealed records are more *accessible* than expunged. See Section 943.059(4), Fla. Stat. (2001). The law concerning expunction and sealing has not been amended in recent years in any way that affects this argument. All statutory citations are to the 2001 Florida Statutes. The Record on Appeal will be designated as (R - \_\_\_).

(Fla. 1st DCA 2000), recites that appellate courts may review the *denial* of petitions to expunge under an abuse of discretion standard, but does not suggest that the *granting* of a petition to expunge filed by an *eligible* petitioner would ever be reversible under an abuse of discretion standard. (No case implying such is known.)

The Petitioner asserts that his pardon overrides the quoted statutory proscriptions and obliges FDLE to issue him a certificate of eligibility, based on *Doe v. State*, 595 So.2d 212 (Fla. 5th DCA 1992). Contrary to the statement at page 9 of his Initial Brief, *Doe* did not hold that FDLE must give a pardoned offender a certificate of eligibility to expunge notwithstanding an otherwise disqualifying conviction. *Doe* was decided on February 28, 1992, *before* the effective date, July 1, 1992, of the statutory amendments which imposed the certificate of eligibility requirement. *See* Chapter 92-73, Laws of Fla. However, this oversight does not alter the crux of the Petitioner's argument: That *Doe* authorizes the expunction of a pardoned conviction, even though someone seeking expunction must swear that he or she has not been convicted of any crime as of the time he or she petitions the court.

The Petitioner is asking this Court to rule that *Randall v. Florida Department of Law Enforcement*, 791 So.2d 1238, 1245 (Fla. 1st DCA 2001), is bad law, because it held "that the *Doe* court misinterpreted the state of Florida law on the issue [of the effect of a pardon], and arrived at an erroneous conclusion."

In what follows, Respondent FDLE will first undertake to show that the First DCA was correct in *Randall*: That this Court's own precedent, when properly read and understood, not only does not support *Doe* but cannot be reconciled with it. In other words, this Court would have ample grounds to reverse *Doe's* holding that a pardon lets the record of a conviction be

expunged even if *Randall* had never been decided. In so doing, Respondent hopes also to make manifest that *Randall* is nothing more (or less) than an accurate and comprehensive summation of this Court's consideration of the law of pardons in Florida.

An *executive* pardon following conviction differs fundamentally from a *judicial* set aside after appeal. See *United States v. Schaffer*, 240 F.3d 35, 38 (D.C. Cir. 2001) (Where pardon mooted pending appeal of conviction, final judgment was never reached because appeal process was terminated prematurely, but “pardon does not, standing alone, render [recipient] innocent of the alleged [criminal] violation” as “[f]inality was never reached on the *legal question* of [recipient's] guilt”).

If a conviction has been set aside by an appeals court, the aspirant for expunction may truthfully state that he or she has not been convicted because the *conviction itself* – and not just the effects or consequences of the conviction – has been negated and nullified by judicial action.

As a result of the set aside, the conviction as a *legal fact* no longer exists, while the conviction as an *historical fact* remains but is entirely superseded by the record fact of a subsequent contrary disposition.

Under the controlling law of Florida, as is shown below, and that of many if not most other jurisdictions, a pardon does not have the same effect as does a set aside. A pardon modifies, but does not eliminate, the legal fact of a conviction, by removing some *but not all* of its consequences. Specifically, it removes punishment and restores civil rights. The historical fact of a pardoned conviction, far from being obliterated, is not affected in any way: The beneficiary of a pardon (as opposed to an *expunction*) cannot then deny that he or she has

been convicted without committing perjury.

Simply put, a pardon does not make a conviction disappear if the conviction is being used, not to punish the person convicted, but to hold such person accountable for his or her past conduct when that conduct is relevant to measuring moral character for the benefit of the public.

The best place to begin a survey of this Court's law of pardons is with *State v. Snyder*, 136 Fla. 875, 187 So. 381, 382 (1939):

The fact of having been restored to citizenship and civil rights by virtue of a pardon from a conviction of embezzlement in no way affects a disbarment proceeding, even though predicated on the fact of conviction alone, *Branch v. State*, 120 Fla. 666, 163 So. 48. The case for disbarment may therefore proceed notwithstanding the pardon.

The case for disbarment grows out of the stigma attached to the fact of having been charged with and convicted of embezzlement. This is on the theory that such conduct unfits the perpetrators to associate with the fair and honorable members of the profession. *A pardon does not reach and purge him of this stigma but goes only to civil rights.* He may purge himself by showing in another proceeding that he is a fit and proper person to re-engage in the practice of law.

The *mere fact of conviction* of the crime of embezzlement bars one from the practice of law in this State. ... In this view of the case, there was no basis whatever on which a pardon should have been permitted to work an abandonment of the disbarment proceedings.

*The pardon does not blot out the fact of having committed the crime* for which disbarment is imposed and was no part of the punishment for it. *It merely restores civil rights that were forfeited for having committed and been convicted of the crime.* If he can later show that he is fit and worthy to be restored to the roll of practicing attorneys, that is another question but it takes more than a pardon to do this. (Emphasis added.)

*Snyder* encapsulates the Court's understanding of pardons and contains all that is needed to resolve the present controversy: A pardon does not alter every single consequence triggered by "the fact of conviction alone," though it may mitigate the

ultimate resolution of proceedings which turn on consideration of the facts underlying the conviction. Disbarment, which is not a criminal punishment but the removal of a professional license for the protection of the public<sup>2</sup>, “may ... proceed notwithstanding the pardon.” A pardon restores civil rights, but “does not reach and purge [the] stigma” of conviction, at least in the non-criminal arena. “The mere fact of conviction” continues to have repercussions even after a pardon is granted, because a “pardon does not blot out the fact of having committed the crime for which disbarment [a non-criminal sanction] is imposed.”

Just as disbarment may proceed notwithstanding a pardon, because “disbarment is not punishment,” *DeBock*, 512 So.2d at 166, the record of a pardoned offender may continue to be made public for use in, for example, hiring or selection for sensitive positions, because the public availability of the record is “no part of the punishment for” the crime.

The conviction, though pardoned, is and remains an historical and record fact, and “[t]he pardon does not blot out the fact of having committed the crime for which” expunction is sought.

*Snyder*, in short, is sufficient to dispose of this case, but (unlike *Doe*) it does not stand alone. It keeps close company with other rulings from this Court of the same

---

<sup>2</sup> See *DeBock v. State*, 512 So.2d 164, 166 (Fla. 1987), in which this Court “rejected the idea that an inquiry into an attorney’s fitness to practice law is penal,” and “reaffirm[ed]” its holding “that bar disciplinary proceedings are remedial, and are designed for the protection of the public and the integrity of the courts.”

import, and culminated in the First District's precise dissection of this Court's pardon cases in *Randall*. But *Randall* is not new law as much as a distillation of the Court's deliberations on the effect of a pardon in forums where the conduct the conviction represents (conduct which has either been admitted by the defendant or found by the trier of fact beyond a reasonable doubt), is significant for purposes other than punishment.

Equally on point is *Page v. Watson*, 140 Fla. 536, 192 So. 205, 208 (1938), involving the revocation of a medical license on the grounds of having been convicted of a felony, in which this Court quoted with approval from 46 *C.J.* pages 1192, 1193, par. 32, the following description of "the effect of a full and absolute pardon":

"While a pardon has generally been regarded as blotting out the existence of guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offense, *it does not so operate for all purposes* and as the very essence of a pardon is forgiveness or remission of penalty, a pardon implies guilt; *it does not obliterate the fact of the commission of the crime and the conviction thereof*; it does not wash out the moral stains; as has been tersely said[:] it involves forgiveness and not forgetfulness." (Emphasis added.)

Consistent with this description, the Court found that "[t]he effect of a pardon should not be construed or extended to strike down the statutes of Florida requiring moral qualifications to receive a license to practice medicine in Florida." *Page*, 192 So. at 210.

As with *Snyder*, *Page* contains the guidance needed to decide the instant matter. While a pardon has, at various times and for certain purposes, been thought to render the recipient, as it were, "as innocent as if he had never committed the offense," a pardon is not a universal solvent, dissolving the stain of the conviction from whatever

it might touch. Logically and legally, “a pardon implies guilt”<sup>3</sup> and thus “does not obliterate the fact of the commission of the crime and the conviction thereof.”

And just as a pardoned conviction can (and indeed should) be evaluated when deciding on fitness to practice law and medicine, so the fact of having committed the crime and been adjudicated guilty of it should not be erased from the public record for all but a few, severely restrained, uses. (Section 943.0585(4), Fla. Stat., specifies a limited number of entities – such as the Florida Bar – which may be informed of the existence, but not the contents, of an expunged record, while providing that the contents may be disclosed only upon court order.)

This is both a legal and a policy argument: The decisional law suggests that a pardoned conviction is not “wiped out” for all purposes, and in particular is not negated when the recipient’s suitability to engage in a licensed profession is under scrutiny. The conviction remains a fact of record, even while the pardon restores civil rights and prevents further punishment.

The Court’s pardon holdings are in conflict with the notion that one seeking expunction may deny the pardoned conviction, or demand that FDLE, when issuing a certificate of eligibility, close its eyes to the conviction as though it had never happened.

---

<sup>3</sup> Except, that is, when granted upon *belief of innocence*. Such a pardon, which is intended to correct and, insofar as may be possible, remedy a miscarriage of justice rather than to forgive and absolve one whose conviction was just, may be designated by the Governor and Cabinet as affording the recipient eligibility to expunge the record of the pardoned offense. See Appendix A, Transcript of Board of Executive Clemency Meeting, October 28, 1999 (R- 50-53).

The cases also advance a public policy interest: That the boards and commissions which pass upon an individual's fitness to enter or practice a regulated profession should have access to, and hold the applicant answerable for, "the fact of the commission of the crime and the conviction thereof."

If this is a good idea for law and medicine, it must be equally sound policy for other regulated professions, and in this litigious age, for private employers as well.<sup>4</sup>

An expunction denies most government agencies, and essentially the entire general public, any knowledge of the existence of a pardoned offense unless the offender chooses to disclose it.

This result cannot be made to accord with the rationale expounded in the cases just cited, except by the questionable stratagem of labeling "doctors and lawyers" as unique among the occupations having a potential to adversely affect the lives of this state's citizens. Recent events would prompt the addition of auditors and accountants

---

<sup>4</sup> See, for example, Section 68.096(2), Fla. Stat., creating a presumption against negligent hiring if a background investigation, which "must include" an FDLE criminal history check, does not "demonstrate[] the unsuitability of the prospective employee." Failure to perform a criminal history check on an employee will not necessarily give rise to liability for negligent hiring or retention. See *Board of County Comm'rs of Bryan County, Oklahoma v. Brown*, 117 S.Ct. 1382 (1997); and *Tallahassee Furniture Co. v. Harrison*, 583 So.2d 744 (Fla. 1st DCA 1991), review denied, 595 So.2d 558 (Fla. 1992). By definition there can be no "failure" to check an *expunged* record in most instances. But that consideration would be of no comfort to the victim of a predacious employee whose criminal history record might, at least, have prompted further inquiry or increased precautions by the prospective employer.

to any “short list,” and it would be arbitrary and invidious to draw the line there.

What about those employees or contractors who routinely ask to enter the homes of unsuspecting families to perform a service or solicit a sale? And, sadly, what about those vocations traditionally entrusted with the care of our most vulnerable populations? Congress, recognizing the danger posed to children, the elderly, and the disabled by unscreened employees and volunteers, sought to facilitate the process of conducting background checks by passing the National Child Protection Act of 1993, as amended, 42 U.S.C. Section 5119a, implemented in Florida at Section 943.0542, Fla. Stat.

*No imputation of any kind is intended against the Petitioner, or any other person who is pardoned.* For many, perhaps most, the pardon confirms a character transformation that has already taken place. But it is not the pardon that rehabilitates – the convicted person must do that, in part by exhibiting the qualities which, ideally, vindicate the granting of the pardon. *Snyder*, 187 So. at 382, alluded to this truth: “If he can later show that he is fit and worthy to be restored to the roll of practicing attorneys, that is another question *but it takes more than a pardon to do this.*”

(Emphasis added.)

The person pardoned is not subject to additional punishments or disabilities for the crime or crimes covered by the pardon, but taking the crime into account when deciding whether to issue or revoke a professional license is *not* a punishment. The distinction was acknowledged, and taken as so well established that no elaboration was needed, by this Court in *Fields v. State*, 85 So.2d 609, 610 (Fla. 1956), when it referred in passing to:

The rule that a pardon does not preclude consideration of a criminal conviction in disbarment proceedings, or as grounds for the discretionary ruling of a board empowered to revoke professional licenses ... .

At the same time, *Fields* held that a pardoned felony conviction could not be counted as a “prior” for habitual offender sentencing. *That* is a (punitive) consequence which a pardon abolishes. But if knowledge of a pardoned crime on the part of a “board empowered to revoke professional licenses” were likewise a consequence of the conviction which a pardon does away with, *Fields* and the cases which precede it would have been wrongly decided.

That they were not wrongly decided is borne out by *Sandlin v. Criminal Justice Standards & Training Commission*, 531 So.2d 1344 (Fla. 1988), which follows logically and readily from the cases just cited. *Sandlin, id.* at 1346, adopted (or, to be precise, advised that the Court had previously adopted) what it termed “the middle ground, i.e., that a pardon removes punishment, but not moral guilt.”

The issue in *Sandlin* was the effect of a pardon on the eligibility of a convicted felon for certification as a law enforcement officer. A determination that the conviction remained an absolute statutory bar to entering the profession would, in the Court’s view, “diminish[] the effect of a pardon and impose a legal disability,” as well as “creat[ing] a head-on confrontation between the legislature’s power to enact laws to protect the public and the executive’s power to pardon convicted felons.” *Sandlin*, 531 So.2d at 1346.

The Court in *Sandlin* steered a middle course: It did not set the pardon at naught, but neither did it use the pardon to cast the fact of conviction into oblivion. The Court pragmatically observed that “[i]t is imperative that law enforcement officers be of good

character. Thus, it is entirely appropriate and necessary to review closely a pardoned felon's character." 531 So.2d at 1347. It followed that "[i]n determining whether to certify Sandlin the commission may take into account and rely upon the facts of Sandlin's pardoned convictions ... ." *Id.*

\_\_\_\_\_ If *Sandlin* is somehow construed as meaning that a pardoned conviction does *not* preclude expunction of the record of the pardoned offense, by analogy to its holding that a pardoned felony would not categorically prohibit certification as a law enforcement officer, it would diverge from the line of cases which lead up to it. For then it would be made to stand for the novel proposition that the fact of a pardoned conviction can be deemed (as a legal fiction) to have been blotted out when applying for a certificate of eligibility to expunge from FDLE, and that any awareness of a pardoned conviction should, in general, be denied to those charged with the task of assessing the character and fitness of the person pardoned.

That is not the holding of *Snyder*, *Page*, and *Fields*, and it is not a proper reading of *Sandlin*. In *Snyder*, the attorney retained the prospect of "showing in another proceeding that he is a fit and proper person to re-engage in the practice of law." 187 So. at 382. In *Sandlin*, the applicant for certification as a law enforcement officer could attempt to convince the certifying commission of his fitness, but neither *Sandlin* nor *Snyder* were offered the privilege of denying the fact of the conviction, or the benefit of being regarded as if it had never happened.

Again, it is no answer to urge that attorneys and law enforcement officers are, by statute, excepted from the right to deny which accompanies expunction. (See Section 943.0585(4) Fla. Stat.) The principle is not limited to these two professions. *Sandlin* builds upon and solidifies the philosophy adumbrated in the earlier decisions: A pardon removes

punishment and restores civil rights, but it does not extinguish the fact of the conviction (or of the underlying crime) for all purposes. The pardoned offender remains responsible for conduct and character, as when applying for a position or permit which necessitates a background investigation. He or she cannot refuse to acknowledge the conviction. A pardon is not an expunction.

Moreover, a ruling that a pardon does not permit expunction of the record of a conviction does *not* “creat[e] a nonrebuttable presumption that pardoned felons are not of good character,” nor does it threaten “a head-on confrontation between the legislature’s power to enact laws ... and the executive’s power to pardon convicted felons,” as the Court sought to avoid in *Sandlin*, 531 So.2d at 1346.

The pardoned offender whose record is not expunged is not thereby prevented from proving to a licensing board or hiring committee that he or she is of good moral character. Rather, extending an expunction to the ex-offender would, in most instances, eliminate the need to even make that showing in the first place.

With respect to expunction, then, no conflict can be posited between the Legislature’s power to enact laws which, under strictly limited conditions, bestow the privilege of expunction of criminal history records, and the Executive’s power to remove the penalties and disabilities associated with a conviction by pardoning.

Due consideration of a pardoned offender’s record is not, according to this Court in the cases just mentioned, a punishment, and, as will be shown more fully below, eligibility to expunge that record is not a civil right “lost” upon conviction.

Only one Florida case, *Doe, supra*, stands for the proposition that a pardon entitles the

holder to expunge the record and deny the existence of a criminal conviction.

*Doe's* rationale, 595 So.2d at 213, rests entirely upon a venerable United States Supreme Court case, *Ex Parte Garland*, 4 Wall. (71 U.S.) 333 (1866), and those Florida Supreme Court cases which cite it, for the following exposition of a pardon's effects:

When the pardon is full, it remits the punishment and blots out of existence the guilt, so that in the eyes of the law the offender is as innocent as if he never committed the offense. [Citations omitted.] A pardon not only blots out the crime committed, but removes all disabilities resulting from conviction and gives to an individual in whose favor it is granted a new character, and makes of him or her a new person. [Citation omitted.] A full and unconditional pardon removes all that is left of the consequences of conviction. [Citations omitted.]

\_\_\_\_\_ Some parts of this language (*e.g.*, “remits the punishment,” “removes all disabilities”) have carried over into more recent judicial parsing of the pardon power, but other formulations (“blots out of existence the guilt, so that in the eyes of the law the offender is as innocent as if he never committed the offense”) have not survived.

It may be observed at the outset that if the most extravagant attributes of a pardon from *Doe* (and *Garland*) are taken literally, the Petitioner, as well as Singleton, Snyder, Sandlin, and all other recipients of a pardon, would not need an expunction. The pardon itself would have accomplished all that expunction could do and more, by “blot[ting] out of existence the guilt, so that in the eyes of the law the offender is as innocent as if he never committed the offense.” Were that indeed the effect of a pardon, no board, commission, or court could take the fact of the conviction or the underlying conduct into account for any purpose, and the further relief of an expunction would be, if not superfluous, akin to the cowardly lion's medal in *The Wizard of Oz*.

\_\_\_\_\_ But the quoted dictum from *Garland* does not now, if it ever did, correctly embody the

law of pardons in Florida, and it is important to recall that *it is dictum*. In *Garland*, an attorney who had served in the Confederate Congress was given the Hobson's choice of swearing that he had taken no part in the "late Rebellion" or forfeiting his license to practice law. In holding the federal law which placed him in this dilemma unconstitutional as both a bill of attainder and an ex post facto punishment, the Supreme Court, 71 U.S. at 379-380, remarked:

The question, in this case, is not as to the power of Congress to prescribe qualifications [for the office], but whether that power has been exercised as a means for the infliction of punishment, against the prohibition of the Constitution. That this result cannot be effected indirectly by a State under the form of creating qualifications we have held [in a companion case], and the reasoning by which that conclusion was reached applies equally to similar action of the part of Congress.

*This view is strengthened by a consideration of the effect of the pardon produced by the petitioner, and the nature of the pardoning power of the President.* (Emphasis added.)

\_\_\_\_\_ The *Garland* Court, 71 U.S. at 380, then set forth the much-quoted gloss that a 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 offence." *But this analysis of the function of pardons was not necessary to the Court's holding.* It simply "strengthened" the "view" already taken by the Court, which alone was sufficient to resolve the case, even if *Garland* had not been pardoned.

By the same token, adjudging that a pardon "blots out of existence the guilt" and leaves the one pardoned "as innocent as if he had never committed the offence" was not a requirement for ruling that a pardon allowed *Garland* to continue practicing law. Having already found that the statutory prohibition at issue was a *punishment*, and an unconstitutional one at that, the

Supreme Court need only have noted that a pardon “releases the punishment.”

In sum, the all-encompassing theory of pardons which wends its way from *Garland* down to *Doe*, and is absolutely essential to Petitioner’s contention that a pardon entitles him to an expunction, is dictum within dictum.

Later citations of *Garland* by the Supreme Court reinforce this conclusion. *United State v. Lovett*, 328 U.S. 303, 315 (1946), for example, referred to *Garland* as having “held invalid on the same grounds [“because it constituted a bill of attainder and because it had an ex post facto operation”] an Act of Congress which required attorneys practicing before this Court to take a similar oath.”

\_\_\_\_\_ In *Public Citizen v. United States Department of Justice*, 491 U.S. 440, 485 (1989), *Garland* was adduced for “the principle that Congress cannot interfere in any way with the President’s power to pardon.”

And, the *Florida* Supreme Court has carefully distinguished *Garland* on the critical (if not dispositive) issue of whether a disbarred lawyer should be reinstated to the practice of law upon receiving a pardon, in *Branch v. State*, 120 Fla. 666, 163 So. 48 (1935). In line with *Snyder* and *Sandlin*, the *Branch* Court, *id.* at 49, reasoned that “the disbarment of a practicing attorney is not a part of the punishment inflicted for the commission of crime,” so that a “pardon wiping out the conviction of the criminal offense will no more reinstate the attorney who has been disbarred (not because of conviction, but because of the commission of a particular act) than would the refusal to grant the pardon preclude such person upon a proper showing from being reinstated in the practice of law.”

The Court then sensed that it was incumbent upon it to reconcile this view of the pardon

power with *Garland*:

It appears that in [*Garland*], a contrary conclusion was reached, but a careful consideration of the opinion in that case will disclose that the court was dealing with a condition not presented in the case at bar. In that case it was contended that although the petitioner had been pardoned by the President, yet he could not be reinstated in the practice of law without taking the oath prescribed in the Act of Congress of January 24, 1865 [citation and history omitted], [which] act was extended to apply to all persons who applied for admission to practice law as attorney or counsellors at the bar of the [federal courts]. The several applicable acts, when taken together, *constitute the disbarment a part of the punishment* for the offense of participating in the rebellion, and therefore, the *disbarment being an element of the punishment* for the alleged offense, it was held that the *pardon operated as a reinstatement*. (Emphasis added.)

---

The Florida Supreme Court quoted a later United States Supreme Court decision, *Hawker v. New York*, 170 U.S. 189, 18 S.Ct. 573, 577 (1898), for the explanation that oaths such as the one at issue in *Garland*, which ““had no relation to the fitness or qualification of the”” parties seeking to practice their chosen profession, were thus ““not legitimate tests of qualification, but in the nature of penalties for past offenses.””

From this exacting look at what is and is not a punishment, some general principles of Florida law emerge: Disqualification to engage in a licensed occupation is not a punishment when based on past criminal conduct, including a pardoned conviction, provided the applicant is given an opportunity to show that he or she is fit to engage in that occupation despite the conviction. While a pardon removes any absolute bar to entering or continuing in a given profession imposed because of a conviction, it does not preclude consideration of the facts underlying that conviction when deciding whether the pardoned offender is fit to enter or continue in that profession.

This principle, in turn, cannot coexist with the proposition that a pardon entitles the recipient to expunge his or her record, and thereafter (with but few and narrow exceptions) to

exercise the privilege of denying the fact of the conviction and effectively preventing an employer or regulatory body from even looking into the conduct which resulted in the conviction as, possibly, a pertinent factor in determining fitness.

It should be pointed out, as well, that the Florida Supreme Court cases which quote what may be termed, appropriately, the *Garland* dictum, do so in dictum and not as part of the holding.

The *Advisory Opinions to the Governor*, reported at 14 Fla. 319 (1872), and 306 So.2d 520 (Fla. 1975), have only a limited bearing on the issue at hand, and in quoting or paraphrasing the *Garland* dictum do not translate it into a holding that a pardon will nullify a conviction for purposes of eligibility to expunge, let alone that a pardon was ever intended to allow the recipient to deny the conviction and suppress knowledge of the crime when seeking employment or licensure.

*Singleton v. State*, 38 Fla. 297, 21 So. 21 (1896), emphasized that the pardoning power was vested exclusively with the Governor and Cabinet, and that the Legislature could not exercise such power for purposes of restoring a convicted felon's competency to testify at a trial.

*Marsh v. Garwood*, 65 So.2d 15 (Fla. 1953), relates to parole and distinguishes it from a pardon, and its teaching that the latter removes disabilities and restores customary civil rights is, to that extent, consistent with the modern understanding of pardons.

\_\_\_\_\_ *Fields*, 85 So.2d at 610, as noted above, ruled that a pardon “removes all that is left of consequences of conviction,” but would not impede consideration of a conviction by a board with discretion to revoke professional licenses.

This Court's own precedent, particularly *Snyder* and *Sandlin*, would be enough to conclude that *Doe* was wrongly decided, even without the aid of *Randall*. But *Randall* studies closely this Court's previous examinations of the effects of a pardon, and takes note of the law in other jurisdictions as well as scholarly commentary. It should not be lightly brushed aside.<sup>5</sup>

*Randall*, 791 So.2d at 1244, did not blink at the authority which seems to lend some plausibility to *Doe*'s treatment of pardons, but explained that the Court

read *Snyder*, *Page* and *Sandlin* as intended by the court to limit the effect of the extremely broad language regarding the effect of a pardon in *Advisory Opinion*, *Singleton*, and *Marsh*. More particularly, [the First DCA] read the former cases as intended to recede from any suggestion in the latter cases that a pardon has the effect of wiping out guilt, so that the conviction is treated as though it had never occurred.

*Randall* and *Doe* cannot be harmonized or distinguished. Both are able to point to passages in this Court's earlier opinions which sustain their differing viewpoints. But *Randall* sifts through those passages to sort out what is dicta from what is law, and "conclude[s] from *Snyder*, *Page* and *Sandlin* that our supreme court has adopted the position that, while a full pardon has the effect of removing all legal punishment for the offense and restoring one's civil rights, it does not wipe out either guilt or the fact of conviction." 791 So.2d at 1245.

With respect, *Randall* represents, if not the only possible construction of this Court's law of pardons, certainly the better one.

**II. Eligibility for expunction is not a civil right lost upon conviction, nor is ineligibility a punishment imposed by conviction.**

---

<sup>5</sup> The First DCA recently reaffirmed its holding in *Randall*, in *R.J.L. v. State, Florida Department of Law Enforcement*, \_\_\_ So.2d \_\_\_ (Fla. 1st DCA June 6, 2002), attached hereto as Appendix B.

Ineligibility for the legislatively-created remedy of expunction is not a punishment. A person who has never been adjudicated guilty of any crime but previously had a record expunged is just as ineligible to expunge a different criminal history record as is someone who has been convicted of a crime. See Section 943.0585(1)(b)1 and 3, Fla. Stat. In neither event is the applicant for a certificate of eligibility subjected to *punishment* for his or her status. He or she simply fails to meet the statutory criteria for eligibility. See *State v. Greenberg*, 564 So.2d 1176, 1177 (Fla. 3d DCA 1990), *review denied*, 576 So.2d 287 (Fla. 1991), and later cases which refer to it as authority for the ruling that the ex post facto proscription does not apply to amendments affecting (restricting) eligibility for expunction, because “the expungement statute as a whole is a remedial statute providing *remedies which are civil in nature* and this section has already been held to apply retroactively.” (Emphasis added.)

In this case, ineligibility is a consequence of a past (and pardoned) conviction, but a pardon does not (and could not) eliminate *all* logical consequences of a conviction, such as the historical fact of having been convicted.

As the Court below put it, “the retention of Randall’s criminal history record does not constitute punishment of any sort but, rather, merely accurately reflects the historical fact of his arrest and subsequent conviction.” *Randall*, 791 So.2d at 1238.

Just as the *fact* of a conviction is not removed by a pardon in non-criminal contexts, even those in which a person’s livelihood and career may be at stake, so the fact (and thus, in a limited sense, the consequences) of a conviction do not vanish when eligibility for expunction is in view. The pardoned offender, per *Snyder*, *Page*, and *Sandlin*, is not being punished when held accountable, in the civil arena, for the conviction and what it implies.

The statute itself confirms that expunction is not a civil right: “This section [943.0585, Fla. Stat.] does not confer any right to the expunction of any criminal history record, and any request for expunction ... may be denied at the sole discretion of the court.”

At issue in *Singleton*, 21 So. at 23, was “the disability of not being able to testify as a witness,” which was found to be “as much a part of the pains and penalties of the violated law as incarceration.” But the “disability” of not being eligible to expunge a record is of an entirely different order from that of not being able to vote, hold office, serve on a jury, or give evidence before a court. Expunction of one’s record is not a recognized or traditional civil right that is lost upon conviction of a felony. It is a privilege, whose availability is subject to judicial discretion, and to which the Legislature has, constitutionally, attached certain conditions. *See D.H.W.*, 686 So.2d at 1334-1335.

FDLE’s denial of the Petitioner’s application for certification of eligibility to expunge has not deprived him of a civil right, for he has no *constitutional* right of privacy in his Florida criminal history record. Article I, Section 23, of the Florida Constitution, provides in pertinent part: “This section shall not be construed to limit the public’s right of access to public records and meetings as provided by law.”

Criminal history records in Florida are, with limited exceptions such as expunction, made public by law, at Section 943.053(3), Fla. Stat.

The disclosure of a public record, as required by law, does not infringe the record subject’s privacy rights under the Florida Constitution. *See Post-Newsweek Stations, Florida Inc. v. Doe*, 612 So.2d 549, 552 (Fla. 1992): “The privacy amendment has not been interpreted to protect names and addresses contained in public records ... .” *See also Michel*

*v. Douglas*, 464 So.2d 545, 546 (Fla. 1985) (“[Article I, Section 23, Fla. Const.] does not provide a right to privacy in public records”).

Expunging a record is not a civil right, and the denial of eligibility to expunge is not a penalty. Under this Court’s view of the matter, a pardon does not restore the one, or remove the other.

**III. FDLE’s since-abandoned practice of issuing certificates of eligibility to expunge the records of pardoned convictions does not estop the State from asserting that this practice was and is in error.**

FDLE would maintain, contrary to the Petitioner, that the Executive Branch’s grasp of the law as to the effect of a pardon on eligibility to expunge a record has not changed since October 28, 1999, but rather was articulated and reemphasized by the Board of Executive Clemency as shown in the transcript of its meeting of that date (App. A). *Doe* did not vitiate the Florida Supreme Court’s previous understanding of pardons, as *Randall*, 791 So.2d at 1242, recognized, but did cause a temporary aberration or detour from the outcome logically yielded by that precedent, during which FDLE issued certificates of eligibility to persons whose convictions had been pardoned.

However, FDLE’s former action, which should now be seen as erroneous in light of *Randall* and the substantial authority it draws upon, does not estop the State from arguing that a pardon does not (and did not) automatically entitle the recipient to an expunction of the record of the pardoned conviction.

Estoppel is not applicable in this situation. *See State, Department of Revenue v. Anderson*, 403 So.2d 397, 400 (Fla. 1981): “As a general rule, equitable estoppel will be applied against the state only in rare instances and under exceptional circumstances. [Citation

omitted.] Another general rule is that the state cannot be estopped through mistaken statements of the law.”

The uncontested fact that certificates of eligibility were given to pardoned applicants *before* the Governor and Cabinet vocally objected to the practice, does not give this or any petitioner a “vested right” to insist that his or her record be deemed eligible under FDLE’s “former” interpretation of the law. *See Lewis v. State, Department of Health and Rehabilitative Services*, 659 So.2d 1255, 1257 (Fla. 4th DCA 1995): “Lewis has no vested right to retain the incorrectly paid benefits and therefore HRS should not be precluded from following its regulatory scheme to recover overpayments.”

\_\_\_\_\_The Petitioner has not shown that the Executive Branch was *ever* disposed to adhere to *Doe*’s view of “the expansive effect of a full and unconditional pardon,” 595 So.2d at 213. The State vigorously opposed this construction of a pardon in *Doe, id.*, “argu[ing] in its motion for reconsideration that a full and unconditional pardon does not remove the adjudication itself but only removes the disabilities which flow from such an adjudication.”

That, of course, is the result *Randall* reached almost 10 years later. But this was also the State’s position in 1981, as evidenced by an informal Florida Attorney General’s Opinion to the Coordinator of the Office of Executive Clemency, dated June 2, 1981, attached as Appendix C, which “conclude[d] that ... a person who has been granted a full and unconditional pardon for a conviction of a felony ... by the Governor [and] Cabinet, is required to state on an employment application form of a public employer, if requested, that he or she has been convicted of a felony.”

Opinions of the Attorney General, formal or informal, do not declare the law, but have

been pronounced “entitled to considerable weight” in construing constitutional provisions, *Chiles v. Phelps*, 714 So.2d 453, 459 (Fla. 1998). The Attorney General’s reading of the law anticipates *Randall’s*, citing many of the same precedents.

What *has* changed since 1981, to put the matter bluntly but succinctly, is not the State’s understanding of a pardon, nor (Respondent would respectfully submit) *this* Court’s jurisprudence of pardons, but the availability of intermediate appellate precedent directly on point. Prior to *Randall*, *Doe* was the only District Court of Appeal decision to squarely address the effect of a pardon on eligibility to expunge the record of the pardoned offense.

The Legislature’s supposed failure to amend the expunction and sealing statutes in the wake of *Doe* does not imply, much less establish, that the Legislature accepted or endorsed *Doe’s* conception of a pardon’s effects. *Singleton*, 21 So. at 23, cautioned “that an attempt on the part of the legislature to exercise any part of the pardoning power exclusively conferred upon [the Executive Branch] by [the state] constitution, would be in conflict with that instrument, and therefore void.”

The Legislature cannot be faulted, and should not be second-guessed, for declining to enter the fray. “Neither the legislature nor the judiciary may infringe upon the executive’s authority to grant pardons.” *Sandlin*, 531 So.2d at 1346.

In *Parole Commission v. Lockett*, 620 So.2d 153, 154-155 (Fla. 1993), the Court took pains to reiterate:

that the clemency process is derived solely from the constitution and is strictly an executive branch function, and that, consequently, the Legislature, by statute, may neither preempt nor overrule the clemency rules without violating the separation of powers doctrine expressly set forth in article II, section 3, of the Florida constitution.

\_\_\_\_\_An enactment announcing that a pardon would *not* permit expunction could be seen as an incursion upon the Court’s exclusive power to say what the law is, while a legislative mandate that FDLE issue a certificate of eligibility to *anyone* whose conviction had been pardoned, no matter what the circumstances, might well be regarded as hemming in the Governor and Cabinet’s unshared and all but unlimited power to grant pardons.

Indeed, the split of opinion between two District Courts of Appeal which now confronts this Court adequately attests to the wisdom of the Legislature’s discretion.

The Petitioner presents no grounds from which to infer that *his* pardon should be handled any differently from pardons issued after October 28, 1999, when the Governor and Cabinet formally *expressed* their intent as to a pardon’s effect on resort to expunction. That expression signaled a reaffirmation, not a revision, of the State’s previous thinking on the subject.

**IV. Both federal precedent and the decisions of other state courts are in line with this Court’s “middle ground” approach to pardons, and support *Randall’s* holding that a pardoned conviction is not eligible for expunction.**

The First DCA reviewed federal caselaw on pardons in *Randall*, 791 So.2d at 1244-1245, as did the Respondent in its Response below (R- 33, 37). As *Randall* remarked, *id.* at 1244, federal law is relevant because the Florida Supreme Court has looked to the United States Supreme Court to augment its understanding of the effect of a pardon.

The “modern view” of pardons is carefully explicated in *United States v. Noonan*, 906 F.2d 952, 955 (3d Cir. 1990), in which “[t]he centerpiece of Noonan’s argument [wa]s that a pardon ‘blots out of existence the guilt,’” for which, as one might expect, *Garland* had been cited as the principal authority.<sup>1</sup>

“[O]n the basis of long-held traditional views on the effect of a pardon,” and more recent authorities, the *Noonan* Court “conclude[d] that the Presidential pardon of 1977 does not eliminate Noonan’s 1968 conviction and does not ‘create any factual fiction’ that Noonan’s conviction had not occurred to justify expunction of his criminal court record.” *Id.* at 960.

*Noonan* was cited with approval in *In re North (George Fee Application)*, 62 F.3d 1434, 1437 (D.C. Cir. 1994), *amended at* 1994 U.S. App. LEXIS 40850 (D.C. Cir. Oct. 21, 1994) (*without changing holding, reasoning, or language quoted*), which concluded: “Because a pardon does not blot out guilt or expunge a judgment of conviction, one can conclude that a pardon does not blot out probable cause of guilt or expunge an indictment.”

These cases are of a piece with this Court’s choice of the “middle ground,” *Sandlin*, 531 So.2d at 1346-1347, “that a pardon removes punishment, but not moral guilt,” and thus that ““the events underlying the pardoned conviction may be and should be evaluated, and relied upon reasonably, by the proper public body or authority.”” This reasoning is flatly at odds with the notion that a pardon entails expunction of the recipient’s criminal history record.

Although the prerequisites and effects of expunction (or sealing) of criminal history records differ from state to state, decisions from other states evince a general tendency not to permit expunction of a conviction record on the basis of a pardon, unless statutory law so authorizes, or a pardon is (still) regarded as having the all-absolving effect ascribed to it in *Garland*.

In *Delaware v. Skinner*, 632 A. 2d 82, 85 (Del. 1993), the Delaware Supreme Court discounted the defendant’s reliance on the dictum of *Garland*: “While the pardon may have forgiven [Skinner’s] conviction, *it did not obliterate the public memory of the offense.*”

(Emphasis added.)

The Court in *Skinner*, *id.* at 85, note 5, added that it was “not dealing with a pardon granted upon grounds of innocence, which would pose an entirely different issue.” This is precisely the position of the Florida Board of Executive Clemency (Governor and Cabinet). (See App. A.)

*Illinois v. Glisson*, 69 Ill. 2d 502, 372 N.E. 2d 669, 670 (1978), quoted the Executive Clemency Rules Book issued by the Illinois Parole and Pardon Board: ““The granting of a pardon does not expunge the record. It merely provides official forgiveness, which only in recent years is noted on fingerprint transcripts.”” Further: “[I]t cannot be concluded that the simple issuance of a pardon vests the recipient with an entitlement to this expunction and return [of arrest records].” *Id.* at 670.

The Court in *Massachusetts v. Vickey*, 381 Mass. 762, 412 N.E. 2d 877 (1980), ruled that a pardon is not analogous to a dismissal of charges and does not entitle a defendant to immediate sealing. “The law of pardons has been somewhat obfuscated by the failure to differentiate a pardon for innocence from a pardon for other reasons.” 412 N.E. 2d at 881. “The truism that a pardon does not wipe out guilt has consequences for law enforcement and other public informational needs ... . The law ... has continued to support the state’s interest in making available the facts of both the conviction and the pardon.” *Id.* at 882 (citations omitted). The Court cited a series of cases adverting to a substantial governmental interest in access to the facts behind a pardoned conviction.

Under Missouri law, as reported in *Missouri v. Bachman*, 675 S.W. 2d 41, 51 (Mo. App. 1984), “the fact of conviction was obliterated and not the fact of guilt” upon receipt of a

pardon, with “[t]he net result [being] that a pardon does not order, direct, or authorize the closure of records.” *Bachman* relied upon an earlier Missouri Supreme Court decision that had “disapproved of the broad language of the *Garland* opinion.” *Id.* at 50.

The law in South Carolina, as summarized in that State’s Attorney General’s Opinion No. 80-68 (1980), subscribes to the limited view of a pardon’s efficacy: A pardon relieves a convicted person from the remaining punishment for his offense, and restores to him certain rights of citizenship; but does not establish the innocence of the person pardoned nor does it serve to obliterate the conviction record of the pardoned offense.

Two final cases in which expunction was not directly at issue should nonetheless be mentioned for their understanding of pardons as not changing history. In *Washington v. Cruz*, 139 Wash. 2d 186, 985 P. 2d 384, 390 (1999), the Dissent, in a point not in dispute, commented:

Even a pardon by the Governor does not serve to eliminate the criminal conviction: In Washington, a Governor’s unconditional pardon does not expunge the crime pardoned from the pardoned recipient’s record. [Citation omitted.] It merely forgives the crime by commuting the sentence. The rationale for this stems from the nature of the pardon itself; by a pardon, the Governor forgives the individual for the crime committed. Such forgiving implies that the guilt was established.

Although again the right to expunction was not involved, the Court in *Dean v. Skeen*, 137 W. Va. 105, 70 S.E. 2d 256, 257 (1952), “expressed the view that an unconditional pardon of a prior offense did not serve to destroy the historical effect of the conviction thereof.” The West Virginia Supreme Court of Appeals rejected what it termed “the minority view [that is] seemingly based upon the postulate that an unconditional pardon serves to wipe out all the effects of the prior convictions and makes the offender ‘a new man,’ just as though he had

never committed the crime.” *Id.* at 259.

To be sure, contrary opinions are found where the *Garland* dictum continues to hold sway, or the issue is governed by statute. See, for example: *Indiana v. Bergman*, 558 N.E. 2d 1111, 1113 (Ind. App. 1990) (Observing, however, that “Some [states, such as New York, South Carolina, Vermont, and Virginia] hold that a pardon merely acts to relieve a person of the punishment or penalty for the offense, but does not wipe out the fact of the conviction”); *Ohio v. Cope*, 111 Ohio App. 3d 309, 676 N.E. 2d 141, 142 n. 4 (1996) (Distinguishing its holding from that in *Delaware v. Skinner*, *supra*, which “took a different view of the effect of a full pardon”); *Pennsylvania v. C.S.*, 517 Pa. 89, 534 A. 2d 1053, 1054 (1987) (“A pardon without expungement is not a pardon”); *Texas Department of Public Safety v. Moran*, 949 S.W. 2d 523 (Texas App. 1997) (Statute permits expunction after pardon).

On balance, the current state of the law may well be reflected in a recent opinion, *In re Abrams*, 689 A.2d 6, 11 (D.C. App. 1997), which refers to both *Noonan* and *North* as instructive and, while criticizing *Garland*’s “blotting out” rhetoric, surmised that a Presidential pardon would not preclude bar disciplinary proceedings against an attorney convicted of a crime involving dishonesty: “We discern no basis in law, justice, or reason to challenge this overwhelming trend.”

**CONCLUSION**

This Court’s precedent, unlike *Doe*, does not induce a departure from “this overwhelming trend.” Rather the Court has aligned Florida with what appears to be the majority view: That a pardon “wipes out” punishment but not the record fact of conviction or the reality of remaining responsible for the conduct behind the conviction, which therefore should not be erased from public sight in the process of restoring those rights lost upon conviction. *Randall* simply ratifies this understanding of pardons, and applies it, correctly, to the question of eligibility to expunge. It should be affirmed by this Court.

\_\_\_\_\_ Respectfully submitted,

---

**John P. Booth**

Assistant General Counsel  
Florida Department of Law  
Enforcement  
P.O. Box 1489  
Tallahassee, Florida 32302-1489  
(850) 410-7676  
Florida Bar No. 291803

---

**William L. Camper**

General Counsel  
Florida Parole Commission  
2601 Blair Stone Road  
Building C, Room C-220  
Tallahassee, Florida 32399-2450  
(850) 488-4460  
Florida Bar No. 107390

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Sheldon Zipkin, Esq., Attorney for Petitioner, 2020 N.E. 163rd

Street, Suite 300, North Miami Beach, Florida 33162; Michael S. Drews, Esq., Amicus Curiae for Petitioner, 76 South Laura Street, Suite 1703, Jacksonville, Florida 3220; and Robert Augustus Harper, Jr., Esq., 325 West Park Avenue, Tallahassee, Florida 32301; this \_\_\_\_ day of June, 2002.

---

John P. Booth

**CERTIFICATE OF COMPLIANCE**

I HEREBY CERTIFY that this Answer Brief of Respondent Florida Department of Law Enforcement complies with the font requirements of Rule 9.210 of the Florida Rules of Appellate Procedure.

---

John P. Booth

<sup>1</sup> It should be recalled that "a federal court has the inherent power to expunge an arrest and conviction record," *Noonan*, 906 F.2d at 956, unlike the law in Florida, where expunction of nonjudicial records is controlled by statute, and is expressly precluded in the event of a conviction. If a federal appeals court decides that a pardon does not open the door to expunction, its rationale should apply with even greater force in Florida, where state law raises a statutory prohibition against expunging a conviction.