

## The Pennsylvania Mix: Forgiving and Forgetting

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- I. Forgiving in Pennsylvania Through Executive Pardon.
  - a. The Pennsylvania Board of Pardons (“Board”) is a constitutionally created gatekeeper for the Governor.
    - i. The Governor may grant a pardon (or commutation) “[i]n all criminal cases except impeachment,” but only “on the recommendation in writing of a majority of the [Board], and, in the case of a sentence of death or life imprisonment, on the unanimous recommendation” of the [Board].” Pa. Const. art IV, § 9(a).
  - b. The Board is comprised of the Lieutenant Governor (Chair), the Attorney General, and three Senate-confirmed Gubernatorial appointees (a crime victim, a corrections expert and a doctor of medicine, psychiatrist or psychologist). Pa. Const. art IV, § 9(b).
  - c. Working through the Board’s process:
    - i. Applicant pays fees (application, filing, criminal record, driving record). The Board rarely waives its fees for non-incarcerated applications, although it is possible.<sup>2</sup>
    - ii. Applicant submits application, including detailed information about the conviction and *why* a pardon is appropriate.
    - iii. Agent of Pennsylvania Board of Probation and Parole interviews applicant.<sup>3</sup>
    - iv. Board conducts a merit review of the application. It meets four times per year for this purpose. If the applicant is serving a life sentence or a sentence for a crime of violence, three positive votes are needed to move to a public hearing. Otherwise, only two positive votes are needed.<sup>4</sup> An insufficient number of positive votes means that the application is denied and may not generally be refiled for at least one year.<sup>5</sup>

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<sup>2</sup> COMMUNITY LEGAL SERVICES OF PHILADELPHIA, ERASING YOUR CRIMINAL RECORD: HOW TO APPLY FOR A PARDON IN PENNSYLVANIA 2 (June 2013), available at <https://clsphila.org/sites/default/files/get-help/Pardon%20Guide%20NEW.pdf>.

<sup>3</sup> In certain serious cases, including life and death sentences, “each member of the Board will interview the applicant prior to the public hearing.” 37 Pa. Code §81.232.

<sup>4</sup> 37 Pa. Code §81.231(a). All capital cases automatically receive a public hearing. *Id.*, at §81.231(b).

<sup>5</sup> 37 Pa. Code §81.223(a).

- v. Board holds public hearing in the courtroom of the Pennsylvania Supreme Court for those applicants who received the necessary votes during the merit review process. Applicants who are not incarcerated are expected to appear in person and others may speak to support or oppose the application. An insufficient number of positive votes means that the application is denied and may not be refiled for at least one year.
- vi. Board sends positive recommendation and reasons to the Governor, who may then grant or deny the application.<sup>6</sup>
- d. The consequences of a Gubernatorial pardon.
  - i. Rights are restored, including right to serve on a jury and possess a firearm.
  - ii. Expungement of pardoned offenses.
- e. Forgiving by the numbers.
  - i. Timing - The entire Board process takes about three years.<sup>7</sup>
  - ii. Volume.<sup>8</sup> In 2016, the Board:
    - a. Received 521 applications.
    - b. Conducted a merit review of 502 applications.
    - c. Declined to move forward on 78 applications after a merit review, thus denying those applications.<sup>9</sup>
    - d. Held public hearings on 363 applications.
    - e. Recommended a pardon for 287 applicants.
  - iii. Gubernatorial action or inaction.<sup>10</sup> In 2016, the Governor granted 78 pardons and denied no applications.<sup>11</sup>

## II. Forgetting in Pennsylvania Through Expungement.

- a. Complete official forgetting – records destroyed<sup>12</sup> – for a narrow class of convictions, all non-conviction records, juvenile adjudications, and completed diversionary sentences.

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<sup>6</sup> Pa. Const. art IV, § 9(b).

<sup>7</sup> See Frequently Asked Questions, Pennsylvania Board of Pardons, <http://www.bop.pa.gov/application-process/Pages/Frequently-Asked-Questions.aspx#.Vw1dcqQrKCo>.

<sup>8</sup> <http://www.bop.pa.gov/Statistics/Pages/Statistics-by-Year.aspx>.

<sup>9</sup> It therefore appears that the Board did not resolve the merit review process for 61 applications in 2016.

<sup>10</sup> This number is on the low side for grants in recent years, and may reflect backlogs in the governor's office. See, e.g., <http://restoration.ccresourcecenter.org/#pa> ("Process regular and about 100-150 pardons per year (fewer under present governor)").

<sup>11</sup> <http://www.bop.pa.gov/Statistics/Pages/Statistics-by-Year.aspx>.

<sup>12</sup> See, e.g., 18 Pa. Cons. Stat. §9102(1) ("To remove information so that there is no trace or indication that such information existed.").

- b. Judicial process, discretionary or mandatory depending on the offense and situation, is required for expungement.<sup>13</sup>

III. Forgetting in Pennsylvania Through Limited Access Orders.

- a. More limited form of forgetting in a broader – yet still small – set of situations than expungement.<sup>14</sup>
- b. Lower-level misdemeanors with a 10-year waiting period and many exclusions and restrictions.
- c. These “records [are] not available to public, private employers, or landlords, but remain available to licensing agencies and other state and criminal justice agencies.”<sup>15</sup>

IV. The Future of Forgetting in Pennsylvania?

- a. Proposed Clean Slate bill.<sup>16</sup>
- b. Automated limited access mechanism for a broader array offenses than currently covered.<sup>17</sup>
- c. Among other things, it would expand limitation on use to state licensing agencies except the Supreme Court.

V. What to Make of It All?

- a. Is it better to forgive or to forget?
- b. Is forgetting making it easier to forgive?
- c. Is forgetting making it easier *not* to forgive?
- d. Is forgetting better than nothing?

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<sup>13</sup> See, e.g., <http://restoration.ccresourcecenter.org/#pa>.

<sup>14</sup> See generally Sharon M. Dietrich, *From Expungement to Sealing of Records in Pennsylvania*, PA BAR ASSOC. Q. 161 (Oct. 2016).

<sup>15</sup> COLLATERAL CONSEQUENCES RESOURCE CENTER, FORGIVING AND FORGETTING IN AMERICAN JUSTICE: A 50-STATE GUIDE TO EXPUNGEMENT AND RESTORATION OF RIGHTS 58 (October 2017), available at <http://ccresourcecenter.org/wp-content/uploads/2017/10/Forgiving-Forgetting-Report-CCRC-Oct-17.pdf>.

<sup>16</sup> See, e.g., Maura Ewing, *Simplifying How the Courts Seal Criminal Records*, The Atlantic (April 6, 2017) (quoting Sharon Dietrich of Community Legal Services of Philadelphia supporting the act and describing it as “a mind-boggling reform.”), available at <https://www.theatlantic.com/politics/archive/2017/04/simplifying-how-the-courts-seal-criminal-records/521964/>.

<sup>17</sup> Pennsylvania Senate Bill 529, available at <http://www.legis.state.pa.us/cfdocs/billInfo/billInfo.cfm?sYear=2017&sInd=0&body=S&type=B&bn=0529>.