

SYLLABUS

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In re Petition for Expungement of the Criminal Record Belonging to T.O. **(A-55-19) (084009)**

Argued October 26, 2020 -- Decided January 11, 2021

RABNER, C.J., writing for the Court.

In this case, the Court considers the effect of a gubernatorial pardon on a request to expunge a criminal record.

T.O. has two prior convictions: aggravated assault, from May 1994, and possession of a controlled dangerous substance within 1,000 feet of school property, from May 1996. Since his release from prison more than two decades ago, T.O. has not been arrested and has led a productive life. From 2001 to 2016, he worked for a private corrections company, where he rose from an entry-level employee to supervisor of operations. T.O. also volunteered at a homeless shelter and started a nonprofit group that feeds the homeless.

In October 2017, T.O. filed a petition for executive clemency. In January 2018, then-Governor Christopher J. Christie granted T.O. “a full and free Pardon for all criminal charges and convictions arising” out of his two prior arrests and convictions. In June 2018, T.O. filed a petition to expunge all records related to the convictions.

The State opposed T.O.’s petition and argued that N.J.S.A. 2C:52-2(a) barred expungement for individuals with multiple convictions. Aside from the State’s reading of the expungement statute, the prosecutor conceded that “[i]f there is a person deserving of an expungement . . . , it is [T.O.]” The trial court agreed on both points: the court concluded that T.O.’s petition was subject to the statutory bar, which the pardon did not wipe out. Had the statute read otherwise, the court observed, T.O. “would have qualified” for expungement. The Appellate Division affirmed, and the Court granted T.O.’s petition for certification. 241 N.J. 199 (2020).

HELD: Pardons remove legal disabilities linked to the conviction itself but do not erase the underlying facts of an offense. Here, T.O. faced a statutory bar that prevented him from being eligible for expungement. That legal disability came into play solely because of his prior convictions. The pardon -- which removed the legal disabilities that arose from those convictions -- therefore dissolved the statutory bar. With the bar removed,

T.O. is eligible to be considered for expungement on the merits. In light of the State's concession and the trial court's agreement that T.O. would qualify for expungement in the absence of a statutory bar, the Court grants T.O.'s petition for expungement.

1. In New Jersey, expungement is provided for by a statutory scheme "with the primary objective of providing relief to the reformed offender who has led a life of rectitude and disassociated himself with unlawful activity." N.J.S.A. 2C:52-32. Not all convicted individuals, however, are eligible for expungement. Among other restrictions at the time T.O. filed his petition, the expungement statute provided, in part, that "a person may present an expungement application . . . if: the person has been convicted of one crime under the laws of this State, and does not otherwise have any prior or subsequent conviction for another crime." N.J.S.A. 2C:52-2(a) (2018) (emphasis added). The parties do not rely on later amendments to the statute that enable a person with multiple convictions to seek expungement of the latest conviction. (pp. 9-11)

2. Individuals who apply for expungement have an initial burden to satisfy the requirements of the expungement statute by a preponderance of the evidence. Once petitioners satisfy their burden, the burden shifts to the State to demonstrate by a preponderance of the evidence that there is a statutory bar or that the petition should not be granted. N.J.S.A. 2C:52-14 outlines grounds for the denial of an expungement petition. If the State does not meet its burden, the petitioner is presumptively entitled to expungement. The expungement statute has been amended over time to expand opportunities for expungement. Despite multiple amendments to the statutory scheme, the expungement law is silent about the effect of a pardon. (pp. 11-14)

3. The Court reviews cases dating back to the 1800s in which the United States Supreme Court interpreted the presidential pardon power granted by the Federal Constitution, as well as an influential article by Professor Williston. The New Jersey Constitution also empowers the Executive to grant pardons. The Court reviews key cases exploring the nature of the gubernatorial pardon power under the State Constitution and notes that those decisions have held -- in accordance with the predominant reasoning set forth in Supreme Court case law and Williston's formulation -- that a pardon (1) forgives the crime and removes the legal disabilities linked to the fact of the conviction itself, but (2) does not erase the underlying facts of the offense or restore an individual's good moral character. (pp. 14-22)

4. One published Law Division ruling addressed the effect of a pardon on an application for expungement. See In re L.B., 369 N.J. Super. 354, 367 (Law Div. 2004). After reviewing case law and citing Professor Williston's formulation, id. at 361-66, the court observed that "[i]t is not bad character evidenced by commission of the crime but the fact of conviction for possession with intent to sell that makes one ineligible for expungement under the statute," id. at 367. In other words, "[t]he legal disability provided in [the statute] arises solely from the fact of conviction." Ibid. Judge Ashrafi concluded that

“[t]he pardon, then, dissolves the attendant legal disability arising from the conviction” -- and thus extinguishes the statutory bar. Ibid. (pp. 22-23)

5. The Court reviews case law from other jurisdictions and notes that they have reached varying conclusions about the effect of a pardon on a petition for expungement. The Court also notes that statutes in more than a dozen states explicitly provide, in different ways, that receipt of a pardon makes a conviction eligible for expungement or some other method to restrict public access to the records. (pp. 24-25)

6. Under the version of N.J.S.A. 2C:52-2(a) in effect when the trial court denied T.O.’s petition, someone who had multiple criminal convictions -- not listed in a single judgment of conviction or committed as part of a series of events in a short period of time -- was ineligible for expungement. Although T.O.’s pardon did not erase the facts underlying the commission of the offenses, it eliminated disabilities triggered by the convictions themselves. Here, the statutory bar to expungement under section 2(a) arose solely from T.O.’s two convictions. In light of the pardon, that disqualification -- or disability -- no longer exists. T.O. is therefore eligible for expungement of both of his convictions. (pp. 26-27)

7. That does not mean expungement is automatic, however. Under the statutory scheme, once T.O. has satisfied the law’s initial requirements, the burden shifts to the State to demonstrate by a preponderance of the evidence why his petition should not be granted. For example, the State may attempt to show that “[t]he need for the availability of the records outweighs the desirability of having a person freed from” limitations the expungement statute provides. See N.J.S.A. 2C:52-14(b); see also N.J.S.A. 2C:52-14 (listing other grounds for denial of relief). Section 14(b) calls for a qualitative assessment of the public and private interests at stake, which does not turn on the fact of a conviction. Relevant grounds could include, among other things, the circumstances of a particular offense, details about what the applicant did, and the harm the person caused. Such case-specific facts are not wiped clean by a pardon. (pp. 27-28)

8. In this case, nothing in the record demonstrates the need for the continued availability of T.O.’s records. See N.J.S.A. 2C:52-14(b). The State presented no argument against expungement other than the statutory bar for multiple convictions. In fact, at the hearing in the trial court, the State conceded that T.O. was deserving of expungement, an assessment shared by the trial court. Accordingly, T.O. is entitled to expungement of criminal records related to his 1994 and 1996 convictions. (p. 29)

The judgment of the Appellate Division is REVERSED, T.O.’s petition is GRANTED, and the matter is REMANDED to the trial court.

JUSTICES LaVECCHIA, ALBIN, PATTERSON, FERNANDEZ-VINA, SOLOMON, and PIERRE-LOUIS join in CHIEF JUSTICE RABNER’s opinion.

SUPREME COURT OF NEW JERSEY

A-55 September Term 2019

084009

In re Petition for Expungement of the
Criminal Record Belonging to T.O.

On certification to the Superior Court,
Appellate Division.

Argued
October 26, 2020

Decided
January 11, 2021

Jennifer A. Hradil argued the cause for appellant T.O. (Gibbons, attorneys; Jennifer A. Hradil and William J. Palatucci, of counsel and on the briefs, and Brendan J. Kelly, on the briefs).

Erin M. Campbell, Assistant Prosecutor, argued the cause for respondent State of New Jersey (Esther Suarez, Hudson County Prosecutor, attorney; Erin M. Campbell, on the briefs).

Guillermo C. Artiles argued the cause for amici curiae the Honorable Christopher J. Christie, Honorable Jon S. Corzine, Honorable Richard J. Codey, Honorable James E. McGreevey, Honorable John O. Bennett, Honorable Donald T. DiFrancesco, Honorable Christine Todd Whitman, Honorable James J. Florio, and Honorable Thomas H. Kean, Sr. (McCarter & English, attorneys; Guillermo C. Artiles and Geoffrey Rosamond, of counsel and on the brief, and Omar A. Barentto and Newton Portorreal, Jr., on the brief).

Tess Borden argued the cause for amici curiae American Civil Liberties Union of New Jersey, New Jersey Institute for Social Justice, and Volunteer

Lawyers for Justice (American Civil Liberties Union of New Jersey Foundation, attorneys; Tess Borden, Alexander Shalom, and Jeanne LoCicero, on the brief).

CHIEF JUSTICE RABNER delivered the opinion of the Court.

In this case, we consider the effect of a gubernatorial pardon on a request to expunge a criminal record.

T.O. was convicted of separate crimes in 1994 and 1996. In the decades since, he has been gainfully employed, has made contributions to the community, and has successfully rehabilitated himself. In 2018, the Governor granted T.O. a full and complete pardon for his two convictions.

T.O. then sought to expunge the records of those convictions. Both the trial court and the Appellate Division concluded that he was ineligible for relief because the language of the relevant statutory section at the time, N.J.S.A. 2C:52-2(a), did not allow individuals with multiple, separate convictions like T.O.'s to apply for expungement.

Pardons have consequences under the law. They remove legal disabilities linked to the conviction itself but do not erase the underlying facts of an offense. Storcella v. Dep't of Treasury, 296 N.J. Super. 238, 243-44 (App. Div. 1997); Hozer v. Dep't of Treasury, 95 N.J. Super. 196, 202 (App. Div. 1967). A pardon, therefore, forgives punishment for an offense and

removes other disabilities but does not change history or restore a person's good moral character. Ibid.

Here, T.O. faced a statutory bar that prevented him from being eligible for expungement. That legal disability came into play solely because of his prior convictions. The pardon -- which removed the legal disabilities that arose from those convictions -- therefore dissolved the statutory bar. With the bar removed, T.O. is eligible to be considered for expungement on the merits.

The State concedes that T.O. otherwise deserves to have his record expunged. We therefore reverse the judgment of the Appellate Division and grant T.O.'s petition for expungement.

I.

A.

T.O. has two prior convictions. In May 1994, he pleaded guilty to aggravated assault, in violation of N.J.S.A. 2C:12-1(b)(1). Two years later, in May 1996, he pleaded guilty to possession of a controlled dangerous substance within 1,000 feet of school property, in violation of N.J.S.A. 2C:35-7.

Since his release from prison more than two decades ago, T.O. has not been arrested and has led a productive life. From 2001 to 2016, he worked for a private corrections company that operated residential reentry facilities, jails, and drug treatment programs. He rose from an entry-level employee to

supervisor of operations. T.O. also volunteered at a homeless shelter and started a nonprofit group that partners with homeless shelters and other community organizations to feed the homeless.

On October 6, 2017, T.O. filed a petition for executive clemency and sought a pardon. More than twenty co-workers, family members, friends, and fellow volunteers at nonprofit groups wrote letters of recommendation in support of T.O.

On January 12, 2018, then-Governor Christopher J. Christie granted T.O. “a full and free Pardon for all criminal charges and convictions arising” out of his two prior arrests and convictions. Months later, in June 2018, T.O. filed a petition in Superior Court to expunge all records related to the convictions.

B.

The State opposed T.O.’s petition and argued that the expungement statute, specifically N.J.S.A. 2C:52-2(a), barred expungement for individuals with multiple convictions. According to the State, a gubernatorial pardon did not nullify the statutory bar. At the same time, the State acknowledged “the total change in [T.O.’s] life and that he’s been living a productive, law-abiding life since the 90s.” Aside from the State’s reading of the expungement statute, the prosecutor conceded that “[i]f there is a person deserving of an expungement . . . , it is [T.O.]”

The trial court agreed with the State on both points. In an oral ruling on February 15, 2019, the court concluded that T.O.’s petition was subject to the statutory bar, which the pardon did not wipe out. Had the statute read otherwise, the court observed, T.O. “would have qualified” for expungement. The judge acknowledged T.O.’s “sober, offense-free life for 23 years,” stated “I wish I could grant him his application,” and encouraged T.O. to file an appeal.

C.

T.O. did appeal, and on December 30, 2019, the Appellate Division affirmed the denial of his petition for expungement. Like the trial court, the Appellate Division concluded that, despite T.O.’s pardon, the plain language of the expungement statute barred his petition because he had more than one conviction.

The appellate court observed that “expungement is not a right guaranteed by constitutional or common law; it is purely the product of legislation,” which limits courts “to the terms of the statute.” By comparison, the court explained, “a pardon is a matter of executive grace” that does not erase the conduct that led to a conviction or all of the consequences of a conviction. The Appellate Division noted that, despite various amendments to the expungement statute, the Legislature had not altered the language that

barred expungements for multiple offenses, aside from certain situations that did not apply. See N.J.S.A. 2C:52-2(a).

D.

We granted T.O.'s petition for certification. 241 N.J. 199 (2020). We also granted two requests for leave to appear as amici curiae: the first, to former Governors Christopher J. Christie, Jon S. Corzine, Richard J. Codey, James E. McGreevey, John O. Bennett, Donald T. DiFrancesco, Christine Todd Whitman, James J. Florio, and Thomas H. Kean, Sr. (the Former Governors); and the second, to the American Civil Liberties Union of New Jersey (ACLU), New Jersey Institute for Social Justice (NJISJ), and Volunteer Lawyers for Justice (VLJ).

II.

T.O. argues that the State Constitution grants the Executive the exclusive authority to issue a pardon, citing N.J. Const. art. V, § 2, ¶ 1, and that the reach of a pardon may not be diminished or frustrated by an act of the Legislature. As a result, T.O. contends, the Appellate Division's interpretation of the expungement law unconstitutionally interferes with the Executive's pardon power and violates the doctrine of separation of powers.

T.O. submits that a pardon eliminates any disqualification triggered by the fact of a conviction. Because the legal disability in this case arises solely

from the fact that he was convicted multiple times, T.O. maintains he is eligible to be considered for expungement.

T.O. also argues that interpreting the expungement statute to afford a pardon its full effect is consistent with the Legislature's intent to provide relief to reformed offenders, citing N.J.S.A. 2C:52-32.

The ACLU, NJISJ, and VLJ advance similar arguments in support of T.O.'s petition. They likewise argue that N.J.S.A. 2C:52-2(a) does not bar an application for expungement of multiple pardoned convictions and that the constitutional pardon power should not be interpreted restrictively.

The organizations emphasize that amendments to the expungement law have steadily expanded the statute's reach, including amendments in 2019 that allow individuals with multiple convictions to seek to expunge their latest conviction. Amici argue that any ambiguity or silence in the law about the effect of a pardon on expungement should therefore be read in favor of expungement.

Amici also highlight benefits of expungement like greater access to employment and housing, and lower recidivism rates. Finally, they note that more than twenty states provide that a pardon makes the recipient eligible for expungement by statute or case law.

The Former Governors raise similar concerns. They assert that the power to pardon belongs exclusively to the Governor, that it is not subject to limitation by the Legislature or judicial review, and that it dissolves all legal disabilities arising from a pardoned conviction. The Former Governors submit the pardon power must be given full effect to avoid separation of powers concerns. They also argue that the analysis set forth in In re L.B., 369 N.J. Super. 354 (Law Div. 2004), should be adopted.

In short, the Former Governors claim that full vindication of the Executive's powers requires that T.O. not be precluded from seeking expungement. At oral argument, counsel for the Former Governors argued more broadly that a pardon should automatically result in expungement of a criminal conviction.

The State contends that T.O.'s pardon does not make him eligible for expungement. The State also asserts that a gubernatorial pardon may not interfere with the Legislature's statutory scheme for expungement.

More specifically, the State argues that a pardon has no effect on T.O.'s eligibility for expungement because he remains convicted of two crimes. The State adds that no legislative intent exists to expunge multiple indictable convictions. Despite periodic amendments to the expungement statute, the

State notes, “the Legislature has not seen fit to include pardons in the statute” or allow for expungement of multiple indictable convictions.

The State also contends that the majority of jurisdictions have held “that a pardon . . . does not remove the adjudication of guilt.”

III.

To assess the effect of a gubernatorial pardon on a petition for expungement, we begin with an overview of the expungement statute and then outline certain principles relating to pardons.

A.

Expungement of a criminal conviction “offers a second chance to rehabilitated offenders who have made a commitment to lead law-abiding lives.” In re T.B., 236 N.J. 262, 267 (2019). In New Jersey, expungement is provided for by statute, N.J.S.A. 2C:52-1 to -32.1. As the Legislature explained, the statutory scheme

shall be construed with the primary objective of providing relief to the reformed offender who has led a life of rectitude and disassociated himself with unlawful activity, but not to create a system whereby persistent violators of the law or those who associate themselves with continuing criminal activity have a regular means of expunging their police and criminal records.

[N.J.S.A. 2C:52-32.]

Not all convicted individuals, however, are eligible for expungement. The statute sets forth various restrictions. See, e.g., N.J.S.A. 2C:52-2(a) to (c). Among other restrictions at the time T.O. filed his petition in 2018, the expungement statute provided, in part, that “a person may present an expungement application to the Superior Court pursuant to this section if: the person has been convicted of one crime under the laws of this State, and does not otherwise have any prior or subsequent conviction for another crime.” N.J.S.A. 2C:52-2(a) (2018) (emphasis added).

In December 2019, the Legislature amended the highlighted language. L. 2019, c. 269, § 2. In addition to other changes, the statute will no longer include a bar on expungement for individuals with multiple convictions. The amended text of N.J.S.A. 2C:52-2(a) will instead allow people with multiple convictions to apply for expungement of their latest conviction.

The amended language in section 2(a) reads, in part, that “a person may present an expungement application to the Superior Court pursuant to this section if: the person has been convicted of one crime under the laws of this State, and does not otherwise have any subsequent conviction for another crime.” L. 2019, c. 269, § 2 (emphasis added). By removing the words “any prior,” the Legislature opened the door to applicants who had previously been ineligible for expungement because of an earlier conviction.

The parties largely do not address the effect of the recent changes to section 2(a) and do not rely on them. Nor do the parties address the operative date of the amended language. Compare L. 2019, c. 269, § 2 (eff. June 15, 2020), with Exec. Order No. 178, 52 N.J.R. 1704(a) (Aug. 14, 2020) (delaying the effective date of certain amendments to the expungement statute, including changes to N.J.S.A. 2C:52-2(a), from June 15, 2020 to February 15, 2021, because of the COVID-19 pandemic).

Individuals who apply for expungement have an initial burden to satisfy the requirements of the expungement statute by a preponderance of the evidence. In re D.H., 204 N.J. 7, 18 (2010). Petitioners must present a verified petition and certain accompanying statements. See generally N.J.S.A. 2C:52-7 to -8.

Once petitioners satisfy their burden, the burden “shifts to the State to ‘demonstrat[e] by a preponderance of the evidence that there is a statutory bar or that the petition should not be granted.’” D.H., 204 N.J. at 18 (quoting In re G.R., 395 N.J. Super. 428, 431 (App. Div. 2007)). The State, for example, is obligated to present any facts that may bar relief or demonstrate why relief would be inappropriate. N.J.S.A. 2C:52-24.

Section 14 of the statute outlines grounds for the denial of an expungement petition. N.J.S.A. 2C:52-14. Those grounds include the

following: if “[a]ny statutory prerequisite . . . is not fulfilled or there is any other statutory basis for denying relief,” id. at (a); and if “[t]he need for the availability of the records outweighs the desirability of having a person freed from any disabilities as otherwise provided in” the statute, id. at (b).¹ If the State does not meet its burden, the petitioner is presumptively entitled to expungement. D.H., 204 N.J. at 18.

If a court grants expungement, “the arrest, conviction and any other proceedings related thereto shall be deemed not to have occurred, and the petitioner may answer any questions relating to their occurrence accordingly.” N.J.S.A. 2C:52-27. Nonetheless, a person whose record has been expunged must still reveal information in expunged records if he or she seeks employment with the Judiciary, law enforcement, or a corrections agency. N.J.S.A. 2C:52-27(c); see also Cicchetti v. Morris Cnty. Sheriff’s Off., 194 N.J. 563, 584-85 (2008) (noting that although section 27(c) requires disclosure, it does not impose an absolute bar to employment).

Expunged records -- including complaints, warrants, arrests, judicial docket records, and related items -- are extracted and isolated but not

¹ Other grounds for denial include (1) pending civil litigation related to the arrest or conviction sought to be expunged, N.J.S.A. 2C:52-14(d); and (2) certain situations in which the person had a prior conviction expunged, id. at (e).

destroyed. N.J.S.A. 2C:52-1, -15; In re Kollman, 210 N.J. 557, 568-69 (2012).

The records remain available to courts, county prosecutors, probation and pretrial services, and the Attorney General for use in connection with bail hearings, decisions on pretrial release, presentence reports, and sentencing.

N.J.S.A. 2C:52-21. They also remain available to the Parole Board to assess parole requests, N.J.S.A. 2C:52-22, and to the Department of Corrections to classify and assign inmates, N.J.S.A. 2C:52-23.

The expungement statute has been amended over time to expand opportunities for expungement. See, e.g., In re J.S., 223 N.J. 54, 66-71 (2015) (recounting amendments from the statute’s enactment in 1931 through 2010).

In 2010, the Legislature expanded the types of crimes that can be expunged and reduced the wait time to apply if expungement is in the public interest.

Kollman, 210 N.J. at 570-72. In 2017, the Legislature relaxed the requirement that an applicant have only one conviction and allowed expungement for multiple convictions that were listed in a single judgment or were otherwise “interdependent or closely related . . . and were committed as part of a sequence of events within a comparatively short period of time.” N.J.S.A. 2C:52-2(a) (as amended by L. 2017, c. 244, § 1 (eff. Oct. 1, 2018)).

The Legislature amended the statute once again in December 2019. L. 2019, c. 269. In addition to the removal of the words “any prior” from section

2(a), discussed above, the amendment will allow people to apply for a “clean slate” expungement. Id. § 7 (codified at N.J.S.A. 2C:52-5.3). Under that new provision, individuals can seek to expunge multiple convictions after a period of ten years from their most recent conviction. Ibid.² Among other changes, the recent amendment also requires the State to establish an automated process for “clean slate” expungements. Id. § 8 (to be codified at N.J.S.A. 2C:52-5.4).

Despite multiple amendments to the statutory scheme, the expungement law is silent about the effect of a pardon.

B.

Although the outcome of this appeal turns on state law, federal law dating back to the 1800s informs the modern understanding of the meaning and effect of a pardon. For that reason, we briefly review certain federal cases and relevant commentary before turning to state law.

1.

The Federal Constitution provides the President the “Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.” U.S. Const. art. II, § 2, cl. 1.

² The parties do not rely on this amendment, whose operative date also appears to be affected by Executive Order No. 178. See 52 N.J.R. 1704(a) (delaying the amendment’s effective date until February 15, 2021).

The Supreme Court first addressed the pardon power in United States v. Wilson, 32 U.S. 150 (1833). In an opinion by Chief Justice John Marshall, the Court stated that “[a] pardon is an act of grace . . . which exempts the individual, on whom it is bestowed, from the punishment the law inflicts for a crime he has committed.” Id. at 160. Two decades later, in Ex parte Wells, the Court noted that the President’s power to pardon was based on, and should be given the same meaning as, the King of England’s power at the time the Constitution was drafted. 59 U.S. 307, 311 (1856). The Court therefore recounted that “[a] pardon is said by Lord Coke to be a work of mercy, whereby the king . . . forgiveth any crime, offence, punishment, execution, right, title, debt, or duty, temporal or ecclesiastical.” Ibid.

The Court used more expansive language in Ex parte Garland to describe the effect of a pardon. 71 U.S. 333 (1867). The Court stated that

[a] pardon reaches both the punishment prescribed for the offence and the guilt of the offender; and when the pardon is full, 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 offence. If granted before conviction, it prevents any of the penalties and disabilities consequent upon conviction from attaching; if granted after conviction, it removes the penalties and disabilities, and restores him to all his civil rights; it makes him, as it were, a new man, and gives him a new credit and capacity.

[Id. at 380-81.]

But after explaining the concept of a pardon in broad, general terms, the Court focused on Garland's pardon in particular and granted him relief: "The effect of this pardon is to relieve the petitioner from all penalties and disabilities attached to [his] offence So far as that offence is concerned, he is thus placed beyond the reach of punishment of any kind." Id. at 381. The Court's focus on the infliction of punishment for conduct that had been pardoned was consistent with its earlier approach in Wilson. See ibid.

Cases after Garland limited the notion that a pardon blots out an earlier offense. In Knote v. United States, for example, the Court reiterated that "[a] pardon is an act of grace" that releases an offender "from the consequences of his offence, so far as . . . practicable," and "from all disabilities imposed by the offence." 95 U.S. 149, 153 (1877). Using less expansive language than it did in Garland, the Court added that a pardon "so far blots out the offence, that afterwards it cannot be imputed to him to prevent the assertion of his legal rights." Ibid. A pardon, however, "does not make amends for the past," "affords no relief for" past imprisonment or punishment, and "does not give compensation for what has been done or suffered." Id. at 153-54. As a result, the Court concluded that a pardoned landowner could not recover the proceeds of the sale of seized property. Id. at 152, 154.

In Burdick v. United States, the Court again moved away from the broad conception of a pardon announced in Garland. 236 U.S. 79 (1915). The Court reaffirmed the principles in Wilson and noted that a pardon “remits punishment.” Id. at 91, 95. More pointedly, the Court explained that a pardon “carries an imputation of guilt; acceptance a confession of it.” Id. at 94; see In re North, 62 F.3d 1434, 1437 (D.C. Cir. 1994) (“Garland’s dictum was implicitly rejected in Burdick”); United States v. Noonan, 906 F.2d 952, 958 (3d Cir. 1990) (“By 1915 . . . the Court made clear that it was not accepting the Garland dictum that a pardon ‘blots out of existence the guilt.’”).

Decades later, the Court observed in Nixon v. United States that “the granting of a pardon is in no sense an overturning of a judgment of conviction by some other tribunal; it is ‘an executive action that mitigates or sets aside punishment for a crime.’” 506 U.S. 224, 232 (1993) (quoting Black’s Law Dictionary 1113 (6th ed. 1990)).

An influential article by Professor Samuel Williston in 1915 distilled the following principles about the effect of a pardon:

The true line of distinction seems to be this: The pardon removes all legal punishment for the offence. Therefore if the mere conviction involves certain disqualifications which would not follow from the commission of the crime without conviction, the pardon removes such disqualifications. On the other hand, if character is a necessary qualification and the

commission of a crime would disqualify even though there had been no criminal prosecution for the crime, the fact that the criminal has been convicted and pardoned does not make him any more eligible.

[Samuel Williston, Does A Pardon Blot Out Guilt?, 28 Harv. L. Rev. 647, 653 (1915).]

In other words, although a pardon eliminates the legal consequences that stem from a conviction, the moral consequences of the offense live on.

2.

The New Jersey Constitution also empowers the Executive to grant pardons. Our focus is on the 1947 Constitution and case law that interprets it.

We note preliminarily that the Constitutions of 1776 and 1844 also included the power to pardon. See N.J. Const. of 1776 art. IX (conferring the power on the Governor and Legislative Council); N.J. Const. of 1844 art. V, ¶ 10 (conferring the power on the Governor, Chancellor, and a majority of the Judges of the Court of Errors and Appeals).

One decision from 1857 addressed the scope of the pardon power. In Cook v. Board of Chosen Freeholders, the Supreme Court³ determined that a “pardon does not restore” what a convicted party “has already endured or

³ The Supreme Court was an intermediate appellate court prior to the 1948 Constitution. Sun Life Assurance Co. of Can. v. Wells Fargo Bank, N.A., 238 N.J. 157, 166 n.2 (2019). “[I]ts rulings were subject to review by the Court of Errors and Appeals, the State’s highest court at the time.” Ibid.

paid,” “but it releases him from all further penalty.” 26 N.J.L. 326, 329 (Sup. Ct. 1857). In terms reminiscent of Garland, the court explained that “[t]he effect of a pardon subsequent to the conviction is to make the offender a new man, and to acquit him of all penalties and forfeitures annexed to the offense for which he obtains his pardon.” Ibid. But the court did not equate the creation of “a new man” with innocence, or an obliteration of guilt. Instead, the court stated that innocence

is not, in practice, the ground upon which pardons are or ought to be based, nor is it the ground upon which the pardoning power in a government is created and sustained. Pardon implies guilt. If there be no guilt there is no ground for forgiveness. It is an appeal to executive clemency. It is asked as a matter of favor to the guilty. It is granted not of right but of grace. A party is acquitted on the ground of innocence, he is pardoned through favor.

[Id. at 331.]

A pardon, the court therefore concluded, “operates prospectively only” and does not entitle one to restitution of a fine that has already been paid. Id. at 334.

It appears, then, that Cook treated the pardon power conferred by the 1844 Constitution not as a retroactive “blotting out” of past guilt, but as a forward-looking determination that no further legal consequences should flow from a conviction that has been pardoned.

Article V, Section 2, Paragraph 1 of New Jersey’s modern Constitution provides that “[t]he Governor may grant pardons and reprieves in all cases other than impeachment and treason, and may suspend and remit fines and forfeitures.” This power to pardon lies exclusively with the Executive, and the decision to pardon is not subject to judicial review. See State v. Mangino, 17 N.J. Super. 587, 591 (App. Div. 1952) (declining to review an act of “executive clemency” -- which includes the power to pardon and to commute a sentence, see Black’s Law Dictionary, 318 (11th ed. 2019)); Brezizecki v. Gregorio, 246 N.J. Super. 634, 644 (Law Div. 1990).

“A pardon relieves the guilty person from the burden of the crimes forgiven so that the legal disabilities attendant upon the convictions are removed.” Storcella, 296 N.J. Super. at 243 (emphasis added). “[B]ut not all consequences of the conviction are erased by the pardon.” Id. at 244. As the Appellate Division explained in Hozer,

[w]hile a pardon may restore to a convicted felon his rights of citizenship and remove all penalties and legal disabilities, it cannot and does not substitute a good reputation for one that is bad; it does not obliterate the fact of the commission of the crime; it does not wash out the moral stain; it involves forgiveness and not forgetfulness and it does not wipe the slate clean.

[95 N.J. Super. at 202 (quotation omitted).]

Despite a pardon, then, the Appellate Division has held that a person can be denied a license as a lottery agent because of past criminal activity -- like conducting a bookmaking operation -- which reflects on the applicant's moral character and the integrity of the State Lottery. Storcella, 296 N.J. Super. at 243-44 (citing N.J.A.C. 17:20-5.1). Likewise, the Appellate Division has held that a police officer who unlawfully protects a bookmaking operation and receives a pardon can be denied a pension because he did not serve honorably, as the applicable statute requires. Hozer, 95 N.J. Super. at 204 (citing N.J.S.A. 43:16-1).

Consistent with those rulings, a county court held that a pardoned conviction could be considered to determine whether a person had the requisite "good character" to receive a gun permit. In re Application of S.S., 130 N.J. Super. 21, 27-29 (Cnty. Ct. 1974) (citing N.J.S.A. 2A:151-33 (repealed 1979) (current version at N.J.S.A. 2C:58-4)). The court held that although the pardon removed a statutory bar based on the existence of a prior conviction, the commission of the crime offered "rebuttable evidence of lack of good and moral character." Id. at 27, 29.

On the other hand, the Law Division has held that a former public official convicted of a crime can seek public office after a pardon. Brezizecki, 246 N.J. Super. at 643-44. Under the relevant statute, a person is disqualified

forever from holding office if convicted of an offense that involves or touches on the individual's public office; a person's bad character, though, is not a basis for disqualification under the law. See N.J.S.A. 2C:51-2(d); Brezizecki, 246 N.J. Super. at 643 (discussing N.J.S.A. 2C:51-2(c) (1990)). Because a pardon removes the legal disabilities attendant to a conviction, the court concluded that the basis for the disqualification no longer existed. Brezizecki, 246 N.J. Super. at 643-44.

In the above situations, courts held that a pardon (1) forgives the crime and removes the legal disabilities linked to the fact of the conviction itself, but (2) does not erase the underlying facts of the offense or restore an individual's good moral character. In other words, as Professor Williston explained a century ago, if a disqualification is triggered by the fact of a conviction, a pardon eliminates the disability; if a person's character is the key question, a pardon does not prevent courts from considering the commission of the offense. Williston, 28 Harv. L. Rev. at 653.

IV.

One published Law Division ruling addressed the effect of a pardon on an application for expungement. See L.B., 369 N.J. Super. 354. In a thoughtful opinion, Judge Ashrafi concluded that a pardon removed a statutory

bar based on the fact of the conviction and therefore allowed the petitioner to seek expungement. Id. at 367.

L.B., the petitioner, had a 1988 conviction for possession of cocaine with intent to distribute. Id. at 356. After the Governor granted L.B. a pardon in 2001, she applied to expunge the records of her arrest and conviction. Id. at 357. At that time, her offense was specifically barred from expungement under the statute. Id. at 358 (citing N.J.S.A. 2C:52-2(c) (2004)).

The trial court first reviewed the above case law and cited Professor Williston's formulation. Id. at 361-66. The court then observed that "[i]t is not bad character evidenced by commission of the crime but the fact of conviction for possession with intent to sell that makes one ineligible for expungement under the statute." Id. at 367. In other words, "[t]he legal disability provided in [the statute] arises solely from the fact of conviction." Ibid. Judge Ashrafi concluded that "[t]he pardon, then, dissolves the attendant legal disability arising from the conviction" -- and thus extinguishes the statutory bar. Ibid.

The trial court went on to consider the merits of L.B.'s petition under the expungement statute. After finding that she met all of the law's other requirements and was "a deserving applicant," the court granted her petition. Id. at 363, 367.

The Third Circuit considered the effect of a presidential pardon on a request for expungement in Noonan. The appeal involved a 1977 pardon for individuals who did not appear for induction and thus violated the Military Selective Service Act. 906 F.2d at 953-54. The Circuit concluded that under federal law, the executive branch does not have the power on its own to expunge records of the judicial branch. Id. at 955-96. “The power to pardon,” the court explained, “is an executive prerogative of mercy, not of judicial record-keeping.” Id. at 955. Beyond the question of the President’s authority, the court observed that “the grant of a pardon does not wipe out the record of a conviction.” Id. at 956.

The Third Circuit relied on federal common law, which differs from New Jersey’s expungement statute in important ways: expungement (or “expunction”) in the federal system is “an extraordinary remedy,” id. at 956, that “is confined to extreme circumstances,” id. at 957. Under New Jersey law, by contrast, expungement is granted more liberally when the statutory requirements are met. See, e.g., D.H., 204 N.J. at 18 (noting petitioners are “presumptively entitled to expungement” when they meet their initial statutory burden and the State does not satisfy its burden in opposition).

In the end, the Circuit concluded that the petitioner’s pardon did not justify expungement of his criminal record. Noonan, 906 F.2d at 960.

State law from other jurisdictions varies. In states where there is no statutory provision that expressly provides for expungement of a pardoned offense, several courts have held that a pardon does not entitle the recipient to expungement. See Polk v. State, 150 So. 3d 967, 970 (Miss. 2014); R.J.L. v. State, 887 So. 2d 1268, 1281 (Fla. 2004); State v. Skinner, 632 A.2d 82, 87 (Del. 1993) (superseded by a statute that allows for discretionary expungement, Del. Code Ann. tit. 11, § 4375). One state high court, hearkening back to language in Garland, observed that a pardon blots out guilt and thus automatically entitles one to expungement. Commonwealth v. C.S., 534 A.2d 1053, 1054 (Pa. 1987) (“A pardon without expungement is not a pardon.”); see also State v. Bergman, 558 N.E.2d 1111, 1114 (Ind. Ct. App. 1990).⁴

⁴ Unlike the law in New Jersey, statutes in more than a dozen other states explicitly provide, in different ways, that receipt of a pardon makes a conviction eligible for expungement or some other method to restrict public access to the records. See Ark. Code Ann. § 16-90-1411; Conn. Gen. Stat. § 54-142a(d); Del. Code Ann. tit. 11, § 4375; Ga. Code Ann. § 35-3-37(j)(7); 20 Ill. Comp. Stat. Ann. 2630/5.2(e); Ky. Rev. Stat. Ann. § 431.073(1)(c); Md. Code Ann., Crim. Proc. § 10-105(a)(8); Md. Code Ann., Pub. Safety § 2-511(a); Mass. Gen. Laws ch. 127, § 152; Neb. Rev. Stat. § 29-3523(5); N.C. Gen. Stat. § 15A-149; Okla. Stat. tit. 22, § 18(A)(4); Or. Rev. Stat. § 144.653(2); 18 Pa. Cons. Stat. § 9122.2(a)(4); S.D. Codified Laws § 24-14-11; Tenn. Code Ann. § 40-32-101(h); Tex. Code Crim. Proc. Ann. art. 55.01(a)(1)(B); Utah Code Ann. § 77-27-5.1; Va. Code Ann. § 19.2-392.2(I); Wash. Rev. Code § 9.94A.030(11)(b); W. Va. Code § 5-1-16a.

V.

We turn next to T.O.'s petition and conclude that records of his charges and convictions from around 1994 and 1996 may be considered for expungement under state law. Under the version of N.J.S.A. 2C:52-2(a) in effect when the trial court denied T.O.'s petition, someone who had multiple criminal convictions -- not listed in a single judgment of conviction or committed as part of a series of events in a short period of time -- was ineligible for expungement.⁵

The Governor's pardon, however, removed the legal disabilities linked to T.O.'s convictions. See Storcella, 296 N.J. Super. at 243. More specifically, although the pardon did not erase the facts underlying the commission of the offenses, it eliminated disabilities triggered by the convictions themselves. Here, the statutory bar to expungement under section 2(a) arose solely from T.O.'s two convictions. See L.B., 369 N.J. Super. at

⁵ As noted earlier, amendments to N.J.S.A. 2C:52-2(a) in December 2019 enable a person with multiple convictions to seek expungement of the latest conviction. L. 2019, c. 269, § 2 (amending N.J.S.A. 2C:52-2(a)); see also Exec. Order No. 178, 52 N.J.R. 1704(a). The recent revisions also provide for "clean slate" expungement of multiple convictions ten years after the person's latest conviction. L. 2019, c. 269, §§ 7 to 8 (codified at N.J.S.A. 2C:52-5.3 to -5.4).

367. In light of the pardon, that disqualification -- or disability -- no longer exists. T.O. is therefore eligible for expungement of both of his convictions.⁶

That does not mean expungement is automatic, however. Under the statutory scheme, once T.O. has satisfied the law's initial requirements, the burden shifts to the State to demonstrate by a preponderance of the evidence why his petition should not be granted. D.H., 204 N.J. at 18.

To be clear, T.O. does not argue that expungement should automatically follow the grant of a pardon. He contends that he is entitled to expungement under the existing statutory framework. The Former Governors advance a broader position and submit that a pardon should automatically result in expungement. We respectfully do not agree.

Courts and legal scholars recognize that a pardon removes the legal disabilities that stem from the fact of a conviction but does not erase what happened when an offense was committed or restore a person's good character. Storcella, 296 N.J. Super. at 243-44; Hozer, 95 N.J. Super. at 202; Williston, 28 Harv. L. Rev. at 653. Thus, although a pardon renders a person eligible for expungement, it does not alter history. A pardoned individual may still fail to

⁶ T.O. argued that a contrary interpretation of the expungement statute would unconstitutionally interfere with the pardon power. We need not address that claim in light of our ruling.

qualify under the statute for reasons other than the fact of conviction -- reasons that live on after a pardon has been granted.

For example, the State may attempt to show that “[t]he need for the availability of the records outweighs the desirability of having a person freed from” limitations the expungement statute provides. See N.J.S.A. 2C:52-14(b); see also N.J.S.A. 2C:52-14 (listing other grounds for denial of relief).

Section 14(b) calls for a qualitative assessment of the public and private interests at stake, which does not turn on the fact of a conviction. Otherwise, because most petitioners have a prior conviction they are seeking to expunge, section 14(b) could override much of the expungement scheme. Instead, the section places the burden on the objector to assert grounds that might weigh against expungement. Those grounds could include, among other things, the circumstances of a particular offense, details about what the applicant did, and the harm the person caused. See Kollman, 210 N.J. at 574-75 (considering the nature of an offense in the context of N.J.S.A. 2C:52-2(a)(2) and (c)(3) (2012)).⁷ Such case-specific facts are not wiped clean by a pardon.

⁷ We do not suggest that simply invoking the serious nature of an offense in a generic manner could satisfy the State’s burden under section 14(b). See Kollman, 210 N.J. at 575, 578-80 (identifying public-interest considerations); In re J.N.G., 244 N.J. Super. 605, 610 (App. Div. 1990) (“The State cannot . . . sustain[] its burden . . . simply by asserting that bad crimes establish a ‘need for the availability of the records.’”).

In this case, nothing in the record demonstrates the need for the continued availability of T.O.'s records. See N.J.S.A. 2C:52-14(b). The State presented no argument against expungement other than the statutory bar for multiple convictions. In fact, at the hearing in the trial court, the State conceded that T.O. has “been living a productive, law-abiding life since the 90s” and acknowledged that “[i]f there is a person deserving of an expungement . . . , it is [T.O.]” The trial judge, as well, stated that T.O. “would have qualified” for expungement, aside from the statutory bar. Accordingly, T.O. is entitled to expungement of criminal records related to his 1994 and 1996 convictions.

VI.

For the reasons set forth above, we reverse the judgment of the Appellate Division and grant T.O.'s petition for expungement. We remand the matter to the trial court to enter an appropriate form of order.

JUSTICES LaVECCHIA, ALBIN, PATTERSON, FERNANDEZ-VINA, SOLOMON, and PIERRE-LOUIS join in CHIEF JUSTICE RABNER's opinion.