Uniform Law Commission
NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS

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To the
United States House of Representatives
Committee on Judiciary
Subcommittee on Crime, Terrorism, and Homeland Security

"Collateral Consequences of Criminal Convictions: Barriers to Reentry for the Formerly Incarcerated"

June 9, 2010

Thank you for the opportunity to submit testimony on behalf of the Uniform Law Commission (ULC). The ULC is also known as the National Conference of Commissioners on Uniform State Laws (NCCUSL).

I am founding member of the Burlington, Vermont law firm Hoff Curtis. In practice since 1980, I served for 14 years as a member of the Vermont Board of Bar Examiners, including 11 years as its Chair. Since 1999, I have served in the American Bar Association (ABA) House of Delegates; as well as a term on the ABA Board of Governors. I currently chair the ABA's Standing Committee on the Delivery of Legal Services.

I have significant experience with litigation and alternative dispute resolution involving the legal profession, higher education, health care, and manufacturing. My clients have included college students, faculty, and administrators as well as individuals, businesses, governmental agencies, and not-for-profit entities.

I am not typically a criminal lawyer, but I do come to this work based on the experience of my own practice. Many years ago I regularly did legal work for a businessman who had a conviction in his past. He had been hired out of prison by a compassionate employer who was well aware of his record. He had steadily advanced in the business. After a subsequent change in federal law, it became illegal for him to work in the business of which he had become the chief operating officer without the consent of our state commissioner of banking and insurance. The businessman was not aware of the change in the law, until his company was acquired and his new employer learned of the law (several years after its adoption) and of his conviction. The businessman consulted me. I sent him home immediately until we could seek consent, rather than risk that he would knowingly violate the law and expose himself to the possibility of a new prosecution. Fortunately, he was able to get consent after a number of weeks of unscheduled leave. I was struck by the harshness of applying such a new law to a fully rehabilitated individual based on an old conviction.

I came to have an opportunity to work to develop policy on this issue because in 1994, the Governor of Vermont appointed me to the Uniform Law Commission, a 118-year-old national, nonprofit, nonpartisan legal organization of commissioners from every state who draft new laws or improve existing laws where uniformity among the states is necessary or desirable.

After participating in approval of the ABA Criminal Justice Standards on Collateral Consequences of Conviction in 2003,[1] I proposed the ULC open a Study Committee on the need for uniformity regarding this subject. From 2005 through 2009, I chaired the Commission's Drafting Committee on the Uniform Collateral Consequences of Conviction Act (UCCCA), which seeks to improve understanding of the nature of the collateral consequences problem and provide modest means by which people who suffer from disabilities associated with collateral consequences may, in appropriate circumstances, gain at least partial relief from them.

[1] American Bar Association, *Standards for Criminal Justice: Collateral Sanctions and Discretionary Disqualification of Convicted Persons* (3rd ed. 2003)., available at http://www.abanet.org/crimjust/standards/collateral_toc.html

The UCCCA was adopted by the Commission in July, 2009. It was endorsed by the American Bar Association in February, 2010. The ULC now is seeking passage of the UCCCA by state legislatures across the country.

Uniform Law Commission

Now in its 118th year, the ULC works to harmonize state laws in critical areas where consistency is desirable and practical and supports the federal system by addressing issues of national significance best resolved at the state level.

The Uniform Law Commission (ULC) has worked for the uniformity of state laws since 1892. It was originally created by state governments to consider state law, determine in which areas of the law uniformity is important, and then draft uniform and model acts for consideration by the states. For well over a century, the ULC's work has brought consistency, clarity, and stability to state statutory law. Included in this important work have been such pivotal contributions to state law as the Uniform Commercial Code, the Uniform Partnership Act, the Uniform Anatomical Gift Act, the Uniform Interstate Family Support Act, the Uniform Electronic Transactions Act, and the Uniform Prudent Management of Institutional Funds Act.

The ULC is a non-profit unincorporated association, comprised of commissions on uniform laws from each state, the District of Columbia, the Commonwealth of Puerto Rico, and the U.S. Virgin Islands. Each jurisdiction determines the method of appointment and the number of commissioners actually appointed. Most jurisdictions provide for their commission by statute. All commissioners must be qualified to practice law. While some serve as state legislators, or employees of state government, most are private practitioners, judges, or law professors. Commissioners donate their time and expertise as a pro bono service and receive no salary or fee for their work with the ULC. It has some 350 members.

The ULC has drafted more than 250 uniform acts in various fields of law setting patterns for uniformity across the nation, in such areas as business entity law, interstate child support and custody, investment allocation rules, and trust and estates law. The ULC's work prevents states from having to perform duplicative and costly research in addressing shared legislative issues. Uniform Acts are voluntarily adopted by state legislatures and localized to respond to each state's statutory framework and concerns.

ULC Procedures

Uniform Laws are the products of a painstaking development process. Briefly, here's how the process of drafting and promoting passage of uniform acts works: Each uniform act typically takes two to four years to complete. The process starts with the ULC Scope and Program Committee. It investigates each proposed act, and then reports to the Executive Committee whether a subject is one in which it is desirable and feasible to draft a uniform law. If the Executive Committee approves a recommendation, a drafting committee of commissioners is appointed and begins to convene regularly. Tentative drafts are fully vetted at multiple drafting

committee meetings. Advisors from the ABA and observers from any entity interested in the act are welcome to participate in these meetings.

Draft acts are then submitted for initial debate by the entire ULC membership at an annual meeting. They are read and debated line by line before the entire conference membership and then revised by the drafting committee. Normally after consideration at a second annual meeting,[2] acts are promulgated in a vote by the states. Commissioners in each state and territory submit ULC acts for consideration by state legislatures.

The ULC receives the major portion of its financial support from state appropriations. In return, the ULC provides the states with two related services:

- drafting uniform state laws on subjects where uniformity is desirable and practical
- supporting the effort to enact completed acts.

The ULC is able to get maximum results on a minimum budget because uniform law commissioners donate their time and expertise.

As such, ULC is an ideal entity for addressing traditionally state law issues that are of national concern and would benefit from state-to-state uniformity, such as collateral consequences of conviction.

The ULC is not an interest group and has no partisan political agenda; drafting meetings are open to the public and all drafts are available on the internet at the ULC's website: nccusl.org Because ULC drafting projects are national in scope, we are often able to attract a broad range of advisors and observers to participate in our projects, resulting in a drafting process that has the benefit of a greater range and depth of expertise than could be brought to bear upon any individual state's legislative effort.

The Problem: Barriers to Reentry into Society for Formerly Convicted Persons[3]

The U.S. prison population has increased dramatically since the early 1970s. In 1974, 1.8 million people had served time, or 1.3% of the adult population.[4] In 2001, 5.6 million people, or 2.7% of the adult population, had served time. The Department of Justice estimates that if the

[2] The Act discussed herein, the Uniform Collateral Consequences of Conviction Act (the UCCCA), was approved after consideration at four annual meetings. is The full text of the UCCCA is available at http://www.law.upenn.edu/bll/archives/ulc/ucsada/2009_final.htm.

[3] This portion of the testimony is largely taken directly from the prefatory note to the Uniform Collateral Consequences of Conviction Act prepared by our reporter, Professor Gabriel "Jack" Chin, whose work is gratefully acknowledged.

[4] Heather C. West & William J. Sabol, *Prisoners in 2007*, at 1, Bureau of Justice Statistics Bulletin (Dec. 2008, NCJ 224280); Thomas P. Bonczar, *Prevalence of Imprisonment in the U.S. Population, 1974-2001*, at 1, Bureau of Justice Statistics Special Report (Aug. 2003, NCJ 197976).

2001 imprisonment rate remains unchanged, 6.6% of Americans born in 2001 will serve prison time in their lives.[5]

In addition to those who have served time in prison, an even larger proportion of the population has been convicted of a criminal offense without going to prison. Apparently, no knows how many Americans carry the burden of a criminal record. However, according to the U.S. Department of Justice, there were about 100 million people with criminal records in the United States as of December 2008.[6]

Members of minority groups are far more likely than whites to have a criminal record: Almost 17% of adult black makes have been incarcerated, compared to 2.6% of white males.[7] A recent study has shown that "a criminal record has a significant negative impact on hiring outcomes, even for applicants with otherwise appealing characteristics," and that "the negative effect of a criminal conviction is substantially larger for blacks than for whites."[8]

The growth of the convicted population means that there are literally millions of people being released from incarceration, probation and parole supervision every year. They must successfully reintegrate into society or be at risk for recidivism. Society has a strong interest in preventing recidivism. An individual who could have successfully reentered society, but for avoidable cause reoffends, generates the financial and human costs of the new crime, expenditure of law enforcement, judicial and corrections resources, and the loss of the productive work that the individual could have contributed to the economy. Society also has a strong interest in seeing that individuals convicted of crimes can regain the legal status of ordinary citizens to prevent the creation of a permanent class of "internal exiles" who cannot establish themselves as law-abiding and productive members of the community.[9]

As the need for facilitating reentry becomes more pressing, several developments have made it more difficult. First, a major challenge for many people with criminal records is the increasingly burdensome legal effect of those records. A second major development is the availability to all arms of government and the general public, via Internet, of aggregations of public record information, including criminal convictions, about all Americans.[10] Twenty years ago, an applicant might not have been asked for her criminal record when renting an apartment or applying for a job, and it would have been difficult for even an enterprising administrator to find, say, a 15 year old, out-of-state, marijuana offense. Now, gathering this kind of information is

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[5] Bonczar, *supra.*

[6] U.S. Dept. of Justice, Bureau of Justice Statistics, Survey of State Criminal History Information Systems, 2008, NCJ 228661 (Oct. 2009), at 3.

[7] Bonczar, *supra*, at 5.

[8] Devah Pager & Bruce Western, *Investigating Prisoner Reentry: The Impact of Conviction Status on the Employment Prospects of Young Men 4* (Oct. 2009, NCJ 228584) (http://www.ncjrs.gov/pdffiles1/nij/grants/228584.pdf

[9] *Cf.* Nora V. Demleitner, *Preventing Internal Exile: The Need For Restrictions On Collateral Sentencing Consequences*, 11 STAN. L. & POL'Y REV. 153 (1999).

[10] *See, e.g.*, BUREAU OF JUSTICE STATISTICS, REPORT OF THE NATIONAL TASK FORCE ON PRIVACY, TECHNOLOGY, AND CRIMINAL JUSTICE INFORMATION (Aug. 2001, NCJ 187669).

cheap, easy and routine.[11] According to a 2009 survey of the Society of Human Resources Management, 92% of their members perform criminal background checks on some or all jobs (up from 51% in 1996).[12] Studies in Milwaukee[13] and Los Angeles[14] show that employers are refusing to hire people with criminal records, even for entry level jobs. Apart from impairment of self-esteem and informal social stigma, a criminal conviction negatively affects an individual's legal status. For many years, an individual convicted of, say, a drug felony, lost his right to vote for a period of time or for life.[15] Convicted individuals may be ineligible to hold public office.[16] Federal law bars many persons with convictions from possessing firearms,[17] serving in the military[18] and on juries, civil and criminal.[19] If a non-citizen, a person convicted of a crime may be deported.

These disabilities have been called "collateral consequences" "civil disabilities" and "collateral sanctions." The term "collateral sanction" is used in the Uniform Collateral Consequences of Conviction Act (UCCCA) to mean a legal disability that occurs by operation of law because of a conviction but is not part of the sentence for the crime. It is "collateral" because it is not part of the direct sentence. It is a "sanction" because it applies solely as a result because of conviction of a criminal offense. The Uniform Act also uses the term "disqualification" to refer to disadvantage or disability that an administrative agency, civil court or other state actor other than a sentencing court is authorized, but not required, to impose based on a conviction. Collectively, collateral sanctions and disqualifications together comprise collateral consequences.

In recent years, collateral consequences have been increasing in number and severity. Federal law now imposes dozens of them on state and federal offenders alike.[20] To identify just some of those applicable to individuals with felony drug convictions, 1987 legislation made individuals with drug convictions ineligible for certain federal health care benefits;[21] a 1991 law required states to revoke some driver's licenses upon conviction or lose federal funding,[22] in 1993, Congress made individuals with drug convictions ineligible to participate in the National and Community Service Trust Program.[23] In 1996, Congress provided that individuals convicted of

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[11] Corinne A. Carey, *No Second Chance: People With Criminal Records Denied Access To Public Housing*, 36 U. TOLEDO L. REV. 545, 553 (2005); *see generally* James B. Jacobs, *Mass Incarceration and the Proliferation of Criminal Records*, 3 ST. THOMAS L. REV. 387 (2006).
[12] Society for Human Resource Management, *Background Checking: Conducting Criminal Background Checks* (Jan. 22, 2010).
[13] Devah Pager, *The Mark of a Criminal Record*, 108 American Journal of Sociology 937, 955-58 (March 2003).
[14] Harry Holzer et al., *The Effect of an Applicant's Criminal History on Employer Hiring Decisions and Screening Practices: Evidence from Los Angeles (*National Poverty Center Working Paper Series Dec. 2004).
[15] *See* JEFF MANZA & CHRISTOPHER UGGEN, LOCKED OUT: FELON DISENFRANCHISEMENT AND AMERICAN DEMOCRACY (Oxford 2006).
[16] *See, e.g.*, State *ex rel.* Olson v. Langer, 256 N.W. 377 (N.D. 1934).
[17] 18 U.S.C. § 922(g)(1).
[18] 10 U.S.C. § 504(a).
[19] Brian C. Kalt, *The Exclusion of Felons from Jury Service*, 53 AM. U. L. REV. 65 (2003).
[20] *See generally* KELLY SALZMANN & MARGARET COLGATE LOVE, INTERNAL EXILE: COLLATERAL CONSEQUENCES OF CONVICTION IN FEDERAL LAWS AND REGULATIONS (ABA 2009) (http://www.abanet.org/cecs/internalexile.pdf).
[21] 42 U.S.C. § 1320a-7(a)(4).
[22] 23 U.S.C. § 159.
[23] 42 U.S.C. § 12602(e).

drug offenses would automatically be ineligible for certain federal benefits.[24] A year later, Congress rendered them ineligible for the Hope Scholarship Tax Credit.[25] In 1998, individuals convicted of drug crimes were made ineligible for federal educational aid,[26] and for residence in public housing.[27] In addition, 1988 legislation authorized state and federal sentencing judges to take away eligibility for federal benefits in the form of grants, contracts, loans, professional or commercial licenses,[28] and any person convicted of a drug offense may, at the discretion of the sentencing court, be made ineligible for federal benefits for up to one year.[29]

Like Congress, state legislatures have embraced regulation of convicted individuals. Studies of disabilities imposed by state law or regulation done by law students in Arizona, Maryland, and Ohio show literally hundreds of collateral sanctions and disqualifications on the books in those states.[30] Studies done for Connecticut, the District of Columbia, Michigan, New York, Minnesota, and Washington are to similar effect.[31] An April, 2006 Florida Executive Order directs collection of collateral consequences by all state agencies.[32] These laws limit the ability of convicted individuals to work in particular fields, to obtain state licenses or permits, to obtain public benefits such as housing or educational aid, and to participate in civic life.

It is important to note that collateral consequences are imposed by federal, state and local regulation and practice as well as by legislative action. Notably, a complaint has recently been filed with the EEOC over a refusal on the part of the Census Bureau to hire people with convictions for temporary employment as census takers.

The legal system is only beginning to manage the proliferation of collateral consequences. One

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[24] 21 U.S.C. § 862a.
[25] 26 U.S.C. § 25A(b)(2)(D).
[26] 20 U.S.C. § 1091(r).
[27] 42 U.S.C. § 13662.
[28] 21 U.S.C. § 862(a). For the first conviction ineligibility period may be up to five years; for a second it may be up to 10 years; and for a third or subsequent conviction ineligibility is mandatory and permanent. *Id*.
[29] 21 U.S.C. § 862(b). For a second conviction the ineligibility period may be up to five years. The period of ineligibility may be waived if the person declares himself to be an addict and submits to long-term treatment. *Id*. *See also* SALZMANN & LOVE, supra note 20 at 36-37; *id.* at 47 App. 1 ("Federal Consequences Affecting a Person with a Felony Drug Conviction").
[30] *See* Kate Adamson et al., *Collateral Consequences of Criminal Conviction in Arizona*, The Law, Criminal Justice and Security Program, University of Arizona (2007); Kimberly R. Mossoney & Cara A. Roecker, *Ohio Collateral Consequences Project*, 36 U. TOLEDO L. REV. 611 (2005); Re-Entry of Ex-Offenders Clinic, University of Maryland School of Law, *A Report on Collateral Consequences of Criminal Convictions in Maryland* (2007). (http://www.sentencingproject.org/detail/publication.cfm?publication_id=164).
[31] *See* George Coppolo et al., *Consequences of a Felony Conviction Regarding Employment*, Report No. 2005-R-0311, Connecticut General Assembly, Office of Legislative Research (2005). Available at http://www.cga.ct.gov/2005/rpt/2005-R-0311.htm; PUBLIC DEFENDER SERVICE FOR THE DISTRICT OF COLUMBIA, COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTIONS IN THE DISTRICT OF COLUMBIA: A GUIDE FOR CRIMINAL DEFENSE LAWYERS (2004); Michigan Reentry Law Wiki, Michigan Poverty Law Program (http://reentry.mplp.org/reentry/index.php/Main_Page); NEW YORK STATE BAR ASS'N, SPECIAL COMMITTEE ON COLLATERAL CONSEQUENCES OF CRIMINAL PROCEEDINGS, RE-ENTRY AND REINTEGRATION: THE ROAD TO PUBLIC SAFETY (2006). *See also* MINN. STAT. Ch. 609B, Collateral Sanctions (2007); Kim Ambrose, *Beyond the Conviction: What Defense Attorneys in Washington State Need to Know About Collateral & Other Non-Confinement Consequences of Criminal Convictions,* WASHINGTON DEFENDER ASSOCIATION (2005).
[32] *See* Fl. Exec. Order No. 6-89 (Apr. 25, 2006).

problem is that collateral consequences are administered largely outside of the criminal justice system. Court decisions have not treated them as criminal punishment, but mere civil regulation.[33]

The most important consequence of this principle is in the context of guilty pleas. In a series of cases, the Supreme Court has held that a guilty plea is invalid unless "knowing, voluntary and intelligent." Until recently, courts have held that while a judge taking a guilty plea must advise of the "direct" consequences—imprisonment and fine—defendants need not be told by the court or their counsel about collateral consequences.[34] For example, the Constitution has not typically been held to require that a defendant pleading guilty to a drug felony with a stipulated sentence of probation be told that, even though she may walk out of court that very day, a wide range of public benefits and opportunities may no longer be available to her: Military service, government employment, welfare benefits, higher education, public housing, many kinds of licensure, even driving a car, may be out of the question. Inevitably, individuals with convictions, most not legally trained, are surprised when they discover legal barriers they were never told about.

The major exception to the exclusion of collateral consequences from the guilty plea process has been in the area of deportation. More than half of American jurisdictions provide by rule, statute or court decision that defendants must be advised of the possibility of deportation when pleading guilty. Recently, in *Padilla v. Kentucky*,[35] the United States Supreme Court held that defense counsel was obligated, under the Sixth Amendment, to advise of the possibility that a guilty plea would lead to deportation.

The 7-2 decision in *Padilla* appears to profoundly change the legal landscape surrounding the collateral consequences of conviction. The defendant, Jose Padilla, was a lawful permanent resident who claimed constitutionally insufficient counsel when his lawyer failed to advise him of the consequences to his immigration status of a plea guilty to drug distribution charges. With such information the defendant claimed he would not have entered a guilty plea and instead opted to take his case to trial. The Supreme Court found that the immigration implications of a guilty plea are so integral to the penalties associated with the plea that the advice of counsel on such matters is within the ambit of the Sixth Amendment right to counsel. Justice Stevens, writing for the majority, said that silence of counsel is "fundamentally at odds with the critical obligation of counsel to advise the client of the advantages and disadvantages of a plea agreement." Counsel now must inform a client whether a plea carries a risk of deportation for the advice of counsel to be found competent.

The rationale of the majority opinion rejected the conclusion that the distinction between a direct sanction of conviction and a "collateral" one is meaningful in terms of determining whether competence requires that a consequence of conviction be disclosed to a defendant in connection with plea negotiations. Instead, Justice Stevens focused on the importance and certainty of a

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[33] *See* Gabriel J. Chin, *Are Collateral Sanctions Premised on Conduct or Conviction?: The Case of Abortion Doctors*, 30 FORDHAM URB. L.J. 1685, 1686 n.10 (2003).

[34] *See, e.g.*, Foo v. State, 102 P.3d 346, 357-58 (Hawai'i 2004); People v. Becker, 800 N.Y.S.2d 499, 502-03 (Crim. Ct. 2005); Page v. State, 615 S.E.2d 740, 742-43 (S.C. 2005); Gabriel J. Chin & Richard W. Holmes, *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 CORNELL L. REV. 697, 706-08 (2002)).

[35] 130 S. Ct. 1473 (March 31, 2010).

particular consequence. This suggests that *Padilla* may well be extended to require accurate counseling about the collateral consequences of a conviction far beyond immigration issues.[36]

If this reading of *Padilla* proves to be correct, it appears in the future, competent defense counsel will be required to accurately advise defendants in criminal cases about the important and certain collateral consequences that will attach to a particular conviction. For reasons, I will explain below, some very significant research (which is underway) will be required to enable counsel to meet this obligation.

Another problem is that it has become increasingly difficult to avoid or mitigate the impact of collateral consequences. Most states have not yet developed a comprehensive and effective way of "neutralizing" the effect of a conviction in cases where it is not necessary or appropriate for it to be decisive. In almost every U.S. jurisdiction, offenders seeking to put their criminal past behind them are frustrated by a legal system that is complex and unclear and entirely inadequate to the task. As a practical matter, in most jurisdictions people convicted of a crime have no hope of ever being able to fully discharge their debt to society.[37]

The criminal justice system must pay attention to collateral consequences. If the sentence is a reliable indicator, collateral consequences in many instances are what is really at stake, the real point of achieving a conviction. In 2004, 60% of those convicted of felonies in state courts were not sentenced to prison; 30% received probation or some other non-incarceration sentence and 30% received jail terms.[38] In a high percentage of cases, the real work of the legal system is done not by fine or imprisonment, but by changing the legal status of convicted individuals. The legal effects the legislature considers important are in the form of collateral sanctions imposed by dozens of statutes. Yet the defendant as well as the court, prosecutors and defense lawyers involved need know nothing about them. As a National District Attorney's Association resolution recognizes, "the lack of employment, housing, transportation, medical services and education for ex-offenders creates barriers to successful reintegration and must be addressed as part of the reentry discussion."[39]

Consider for a moment the impact on an individual family of the collateral consequences of conviction: Eighteen years ago, in June of 1992, a young, newly married couple who live in my county had an argument.[40] The young husband told his wife he planned to move out of their apartment. Some kind of physical altercation ensued. The police affidavit says the husband "grabbed her, shook her and slammed her against the door," and adds that wife told police that he had also pushed her up against a sink. Today, the wife says that she was trying to make him

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[36] *See* Margaret Colgate Love & Gabriel J. Chin, Padilla v. Kentucky: The Right to Counsel and the Collateral Consequences of Conviction, 34 THE CHAMPION 18 (May 2010).

[37] *See generally* MARGARET COLGATE LOVE, RELIEF FROM THE COLLATERAL CONSEQUENCES OF A CRIMINAL CONVICTION: A STATE-BY-STATE RESOURCE GUIDE (William S. Hein & Co. 2006).

[38] Matthew R. Durose & Patrick A. Langan, *Felony Sentences in State Courts, 2004*, at 3, Bureau of Justice Statistics Bulletin (July 2007, NCJ 215646).

[39] NATIONAL DISTRICT ATTORNEY'S ASSOCIATION, POLICY POSITIONS ON PRISONER REENTRY ISSUES §4(a) at 7 (Adopted July 17, 2005).

[40] This account is drawn from "*1992 Conviction Sinks Soldier's Guard Career"* by *Sam Hemingway, Staff Reporter*, BURLINGTON FREE PRESS, Sunday, May 16, 2010.

stay at the apartment and that he simply "removed my arms" from him as he tried to depart. A month later, the husband pled guilty to domestic assault in Vermont District Court. As part of a plea agreement, the state dropped a count of unlawful mischief. The husband paid a fine of $10 and was placed on probation. He was released from probation in April of 1993 after attending 27 weeks of Domestic Abuse Education Program classes.[41]

I suppose the young couple thought these events were behind them. They were wrong.

The couple stayed together and raised two children. The husband had been a member of the Vermont National Guard. He reenlisted in 1996 and says he disclosed his misdemeanor conviction at that time. He became a full-time National Guard technician in 2000. He was deployed to Kuwait in 2004-2005. He has been promoted several times, ultimately to sergeant first class.[42]

In 2009, during a background check in anticipate of deployment to Afghanistan, the National Guard discovered his conviction. Under the Lautenberg amendment, adopted in 1995, a person with a domestic assault conviction cannot lawfully possess a firearm.[43] Facing discharge from the National Guard, the soldier sought expungement of his conviction. Two Vermont judges denied his request, each concluding that the courts lacked authority to expunge an adult conviction. A third judge declined to reopen his conviction, even with the support of the county prosecutor, noting that he could find no evidence the case was mishandled at the time of conviction.[44]

After the first effort to expunge his conviction, the soldier sought a gubernatorial pardon. Vermont's Governor, James H. Douglas, declined a pardon.[45] He has stated: "The Congress of the United States determined that under the gun control law, people with a conviction of domestic assault ought not to carry a firearm. I am troubled by the notion that I might be called upon to substitute my judgment for that of the United States Congress."[46]

As a result, the soldier is a soldier no more. He has lost the opportunity to serve his country in Afghanistan. He has lost his 16 year military career in the National Guard and a substantial portion of his military pension. Unemployed, he says: "I'm just lost. I wake up every day

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[41] *Id.*
[42] *Id.*
[43] 18 U.S.C. § 922(g)(9). Unlike the more general prohibition on gun possession for those convicted of a felony, 18 U.S.C. § 922(g)(1), the prohibition attaching to domestic violence convictions is not subject to waiver for possession of a firearm in government employment in 18 U.S.C. § 925.
[44] *Id.* at 32.
[45] Unfortunately the exercise of the executive power to pardon in most states has become is relatively rare. For example, in his nearly 8 years in office, Governor Douglas has granted only thirteen pardons, less than two a year. "Pardons Present Challenges for Governors" by Sam Hemingway, Staff Reporter, Burlington Free Press, Sunday, May 16, 2010. While every US jurisdiction offers pardon as a way of avoiding or mitigating collateral consequences, in only about only third of the states is pardon a reasonably accessible and reliable form of relief. Supra, n. 37. On the federal level, Presidential pardons have not been available on a regular basis since the Reagan Administration. *Id.* President Obama has yet to grant a single pardon. "Obama Should Exercise the Pardon Power," Kenneth Lee, *National Law Journal*, April 12, 2010.
[46] *Id.* at 32.

wondering how I am going to provide for my family. ... I devoted my whole life to the Guard. It was such a great way of life for me. I felt I fit into something. It was a way I could give back to my community and my country."[47]

As a nation, our law on the subject of the collateral consequences of conviction is in disarray. We go about the process of punishing crime ignorant of the full extent of the penalties we impose. No one knows the full extent of the collateral consequences of conviction, because, in most of our jurisdictions, they have never even been collected. Our policy makers decide what consequences to impose without knowing what already exists. Our prosecutors, defense lawyers, judges and even defendants negotiate plea agreements while ignorant of the long term impact of their decisions.

By doing so we have created a dizzying array of collateral consequences of conviction. Some of these consequences are necessary and appropriate measures designed to protect the public. Many are not. Many are applied with little regard for the particular circumstances of the individual case. Often the consequences become roadblocks to successful reentry into law abiding society and push convicted persons back to a life of crime.

If, as Attorney General Eric Holder has suggested, "we must be 'tough on crime[,]' but we must also commit ourselves to being 'smart on crime[,]'"[48] it is time for change. We need a more thoughtful, reasoned approach to the problem of the collateral consequences of conviction.

The ULC Response

In 2003 the American Bar Association issued its "Standards on Collateral Sanctions and Discretionary Disqualification of Conviction Persons."[49] In response to this study, I proposed that the ULC consider drafting an act to address the problems of the exponential growth of collateral consequences. The ULC Committee on Scope and Program recommended in July 2003 that a study committee be formed. After two years of study, in July 2005, the ULC appointed a Drafting Committee on Uniform Collateral Consequences of Conviction Act.

The drafting committee was greatly assisted by numerous observers to the committee representing a wide variety of interested and affected groups, including the American Bar Association Criminal Justice Section, the ABA Judicial Division and the National Association of Attorneys General and the National Association of Criminal Defense Lawyers.

After four years of drafting, which included numerous in-person drafting committee meetings, the Uniform Collateral Consequences of Conviction Act was approved by the ULC in July 2009. It was subsequently approved by the ABA House of Delegates in February 2010.

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[47] *Id.* at 32.
[48] Prepared Remarks of Attorney General Eric Holder at the 2009 ABA Convention, Chicago, Ill., August 3, 2009.
[49] See note 1, supra.

The Uniform Collateral Consequences of Conviction Act[50]

The UCCCA address three significant problems:

1. The need for information about collateral consequences;
2. The need to harmonize state law relating to collateral consequences; and
3. The need for some relief from collateral consequences.

1. Information.

Compilation and Collection of Collateral Consequences.
One of the first issues confronted by the drafters of the UCCCA was the complete disorganization of law and regulations related to collateral consequences. Coupled with this disorganization was a lack of awareness exhibited by the public, practitioners, and the judiciary regarding the existence and pervasiveness of these consequences. As drafted, the UCCCA will ensure that collateral consequences are known to all involved in the criminal proceeding -- furthering the fairness of our criminal justice system.

The UCCCA requires states to collect in a single document all collateral consequences contained in state law and regulations. Each consequence must be summarized by a short description that explains the nature and extent of the penalty. Further, the document must include all provisions for avoiding or mitigating the penalty. The completed list must be made available to the public upon completion. All collateral consequences must be authorized by statute or regulation. This collection will not represent a body of positive law, nor will it constitute a change to existing state law.

The federal government has already taken action to assist the states and territories with significant research burden of creating such a collection. Section 510 of the Court Security Act of 2007[51] requires that the United States Department of Justice survey the collateral consequences in each of the 50 states and four territories and make the results of that survey available to each state. Collection of the myriad existing collateral consequences is being addressed through a grant recently awarded by the National Institute of Justice (NIJ) to the American Bar Association.[52] The Section, in collaboration with George Washington University School of Law, has commenced the ABA Adult Collateral Consequences Project. The Project seeks to catalog every collateral consequence of criminal convictions in the United States, including the District of Columbia, Puerto Rico and the Virgin Islands and then create a database allowing users to determine exactly what consequences follow from particular criminal offenses. Eventually, the Project intends to create a free online resource for attorneys, policymakers, and the public to input specific criminal offenses and view the collateral consequences attaching to convictions.

The contract for this study was awarded in December 2009, and the study is expected to be

[50] The full text of the UCCCA is reproduced at Appendix I.
[51] Court Security Improvement Act of 2007, Pub. L. 110-177 § 510, 121 Stat. 2534, 2544.
[52] I serve as a member of the Advisory Committee to The ABA Adult Collateral Consequences Project.

completed by December 2012. At present, the Project is in the data collection stage. Initial collections have been completed for 8 states:

States Completed	Collateral Consequences Identified
Arizona	933
New York	1119
New Hampshire	644
Alaska	497
Washington	586
Minnesota	660
Maryland	902
Mississippi	423

This represents an average of 720 collateral consequences, imposed by statute and regulation, indentified in each state studied so far. Data collection is currently underway for the states of: Alabama, Arkansas, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, New Mexico, and North Carolina.

Obviously, completion of the Project study will ease state accession to the UCCCA collection requirement. This study will also improve the ability of lawyers and courts to give notice of the collateral consequences associated with a crime to a defendant.

Notice to Defendants.
Under the UCCCA, an individual charged with a criminal offense must be provided with notice of the existence of collateral consequences. The aggregation of all state law collateral consequences will, for the first time, facilitate effective lawyer-client counseling on this subject. With the collection of collateral consequences in hand, defense lawyers will be able to fully inform the accused of the consequences of a guilty plea before trial, and afford the accused information vital to informed decision making. Similarly, the existence of such information will enable prosecutors and judges to consider the impact of collateral consequences when considering plea offers and sentences

Notifying an individual convicted of an offense of the existence of collateral consequences is also required at the time of sentencing, and if the individual is sentenced to prison, at the time of release. This will reduce the risk that an offender will reoffend due to ignorance of applicable collateral consequences. Offenders must also be notified of the opportunity to obtain relief from the collateral consequences.

As noted about, the recent Supreme Court decision in *Padilla v. Kentucky,*[53] places an affirmative obligation on criminal defense attorneys to advise clients the impact a guilty plea or conviction will have on immigration status. While *Padilla's* holding only requires that action be taken to assure that adequate counsel is given on the subject of deportation, the rationale of the case suggests that adequate counsel will also be required as to all important and certain collateral

[53] See note 35, supra,

consequences. It seems unlikely that importance and certainty will prove a sufficiently certain standard to permit lawyers and judges to distinguish in advance between consequences as to which accurate advice will be required and those as to which it will not.

As a result, the ULC Standby Committee on the UCCCA, has recommended that a new subsection (b) be added to Section 5 of the Act which would instruct trial courts to confirm that the defendant has received and understood notice of collateral consequences and had an opportunity to discuss them with defense counsel.[54] Such a colloquy is an obvious step that courts could take to reduce the risk that *Padilla* will have a destabilizing effect on the plea process. These changes will considered by the ULC at its upcoming meeting in Chicago in July.

2. Harmonization of State Law.

The increasing mobility of all individuals in society and lack of uniformity throughout the states in defining specific crimes creates unpredictability as to whether collateral consequences will be imposed based on crimes committed in other states. Under the UCCCA, determinations of the applicability of collateral consequence for an out-of-state crime are to be made using the test set forth by the Supreme Court in *Blockburger v United States.*[55] An out-of-state conviction constitutes a conviction in a new state if the elements of the offense are the same. If there is no offense in the new state with the same elements of the out-of-state conviction, the conviction is deemed to be the most serious offense established by the elements of the offense. Further, convictions that have been overturned or pardoned, including those that are out-of-state convictions, may not be the basis for imposing collateral consequences. The UCCCA also provides two alternatives for states to choose from when addressing the impact of "mercy" relief granted by other jurisdictions, such as expungement or set-aside, for purposes of assigning collateral consequences. One alternative does not give rise to collateral consequences if the conviction has been relieved, while the other treats the conviction the same as any other conviction.

3. Providing Some Relief from Collateral Consequences.

The UCCCA balances the interests of public safety with the need to improve opportunities for successful reintegration of persons with convictions. The Act would establish two devices to provide relief, an Order of Limited Relief and a Certificate of Restoration of Rights. Neither

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[54] The proposed UCCCA language is as follows:

> "(b) Before a court accepts a plea of guilty or nolo contendre from an individual, the court shall confirm that the defendant received and understands the notice required by subsection (a) and has had an opportunity to discuss the notice with defense counsel."

Because *Padilla* involves collateral consequences imposed as result of federal law, the Standby Committee also recommends that the identification and collection of collateral consequences required under Section 4 of the Act be expanded to include reference to the most recent collection of collateral consequences imposed by federal law. It also recommends that a reference to a state's Megan's Law in Section 12 (1) be updated to reference more recent federal legislation relating to sex offender registration and notification. Conforming changes are recommended to the Official Comments as well.

[55] 284 U.S. 299 (1932),

device would relieve obligations related to sex offender registration, motor vehicle licensing, or the right to employment by law enforcement agencies.

Order of Limited Relief
The Order of Limited Relief permits a court or agency to lift the automatic bar of a collateral sanction related to employment, education, housing, public benefits, or occupational licensing. The petition for the order can be presented to the sentencing court before, or at, the time of sentencing. Failure to petition for the order at that time does not bar subsequent relief. The offender can petition the designated agency or board within the state at any time after sentencing occurs. The reviewing entity must review the petition and can issue the relief if it finds that granting the petition does not pose a public safety risk and that the relief will substantially improve the ability of the offender to reintegrate into society. An Order of Limited Relief does not guarantee that the benefit sought will be obtained. It only ensures that an ex-offender seeking such a benefit is treated on an equal footing with an individual who has admitted engaging in the same underlying behavior, but has never been convicted.

Certificate of Restoration of Rights
The Certificate of Restoration of Rights is broader than the Order of Limited Relief. If granted, the Certificate applies to all collateral sanctions, not just those associated with employment, education, housing, public benefits, or occupational licensing. The provisions found in the UCCCA are based upon the procedures utilized in New York, the only state with comprehensive procedures to relieve the restrictions imposed by collateral consequences after a period of law abiding behavior. Under Section 10 of the UCCCA, an offender may petition the appropriate state board or agency for the Certificate after a five year period in which the individual demonstrates conduct conforming to the law. Within that period, the individual must additionally show that they have been in school or employed and have a lawful source of income. The UCCCA empowers the board or agency to make exceptions to the restorations of certain rights if it determines the exception is in the interest of public safety. An ex-offender could use a Certificate of Restoration of Rights to show potential employers, landlords, or licensing agencies that he or she has made substantial progress towards rehabilitation; reducing the stigma of a criminal past.

Suggestions for Federal Action

As the foregoing makes clear, the proliferation of collateral consequences of conviction is problem of both federal and state law. Action at the federal and state levels will be necessary if a more thoughtful and well-crafted policy is to emerge.

- The federal government has already begun to take a positive role in this effort by initiating the ABA's Adult Collateral Consequences Project described above. Once the Project has cataloged the collateral consequence of criminal convictions, and made its work product available on line, some additional funding will be required to keep the collection current on an ongoing basis. No source of such funding, other than the federal

government, appears conceivable.

- The Uniform Collateral Consequences of Conviction Act can make a major contribution to this effort if it is widely adopted as state law. State budget problems due to the recession create a significant disincentive to adoption of the UCCCA because some modest government expenditures would be required to administer the processes through which applications for Orders of Limited Relief and Certificate of Restoration of Rights will be processed. A federal grant program to provide at least seed money to support the initial efforts of state and territorial governments to establish and begin to run administrative organizations to process relief applications would greatly assist efforts to adopt the UCCCA.

- Precedent already exists for giving federal effect to state relief measures from collateral consequences. Under the federal firearms law, the right to carry a firearm can be restored to an ex-offender if his civil rights have been restored under state law.[56] The Transportation Safety Administration and other federal agencies administering collateral consequences in federal laws also give effect to certain state relief.[57] These provisions could be interpreted to permit relief measures under the UCCCA to be treated as qualifying relief under these federal schemes. The same idea could be applied to other federal collateral consequences that are based on state convictions.

- A federal collateral consequence of conviction act could usefully adopt many of the provisions of the UCCCA for use in connection with federal convictions. For example, federal law could be

[56] 18 U.S.C. §921(a)(20) provides:

> "What constitutes a conviction of such a crime shall be determined in accordance with the law of the jurisdiction in which the proceedings were held. Any conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction for purposes of this chapter, unless such pardon, expungement, or restoration of civil rights expressly [or implicitly as a matter of state law] provides that the person may not ship, transport, possess, or receive firearms."

The federal courts have essentially defined "restoration of civil rights" as having three components: the right to vote, the right to seek and hold public office, and the right to serve on a jury. See *Hampton v. United States*, 191 F.3d 695 (6th Cir. 1999).

But note that if state law retains any sort of firearms restriction (*i.e.* allowing long guns but not handguns) the federal restriction still applies, effectively nullifying the partial restoration. See *Caron v. United States*, 524 U.S. 308 (1998). In addition, federal offenders appear to have no way of restoring their rights except through a presidential pardon. Cf. *Beecham v. United States*, 511 U.S. 368 (1994).

[57] *See, e.g. proposed* 24 C.F.R. Part 3400, published at 74 Fed. Reg. 66548 (Dec. 15, 2009)(implementation of SAFE Act prohibition on licensing of convicted persons to originate mortgages); Transportation Security Administration, U.S. Dep't of Homeland Security, *Disqualifiers: HAZMAT Endorsement Threat Assessment Program*, available at http://www.tsa.gov/what_we_do/layers/hazmat/disqualifiers.shtm; Transportation Security Administration, U.S. Dep't of Homeland Security, *Program Information Transportation Worker Identification Credential*, available at http://www.tsa.gov/what_we_do/layers/twic/program_info.shtm.

adopted to authorize the U.S. Parole Board, or some other entity, to consider and in appropriate cases grant, Orders of Limited Relief and Certificate of Restoration of Rights to assist deserving persons convicted of violations of federal criminal law.

Conclusion

I appreciate the opportunity to submit this written testimony and look forward to addressing the Members of the Subcommittee to discuss the problems of collateral consequences and how the Congress can take steps to reduce the extent to which collateral consequences serve as barriers to successful reentry to society of ex-offenders.

For further information on the UCCCA or on the Uniform Law Commission, please contact me or ULC Legislative Counsel Eric Fish at the ULC offices in Chicago at 312-450-6600, eric.fish@nccusl.org

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