



OREGON LAW COMMISSION

MEMORANDUM

DATE: November 8, 2011
TO: Oregon Law Commission Program Committee
FROM: John D. Adams, Law Clerk
RE: Project Proposal: Adopt the Uniform Collateral Consequences of Conviction Act to address collateral consequences

This project proposal requests that the Oregon Law Commission's Program Committee recommend the creation of a work group to undertake a study of the adoption of the amended 2010 Uniform Collateral Consequences of Conviction Act (UCCCA).¹ The National Conference of Commissioners on Uniform State Laws (NCCUSL) drafted the UCCCA. This proposal also requests that the workgroup consider expanding the uniform act to also apply to juveniles, including the adoption or incorporation of the Juvenile Waiver of Counsel—Model Colloquy.² The Office of Public Defense Service Appellate Division drafted this waiver and it has since been circulated among juvenile courts with the support of Chief Justice De Muniz.³

The ultimate goal of the Work Group will be to propose reform recommendations to the 2013 legislative session.

1. The Problem

The modern day collateral consequences of a criminal conviction continue to affect an offender's life well beyond the terms specified in the offender's sentence.⁴ Ever growing statutory prohibitions laden a released offender with restrictions that severely limit the possibility of exercising basic freedoms, such as securing gainful employment, renting or owning a home and conducting other basic activities necessary for an ordinary life.⁵ A juvenile adjudicated as a delinquent faces an equally daunting set of restrictions that may prevent them from entering society as a free adult.⁶ The imposed collateral consequences in Oregon are largely political in nature, and the discussion of each consequence's relative value is beyond the scope of this proposal. However, the consequences of conviction now greatly impede offenders' reintegration

¹ See http://www.law.upenn.edu/bll/archives/ulc/ucsada/2010final_amends.htm

² Juvenile Waiver of Counsel—Model Colloquy for Judges (Office of Public Defender Service Appellate Division, February 2011).

³ See memorandum: "Completion of the *Juvenile Waiver of Counsel Script* - Available for Use," by Mollie Coisan, Director of the Office of Education, Training and Outreach (Office of the State Court Administrator, February 9, 2011).

⁴ See generally, ABA Criminal Justice Section: Adult Criminal Consequence Statute Demonstration; Oregon Statutes (Total: 813, as of September 23, 2011)

<http://isrweb.isr.temple.edu/projects/accproject/pages/GetStateRecords.cfm?State=OR>

⁵ Margaret Colgate Love, Relief from the Collateral Consequences of a Criminal Conviction: A State-By-State Resource Guide 4 (October 2005).

⁶ See "Think Before You Plea: Juvenile Collateral Consequence in [Oregon]," <http://www.beforeyouplea.com/or>.

into society and defendants need to adequately know of the potential consequences. By looking to this uniform act, in whole or in part, Oregon law could be improved to collect and clarify the consequences, require improved notification, and make a more fair justice system.

Professional responsibility standards have long been in place stating that it is among the duties of the defense attorney to notify the client about consequences with taking plea bargains, going to trial and convictions.⁷ Recent case law emerging at the federal level suggests that a defendant's right to counsel (under the U.S. Constitution⁸ and Oregon law⁹) may be violated when an attorney does not adequately warn about collateral consequences involved with a guilty plea.¹⁰ The quality of justice becomes even more uncertain when the adult or juvenile waive their right to counsel for representation in a criminal or juvenile adjudication proceeding without any requirement that an indication of what consequences (other than maximum incarceration) will follow a pleading or sentencing.¹¹

All the ramifications of collateral consequences are not well known by the community. Improving notice of consequences has the potential to reduce resources used on PCR cases. Offenders have the right to scarce public defender resources in a trial for post-conviction relief. Offenders often bring these challenges on the basis of inadequate representation by his or her attorney during the original trial because the attorney failed to advise the defendant of the collateral consequences associated with a conviction. Costs associated with defendants bringing PCR claims may be decreased when it can be shown that the attorney or court provided the offender with a clear list of collateral consequences and that the attorney explained the consequences to the client. When there is evidence in the record of the court directly confirming with the defendant that he or she has been advised about the collateral consequences at stake, PCR claims of this kind should also decrease significantly.¹² Unfortunately, the Oregon Revised Statutes do not contain a comprehensive list of collateral consequences; instead, they are scattered among thousands of pages and no official state guidance is available to locate them.

The UCCCA's Solutions

To address some of the problems associated with collateral consequences, NCCUSL drafted the UCCCA. The Act stresses four major elements (split among its 18 sections):

- Notification of the defendant: The criminal justice system relies on the defendant being able to make informed decisions about how to pursue his or her defense. In order to make informed decisions, the defendant needs to be aware of collateral consequences at important junctures of his or her case—at or before formal notification of charges, when pleading guilty, at sentencing and when released. The Act allows for the defendant to receive

⁷ See, ABA Criminal Justice Standards, Pleas of Guilty, Standard 14-3.2, *Responsibilities of Defense Counsel*, www.americanbar.org/publications/criminal_justice_archive/crimjust_standards_guiltypleas_blk.html#3.2

⁸ In re Gault, 387 U.S. 1, 41 (1987).

⁹ ORS 419C.200 and ORS 419C.245.

¹⁰ Padilla v. Kentucky, 130 S.Ct. 1473, 176 L.Ed.2d 284 (2010); Chaidez v. United States, ___ F.3d ___ (7th Cir. 2011).

¹¹ See Leslie J. Harris, et. al. Waiver of Counsel in Delinquency Proceedings (The Oregon Child Advocacy Project, March 2010).

¹² Informal discussions and anecdotal comments from post conviction relief attorneys. *Citation forthcoming*.

notification of collateral consequences at each of these important points of the case.

- Constitutionally competent representation: Sixth amendment case law, professional responsibility rules and criminal defense standards of practice all require that a defense attorney inform the client when a plea involves the risk of deportation and other collateral consequences. The Act provides for a separate actor (the court or an administrator) to confirm with the defendant that the attorney has discussed the collateral consequences. Such notice will help to ensure competent representation and will raise awareness of collateral consequences.
- Collect collateral consequences into a single document: The Act proposes the compilation of all state-sanctioned collateral consequences into a single document. This is meant to reduce the ambiguity of what sanctions exist and to ease the notification burden on defendants and their attorneys.
- Orders of limited relief and certificates of restoration of rights: The Act provides a process for offenders to petition the court for “orders of limited relief” to reduce certain barriers that materially impair their reintegration into society. The Act also permits offenders to seek a “certificate of restoration of rights” to show to employers, landlords or any person considering the defendant for an opportunity that the individual has satisfied his or her penalty and is conforming his or her conduct to the law.

Additionally, the Oregon State Office of Public Defender Services Appellate Division recently completed an effort to improve notification requirements for juveniles waiving counsel.¹³ The notification consists of a colloquy for judges when faced with a juvenile waiving counsel, and it seeks to clarify the potential consequences at stake. It further explains the juvenile’s right to competent representation, why they may be ill-prepared to raise their own defense, and the risks of collateral consequences.

2. History of the Reform Efforts

Oregon is among the minority of states that statutorily mandates that a defendant receive warning of a few collateral consequences that accompany a criminal conviction. Oregon’s collateral consequences statute predates the federal recognition of a defendant’s right to notice of collateral consequences as a collateral due process right. Like the more recent federal precedent, Oregon’s statute followed from a case involving the failure of a defense attorney to advise a non-citizen defendant about the risk of deportation following a criminal conviction.¹⁴ The statute in its current form requires that a court verify directly with the defendant that he or she is knowingly waiving the bulk of the defendant’s due process rights with the guilty plea, along with an acknowledgment of the collateral consequences that may come with the guilty pleading. Beyond the risk of deportation, Oregon’s statute focuses only on other federally enforced sanctions (inexplicably only includes gun ownership, military service and law enforcement

¹³ Oregon Office of Public Defense Services, Appellate Division, “Juvenile Waiver of Counsel—Model Colloquy for Judges” (created February 2011).

¹⁴ Lyons v. Pearce, 694 P.2d 969, 971 (Or. 1985)(en banc).

employment).¹⁵ Later in the chapter, an additional section spells out a general responsibility of the defense counsel, stating “defense counsel, after appropriate investigation, shall advise the defendant of the alternatives available and of factors considered important by the defense counsel or the defendant in reaching a decision.”¹⁶

Although Oregon’s statutory requirements entail slightly more notification than many other states, the statute does not begin to encapsulate a complete notification of the consequences of a conviction. Substantial but omitted consequences include restricted educational opportunities, forfeiture of the ability to seek certain forms of government assistance (including subsidized housing), and other restrictions that arise from having a criminal record generally.¹⁷ In a more recent case, *Gonzalez v. State*, the Oregon Supreme Court upheld the essence of the collateral consequence notification statute, despite reversing the lower courts’ mistaken reading of the law (it is not whether the defense attorney must give an estimate of the likelihood that the consequence will occur, but merely the possible consequences of the plea).¹⁸

NCCUSL’s first version¹⁹ of the UCCCA arrived immediately prior to the U.S. Supreme Court’s landmark *Padilla v. Kentucky* opinion. In that 2010 case, the Court held that the defendant’s attorney provided constitutionally deficient representation because the attorney did not properly advise the defendant that a conviction or plea carried with it the significant consequence of deportation. There was general agreement among the majority, concurrence and dissent that direct consequences of a conviction require notification by the attorney. Further, the majority held that where a defendant faces immigration consequences, the attorney must advise the client about that consequence. If the consequence of conviction would clearly result in

¹⁵ Or. Rev. Stat. §135.385 Guilty or no contest plea; court’s address to defendant

(1) The court shall not accept a plea of guilty or no contest to a felony or other charge on which the defendant appears in person without first addressing the defendant personally and determining that the defendant understands the nature of the charge.

(2) The court shall inform the defendant:

(a) That by a plea of guilty or no contest the defendant waives the right:

(A) To trial by jury;

(B) Of confrontation; and

(C) Against self-incrimination.

(b) Of the maximum possible sentence on the charge, including the maximum possible sentence from consecutive sentences.

(c) When the offense charged is one for which a different or additional penalty is authorized by reason of the fact that the defendant may be adjudged a dangerous offender, that this fact may be established after a plea in the present action, thereby subjecting the defendant to different or additional penalty.

(d) That if the defendant is not a citizen of the United States conviction of a crime may result, under the laws of the United States, in deportation, exclusion from admission to the United States or denial of naturalization.

(e) That if the defendant is entering a guilty plea pursuant to a plea offer and agreed disposition recommendation under [ORS 135.405](#), the court will agree to impose sentence as provided in the agreed disposition recommendation.

(f) That if the defendant enters a plea of guilty or no contest to an offense involving domestic violence, as defined in [ORS 135.230](#), and is convicted of the offense, federal law may prohibit the defendant from possessing, receiving, shipping or transporting any firearm or firearm ammunition and that the conviction may negatively affect the defendant’s ability to serve in the Armed Forces of the United States as defined in [ORS 348.282](#) or to be employed in law enforcement.

¹⁶ ORS 135.425(2)

¹⁷ See fn 3.

¹⁸ 340 Or. 452, 454 (2006).

¹⁹ http://www.law.upenn.edu/bll/archives/ulc/ucsada/2009_final.pdf

deportation or some other result, the attorney must advise as much. However, where the immigration consequences were less clear but likely to occur, the attorney would only have to notify the client that their immigration status would likely change. Although the concurring opinion challenged this clear and unclear dichotomy on the basis that it puts an undue burden on the attorney to know enough about immigration law to know the difference, the opinions point to general agreement that an attorney cannot remain silent about a deportation consequence, and this is due in no small part to the weightiness of the consequence. The Court hinted that the magnitude of a collateral consequence and its foreseeability plays a role in determining whether a failure of the attorney to advise his or her client about it can be enough to be treated as an instance of constitutionally deficient counsel.

Unfortunately, in the year since the U.S. Supreme Court issued the *Padilla* opinion, the Oregon appellate courts have not decided a case with a claim that cites the broader implications of mandated notification requirements for significant collateral consequences, which at least one federal Circuit Court²⁰ and scholars²¹ have found to be implicit in Justice Alito's concurrence in the *Padilla* case.

During the 2011 legislative sessions, North Carolina is the only state to have adopted the UCCCA, though legislation is pending in Colorado, Minnesota, Nevada, New Mexico, Vermont and West Virginia.²²

On the juvenile rights front, a recent survey of juvenile courts around Oregon shows disturbingly inconsistent—and in some instances, high—rates of juveniles waiving counsel with little or no warning about the need to have representation for delinquency proceedings.²³ Though there was some recent success at rolling back collateral consequences for juveniles during the 2011 legislative session,²⁴ these changes are relatively modest in light of the fact that they pertain only to a limited group of delinquents that would otherwise have been subject to sex offender reporting requirements and delinquents who could have been forced to be confined in adult correctional facilities.

3. Scope of the Project

A work group would review the entire UCCCA and make recommendations on what, if any, provisions to place in Oregon law as provided or with amendments.

²⁰ e.g. *Chaidez v. United States*, ___ F.3d ___ (7th Cir. 2011).

²¹ Margaret Colgate Love, "Paying Their Debt to Society: Forgiveness, Redemption, and the Uniform Collateral Consequences of Conviction Act," 54 *How. L.J.* 753 (2011); Gabriel Chin, "Making *Padilla* Practical: Defense Counsel and the Collateral Consequences at Guilty Plea" 54 *How. L.J.* 675 (2011).

²² See: Colorado (SB 44), Minnesota (HB 489/SB 1448), Nevada (SB 87), New Mexico (HB 311), North Carolina (HB 641), Vermont (SB 38) and West Virginia (HB 2010); source: <http://www.nccusl.org/Act.aspx?title=Collateral%20Consequences%20of%20Conviction%20Act> (accessed October 14, 2011).

²³ Leslie J. Harris, et. al. "Waiver of Counsel in Delinquency Proceedings," The Oregon Child Advocacy Project (March 2010), <http://familylaw.uoregon.edu/child/resources/waiverofcounsel.pdf>

²⁴ See SB 408 and HB 2707, 2011 legislative measures signed into law.

Section Four:

The significant content of the act begins at section four, which requires the collection of collateral sanctions and disqualifications, along with the correlating provisions for avoiding or mitigating the sanctions, into a comprehensive document. The Act calls for this document to be made available to all who rely on it in their decision-making—attorneys, defendants, judges and litigators.

Presently, the Oregon Revised Statutes do not contain a centralized list detailing collateral consequences and sanctions at the state level. Two ABA run programs have websites that maintain Oregon specific collections of collateral consequences (one for adults and one for juveniles).²⁵ The Youth, Rights & Justice not-for-profit law firm also has a report that similarly details juvenile collateral consequences.²⁶ Although unofficial, these sources have already done much of the work necessary to help produce an official document that would satisfy this section's purpose.

Sections Five and Six:

These sections of the Act call for notification of the defendant regarding collateral consequences at all relevant crossroads of the case: when formally charged, when pleading guilty, and at both sentencing and release from incarceration. The Act leaves to each state to choose who the appropriate actor should be to give notice—i.e. the court, court clerk, pretrial services, jail authorities or the prosecution. ORS 135.385 currently only covers the single situation of the defendant receiving notification of collateral consequences when pleading guilty. Similarly, ORS 135.425 focuses on the defense attorney's responsibility for advising the defendant of the alternatives available and of factors considered important by the defense counsel or the defendant in reaching a decision on whether to accept a plea deal. As it is currently written in the statute, collateral consequences should arguably be mentioned already, as they fall under "factors considered important by the defense counsel or the defendant." Nevertheless, this point could be easily clarified by revising the statute to say as much.

Some observers argue that a decrease in post-conviction relief (PCR) claims may occur as a result of improved notifications. This would be favorable for the state since PCR claims often require the use of significant public defender services, court resources, and Department of Justice time due to falling within the sixth amendment right to counsel. However, no effort to estimate of any cost savings has been undertaken.

Sections Seven and Eight:

These two sections are aimed at preventing problems in the future and ensuring more sound policies in the future. Section seven restricts the creation of new collateral consequences to those empowered to do so by statute, ordinance, or by rule. Further, section seven handles situations where there is ambiguity about whether a provision is an automatic collateral sanction or merely a discretionary disqualification (i.e. only imposed after reviewing the offender's unique circumstances). This section's provision requires ambiguous laws to be construed as a

²⁵ Adults: <<http://isrweb.isr.temple.edu/projects/accproject/index.cfm>>; Juveniles: <http://www.beforeyouplea.com/or>

²⁶ Youth, Rights & Justice (formerly know as "Juvenile Rights Project"), *Beyond Juvenile Court: Long-term Impact of a Juvenile Record, What Defense Attorneys Need to Know about Collateral and other Non-confinement Consequences of juvenile Adjudications* (2010).

discretionary disqualification (in accordance with the rule of lenity). Section eight requires an individualized assessment of whether a disqualification should be imposed on a defendant and provides guidance on how to make the decision.

Section Nine:

With uniformity ever at the forefront, this section handles how to approach out-of-state convictions, expunged or annulled convictions for crimes and juvenile infractions that may or may not exist in this state's criminal code. The section also reaffirms that convictions that are overturned shall not lead to collateral consequences for the defendant. In subsection (e), two alternatives are offered as some states currently allow forms of relief from collateral consequences, while others do not allow such relief. This is a choice of law issue for adopting states to determine whether to follow the law of the state that sentenced the defendant, or whether to simply apply the state's own laws.

Sections Ten, Eleven, Twelve, Thirteen and Fourteen:

These sections comprise the fourth element of the UCCCA's plan for addressing collateral sanctions. Section ten creates the mechanism of orders of limited relief, which aim to lessen legal obstacles for individuals to help facilitate their reentry into society. In order to qualify for an order, the offender must "show that relief would 'materially assist' in obtaining employment, education, housing, public benefits or occupational licensing, and that the individual has 'substantial need' for the benefit to live a law-abiding life."²⁷

Section eleven permits released offenders to pursue general restoration of rights after a specified period of time has elapsed—during which the individual lives according to a law abiding lifestyle. Once the offender can demonstrate that he or she has satisfied all aspects of his or her punishment and qualifies to gain all rights, a designated board or agency will issue a certificate of restoration of rights. This offender can then use the certificate to demonstrate to others in the community (presumably, when the offender is being considered for an opportunity) that he or she has resumed a law abiding lifestyle. While the certificate does not compel the individual or group offering the opportunity to grant it upon being presented with the certificate, the ability to offer the certificate extends additional reassurance about the offender's history and credibility.

Section twelve lays out restrictions of when orders of limited relief and certificates of restoration of rights may not be issued to mitigate collateral sanctions. Requirements for sex offender registration and notification, motor vehicle licensing restrictions and ineligibility for certain law related employment cannot be waived. The Act makes allowances for this section to be arranged according to the adopting state's current statutory provisions for sanctions ineligible for discretionary relief.

Section thirteen calls for giving notice to the prosecution, whether in-state or out-of-state, when a defendant requests either form of relief. The authority responsible for granting or denying an Order of Limited Relief (or certificate of Restoration of Rights) is also responsible for giving the notice. The section provides a process for determining whether the relief is

²⁷ UCCCA, §10 Comment at pp. 29.

warranted based on available information, and for granting and revoking such relief. The final result of the request for relief, or modification thereof, will be available to the public.

It must be noted that of the four main elements of the UCCCA (as highlighted in the problem section), the first three pertain to procedural improvements that otherwise raise the quality of justice in the judicial system. The fourth element is substantive in nature: the Act's efforts to legislate new forms of relief are likely to subject to political factors that could make them highly controversial. In light of that concern, it may be necessary to split any resulting legislative recommendations that the workgroup may have on this element into a unique bill.

Sections Fifteen, Sixteen, Seventeen and Eighteen:

The remaining sections deal with several ancillary issues that stem from the provisions of the earlier sections, namely allowing victims to weigh in on offender orders for limited relief and certificates of restoration of rights, uniformity in construing the act, continuity of sanctions and allowing for a flexible effective date. As other states have begun to take up this act already, it behooves Oregon to take up the act at its earliest convenience.

Juvenile Waiver of Counsel

The Commission has been similarly urged to take up a separate but related issue regarding competent representation and just notice for juveniles. When counsel has been waived, it has been recommended by state judicial service providers (OPDS) that Oregon further codify a formal colloquy for judges to give to juvenile defendants who wish to waive their right to representation.²⁸ Arguably, juveniles would also benefit from clearer notification of the collateral consequences they face whether they are represented or not. The current standard for adult waiver of counsel is equally deficient as it was for juveniles prior to the arrival of the recommended notification mentioned above,²⁹ as the adult version of the notification fails to satisfy statutory requirements of what counsel is otherwise required to inform the client regarding guilty pleas.³⁰ It is appropriate to review these ancillary issues with the UCCCA because they expose gaps in the framework of fair trials—a broader concern that would be under scrutiny by this potential workgroup.

4. Law Commission Involvement

Commissioner Julie McFarlane, Supervising Attorney at Youth, Rights & Justice Attorneys at Law (Portland, Oregon) first made the suggestion for this proposal to the Commission. This project is appropriate for the Commission to take up because it is a NCCUSL initiative that also coincides with major efforts by the ABA and other national defenders' groups to address the historically overlooked area of collateral consequences. These sources of law reform are cited in the Commission's statutory mission according to ORS 173.338(1)(a)-(c).

²⁸ See fn. 14

²⁹ See OSB Criminal Section model waiver of counsel form, <http://osbar.clsection.org/wp-content/uploads/2008/04/waivercounsel.doc>

³⁰ See *id.* The model waiver of counsel form likely fails to meet requirements requires set out in Or. Rev. Stat. §135.385—fn. 13.

Further, the equitable concerns associated with barriers to offenders' reentry into society also places this topic under ORS 173.338(1)(d), which allows the Commission to address areas of state law that foster inequitable rules that are out-of-touch with modern conditions.³¹

Additionally, the proposal involves several stakeholders that the Commission has engaged with in the past on projects of similar scope. The Commission is uniquely positioned to work with the prosecutors, defense attorneys and the bench on this important issue.

5. Project Participants

Representatives from each of the major stakeholders in this area should be invited to participate in this work group. To begin with, Commissioner Julie McFarlane has committed to assisting with the project. Other key members would likely include Professor Leslie Harris (or another representative) from the Oregon Child Advocacy Project, Mr. Paul Levy from the Office of Public Defense Services Appellate Division, a prosecutor from a county district attorney's office, the Oregon Department of Justice, representatives from the Oregon State Bar Association (specifically, the criminal law section), and representatives from a victim rights group (or the general public).

Additionally, inviting an attorney who currently practices in the area of post conviction relief would bring knowledge useful for investigating any potential savings that notification of defendants about collateral consequences may produce from reducing claims for post-conviction relief.

Conclusion

The Program Committee of the Oregon Law Commission should approve the formation of a work group to study the implementation of the Uniform Collateral Consequences of Conviction Act. The act proposes significant changes to Oregon law regarding the notification by a defendant's attorney and the court of collateral consequences that a plea agreement or a sentence may involve. Additional changes may also include clearer mandates for defendant notification of the consequences of the waiver of attorney representation and collateral consequences generally for both adult and juvenile defendants.

³¹ Or. Rev. Stat. §173.338 Law revision program. (1) The law revision program conducted by the Oregon Law Commission may include, but is not limited to:

(a) Review of the common law and statutes of the state, and current judicial decisions, for the purpose of discovering defects and anachronisms in the law.

(b) Consideration of changes in the law recommended by the American Law Institute, the National Conference of Commissioners on Uniform State Laws, any bar association or other learned bodies.

(c) Consideration of suggestions from judges, justices, public officials, lawyers and the public generally as to defects and anachronisms in the law.

(d) Recommendation for changes in the law that the commission considers necessary to modify or eliminate antiquated and inequitable rules of law and to bring the law of Oregon into harmony with modern conditions.