

To: House Committee on Judiciary, 2015 Oregon Legislature

From: Julie H. McFarlane, Member - Oregon Law Commission, Chair - Uniform Collateral Consequences of Conviction Workgroup Chair

Date: March 26, 2015

Re: HB 2367 (-1)

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Chair Barker and Members of the Committee:

The Oregon Law Commission (OLC) has undertaken a study of the Uniform Collateral Consequences of Conviction Act (UCCCA) and recommends passage of HB 2367(-1). The National Conference of Commissioners on Uniform State Laws (NCCUSL also referred to as the Uniform Laws Commission [ULC]) adopted the UCCCA. The OLC UCCCA Workgroup recommended, and the OLC approved, the expansion of the uniform act to include juveniles adjudicated guilty of crimes. The Workgroup, as directed by the OLC, also limited its initial study to the first part of the UCCCA governing notice to defendants of collateral consequences of criminal conviction. The Workgroup will continue to study and make recommendations to the OLC concerning the second part of the UCCCA relating to relief from collateral sanctions and certificates of restoration of rights.

### **The Problem<sup>1</sup>**

The modern day collateral consequences of a criminal conviction or juvenile delinquency adjudication continue to affect an offender's life well beyond the terms specified in the offender's sentence or disposition. Ever growing statutory and administrative prohibitions laden an offender with restrictions that severely limit the possibility of exercising basic freedoms, such as securing gainful employment, renting or owning a home, having access to public benefits - including public housing, military service, higher education, and many kinds of

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<sup>1</sup> Portions of this Memorandum are excerpted from a Memorandum prepared by OLC Law Clerk, John D. Adams.

licensure and conducting other basic activities necessary for an ordinary life. For a juvenile, a delinquency adjudication may prevent her from entering society as a free adult.

Inevitably, adults with convictions and juveniles with adjudications are surprised to discover these legal barriers they were never told about. The major exception, where advice of one group of collateral consequences is required to be provided both by defense counsel and the trial court is as to the immigration consequences and possibility of deportation for non-citizen defendants. Case law indicates that a defendant's right to counsel may be violated when an attorney does not adequately advise about the immigration consequences involved with a guilty plea.<sup>2</sup> Many commentators believe that the reasoning of the *Padilla* Court may ultimately extend to other collateral consequences.

Individuals with convictions or adjudications are often frustrated by the increasing difficulty in avoiding or mitigating the impact of these collateral consequences.

“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.”<sup>3</sup>

In recent years, the number and severity of collateral consequences has grown at a rapid pace in Oregon, as in other states, with more than 1100 Oregon statutes and administrative rules and policies imposing collateral sanctions on adults convicted of crimes, and more than 200 statutes and administrative rules

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<sup>2</sup> *Padilla v. Kentucky*, 130 S.Ct. 1473, 176 L.Ed.2d 284 (2010)

<sup>3</sup> UCCCA Prefatory Note at page 4.

imposing collateral sanctions on juveniles according to compilations developed by the American Bar Association.<sup>4</sup>

As the UCCCA Prefatory Note points out, it is not only the rapid increase of the number of collateral consequences and the increasingly burdensome legal effect of a record of conviction or adjudication, but the availability to all arms of the government and the general public, via Internet, of this information.<sup>5</sup>

“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 cheap, easy and routine.”<sup>6</sup>

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.<sup>7</sup> The quality of justice becomes even more uncertain when the adult or juvenile waives their right to counsel, proceeding without any requirement that the defendant will be notified of the collateral consequences of a plea. Many commentators have argued that defense attorneys and/or trial courts have constitutional and/or ethical obligations to inform and educate defendants about collateral consequences.<sup>8</sup>

Faced with such large numbers of collateral consequences, it is virtually impossible that defense counsel and trial courts can marshal the necessary information to carry out these ethical and constitutional obligations, exposing the

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<sup>4</sup> The National Inventory of the Collateral Consequences of Conviction is available at:

<http://www.abacollateralconsequences.org/search/?jurisdiction=40>

<sup>5</sup> Prefatory Note at page 2.

<sup>6</sup> Id. Citing Corine A. Carey, “No Second Chance: People with Criminal Records Denied Access to Public Housing”, 36 U. TOLEDO L. REV., 545, 553 (2005).

<sup>7</sup> 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](http://www.americanbar.org/publications/criminal_justice_archive/crimjust_standards_guiltypleas_blk.html#3.2)

<sup>8</sup> Pinard, Michael, “The Logistical and Ethical Difficulties of Informing Juveniles about the Collateral Consequences of Adjudications”, 6 NEVADA LAW JOURNAL 1111,1112 (Spring 2006).

defense lawyers and the state to the costs of malpractice actions, post-conviction relief actions and post-adjudication relief actions. Offenders have the right to scarce public defender resources in a trial for post-conviction relief. Offenders can bring these challenges on the basis of ineffective assistance of counsel during the trial court case because the attorney failed to advise the defendant of the collateral consequences associated with a conviction or adjudication. Costs associated with defendants bringing PCR/PAR 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, claims of this kind should decrease.

### **How HB 2367 (-1) Addresses the Problem**

The provisions of HB 2367 (-1) focus on the collection and notification to defendants of collateral consequences providing them, defense counsel and the courts with access to a collection of collateral sanctions or disqualifications in Oregon's Constitution, statutes and administrative rules. The bill specifies when the notice contained in Section 5 of the bill must be provided to defendants, so that they are informed of potential collateral consequences and may discuss and consider them when determining how to proceed in their case. Notification is simply put a matter of fairness and justice, but it also has other benefits to defendants, the public and the state.

Defense attorneys who are armed with current information on the many varieties of collateral consequences that exist are better equipped to provide constitutionally competent representation and give clients the guidance necessary to aid them in navigating their court involvement and understanding future legal obligations. There has been increased awareness among the defense bar and the courts of collateral consequences in recent years, which has led to the observation that heightened awareness of the risks and pitfalls of

system involvement have led to more robust advocacy by defenders, higher rates of compliance by defendants, and overall better long-term outcomes.<sup>9</sup> The notice provisions of HB 2367 (-1) will aid attorneys and courts in better meeting their obligations, and, as discussed above, will likely also reduce post-conviction or adjudication litigation.

**Submitted by:**

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<sup>9</sup> Models for Change, Innovation Brief, “Avoiding and Mitigating the Collateral Consequences of a Juvenile Adjudication.”