

**UNIFORM COLLATERAL CONSEQUENCES OF
CONVICTION ACT**

(Last Amended or Revised in 2010)

Drafted by the

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

and by it

APPROVED AND RECOMMENDED FOR ENACTMENT
IN ALL THE STATES

at its

ANNUAL CONFERENCE
MEETING IN ITS ONE-HUNDRED-AND-NINETEENTH YEAR
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NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

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TABLE OF CONTENTS

Prefatory Note.....	1
SECTION 1. SHORT TITLE	7
SECTION 2. DEFINITIONS.....	7
SECTION 3. LIMITATION ON SCOPE.....	9
SECTION 4. IDENTIFICATION, COLLECTION, AND PUBLICATION OF LAWS REGARDING COLLATERAL CONSEQUENCES	10
SECTION 5. NOTICE OF COLLATERAL CONSEQUENCES IN PRETRIAL PROCEEDING AND AT GUILTY PLEA.....	13
SECTION 6. NOTICE OF COLLATERAL CONSEQUENCES AT SENTENCING AND UPON RELEASE	18
SECTION 7. AUTHORIZATION REQUIRED FOR COLLATERAL SANCTION; AMBIGUITY.....	20
SECTION 8. DECISION TO DISQUALIFY.....	20
SECTION 9. EFFECT OF CONVICTION BY ANOTHER STATE OR THE UNITED STATES; RELIEVED OR PARDONED CONVICTION.....	23
SECTION 10. ORDER OF LIMITED RELIEF.....	27
SECTION 11. CERTIFICATE OF RESTORATION OF RIGHTS.....	30
SECTION 12. COLLATERAL SANCTIONS NOT SUBJECT TO ORDER OF LIMITED RELIEF OR CERTIFICATE OF RESTORATION OF RIGHTS	32
SECTION 13. ISSUANCE, MODIFICATION, AND REVOCATION OF ORDER OF LIMITED RELIEF AND CERTIFICATE OF RESTORATION OF RIGHTS	33
SECTION 14. RELIANCE ON ORDER OR CERTIFICATE AS EVIDENCE OF DUE CARE	35
SECTION 15. VICTIM'S RIGHTS	36
SECTION 16. UNIFORMITY OF APPLICATION AND CONSTRUCTION.....	36
SECTION 17. SAVINGS AND TRANSITIONAL PROVISIONS.....	37
SECTION 18. EFFECTIVE DATE.....	37

UNIFORM COLLATERAL CONSEQUENCES OF CONVICTION ACT

Prefatory Note

Both the criminal justice system and society as a whole face the problem of managing the growing proportion of the free population that has been convicted of a state or federal criminal offense. In a trend showing little sign of abating, the U.S. prison population has increased dramatically since the early 1970s. 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). Prison growth is large in absolute and relative terms; in 1974, 1.8 million people had served time in prison, representing 1.3% of the adult population. In 2001, 5.6 million people, 2.7% of the adult population, had served time. The Department of Justice estimates that if the 2001 imprisonment rate remains unchanged, 6.6% of Americans born in 2001 will serve prison time during their lives. Bonczar, *supra*. This may be an underestimate given that the incarceration rate has increased every year since 2001. *See also* PEW CENTER ON THE STATES, ONE IN 100: BEHIND BARS IN AMERICA IN 2008 (2008) (http://www.pewcenteronthestates.org/uploadedFiles/8015PCTS_Prison08_FINAL_2-1-1_FORWEB.pdf).

In addition to those serving or who have served prison time, an even larger proportion of the population has been convicted of a criminal offense without going to prison. Over four million adults were on probation in 2007, about twice as many as the number in jail or in prison. Laura E. Glaze & Thomas P. Bonczar, *Probation and Parole in the United States, 2007*, at 1-2, Bureau of Justice Statistics Bulletin (Aug. 2009, NCJ 224707). *See also* PEW CENTER ON THE STATES: ONE IN 31: THE LONG REACH OF AMERICAN CORRECTIONS (2009) (http://www.pewcenteronthestates.org/uploadedFiles/PSPP_1in31_report_FINAL_WEB_3-26-09.pdf). According to the U.S. Department of Justice, “[n]early 100 million individual offenders were in the criminal history files of the State criminal history repositories on December 31, 2008 (An individual offender may have records in more than one State).” *Survey of State Criminal History Information Systems, 2008*, at 4, Bureau of Justice Statistics (Oct. 2009) (<http://www.ncjrs.gov/pdffiles1/bjs/grants/228661.pdf>). Minorities are far more likely than whites to have a criminal record: Almost 17% of adult black males have been incarcerated, compared to 2.6% of white males. Bonczar, *supra*, at 5. 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.” 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>).

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

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

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. See JEFF MANZA & CHRISTOPHER UGGEN, *LOCKED OUT: FELON DISENFRANCHISEMENT AND AMERICAN DEMOCRACY* (Oxford 2006). Convicted individuals may be ineligible to hold public office. See, e.g., *State ex rel. Olson v. Langer*, 256 N.W. 377 (N.D. 1934). Federal law bars many persons with convictions from possessing firearms (18 U.S.C. § 922(g)(1)), serving in the military (10 U.S.C. § 504(a)), and on juries, civil and criminal. Brian C. Kalt, *The Exclusion of Felons from Jury Service*, 53 AM. U. L. REV. 65 (2003). 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 here 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 because of conviction of a criminal offense. The 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 are defined as 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. 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 (42 U.S.C. § 1320a-7(a)(4)); a 1991 law required states to revoke some driver's licenses upon conviction or lose federal funding (23 U.S.C. § 159), in 1993, Congress made individuals with drug

convictions ineligible to participate in the National and Community Service Trust Program. 42 U.S.C. § 12602(e). In 1996, Congress provided that individuals convicted of drug offenses would automatically be ineligible for certain federal benefits. 21 U.S.C. § 862a. A year later, Congress rendered them ineligible for the Hope Scholarship Tax Credit. 26 U.S.C. § 25A(b)(2)(D). In 1998, individuals convicted of drug crimes were made ineligible for federal educational aid (20 U.S.C. § 1091(r)), and for residence in public housing. 42 U.S.C. § 13662. In addition, 1988 legislation authorized state and federal sentencing judges to take away eligibility for federal public benefits. 21 U.S.C. § 862. *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>); *id.* at 47 App. 1 (“Federal Consequences Affecting a Person with a Felony Drug Conviction”).

Like Congress, state legislatures have embraced regulation of convicted individuals. Studies of disabilities imposed by state law or regulation done by law students in Maryland and Ohio show literally hundreds of collateral sanctions and disqualifications on the books in those states. *See* 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). Studies done for the District of Columbia, Michigan, New York, and Minnesota are to similar effect. *See* 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). An April, 2006 Florida Executive Order directs collection of collateral consequences by all state agencies. *See* Fl. Exec. Order No. 6-89 (Apr. 25, 2006). 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.

The legal system is only beginning to manage the proliferation of collateral consequences. One 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. *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). The most important consequence of this principle is in the context of guilty pleas. In a series of cases, the Supreme Court 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. *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)). For example, the Constitution does not 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 is 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. The Supreme Court held in *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010) that defense counsel was obligated, under the Sixth Amendment, to advise of the possibility that a guilty plea would lead to deportation. The reasoning of the Court may ultimately extend to other collateral consequences.

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. *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).

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. Matthew R. Durose & Patrick A. Langan, *Felony Sentences in State Courts, 2004*, at 3, Bureau of Justice Statistics Bulletin (July 2007, NCJ 215646). 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.” NATIONAL DISTRICT ATTORNEY’S ASSOCIATION, POLICY POSITIONS ON PRISONER REENTRY ISSUES §4(a) at 7 (Adopted July 17, 2005).

This Act deals with several aspects of the creation and imposition of collateral consequences. The provisions are largely procedural, and designed to rationalize and clarify policies and provisions that are already widely accepted in many states.

Section 3 makes clear that neither the provisions of the Act nor non-compliance with them are a basis for invalidating a plea or conviction, making a claim of ineffective assistance of counsel, or suing anyone for money damages.

Section 4 requires collection of collateral sanctions and disqualifications contained in state law, and provisions for avoiding or mitigating them, in a single document. The purpose is to make the law accessible to judges, lawyers, legislators and defendants who need to make decisions based on it.

Sections 5 and 6 propose to make the existence of collateral consequences known to defendants at important moments in a criminal case: At or before formal notification of charges, so a defendant can make an informed decision about how to proceed (Section 5(a)), when pleading guilty (Section 5(b)), and at sentencing and when leaving incarceration, so they can conform their conduct to the law (Section 6). Given that collateral sanctions and disqualifications will have been identified, it will not be difficult to make this information available.

Section 7 is designed to ensure that automatic, blanket collateral sanctions leaving no room for discretion are adopted formally, providing that they can be created only by statute, ordinance or formal rule.

Section 8 offers guidance for imposing discretionary disqualifications based on criminal conviction on a case-by-case basis.

Section 9 defines the judgments that count as convictions for purposes of imposing collateral consequences. Sections 9(a) and (b) explain how out-of-state convictions and juvenile adjudications will be used to impose collateral consequences in the enacting state. The rest of the section excludes convictions that have been reversed or otherwise overturned (9(c)), pardoned (9(d)), or did not result in a final conviction because of diversion or deferred adjudication (9(f)). Some states have forms of relief based on rehabilitation or passage of time, allowing convictions to be expunged, sealed, or set aside; in the case of out of state convictions, 9(e) asks states to make a choice about whether to give effect to grants of such relief by other states.

Sections 10 and 11 create new mechanisms for relieving collateral sanctions imposed by law. By definition, collateral consequences can only be imposed by state actors, so relieving them would not impose requirements on private persons or businesses, whose dealing with persons with convictions would be regulated, if at all, by law other than this act.

Section 10 creates an Order of Limited Relief, aimed at an individual in the process of reentering society. It offers relief from one or more collateral sanctions based on a showing that relief would facilitate reentry. The Order of Limited Relief merely lifts the automatic bar of a collateral sanction, leaving a licensing agency or public housing authority, for example, free to consider on a case-by-case basis whether it is appropriate to deny the opportunity to an individual.

Section 11 creates a Certificate of Restoration of Rights for individuals who can demonstrate a substantial period of law-abiding behavior consistent with successful reentry and desistance from crime. The Certificate of Restoration of Rights offers potential public and

private employers, landlords and licensing authorities concrete and objective information about an individual under consideration for an opportunity, and thereby could facilitate the reintegration of individuals with convictions whose behavior demonstrates that they are making efforts to conform their conduct to the law.

Some of the issues have been anticipated by the ABA STANDARDS FOR CRIMINAL JUSTICE: COLLATERAL SANCTIONS AND DISCRETIONARY DISQUALIFICATION OF CONVICTED PERSONS (3d ed. 2004), and the solutions they propose are mentioned.

UNIFORM COLLATERAL CONSEQUENCES OF CONVICTION ACT

SECTION 1. SHORT TITLE. This [act] may be cited as the Uniform Collateral Consequences of Conviction Act.

SECTION 2. DEFINITIONS. In this [act]:

(1) “Collateral consequence” means a collateral sanction or a disqualification.

(2) “Collateral sanction” means a penalty, disability, or disadvantage, however denominated, imposed on an individual as a result of the individual’s conviction of an offense which applies by operation of law whether or not the penalty, disability, or disadvantage is included in the judgment or sentence. The term does not include imprisonment, probation, parole, supervised release, forfeiture, restitution, fine, assessment, or costs of prosecution.

(3) “Conviction” includes an [adjudication as a juvenile delinquent]. “Convicted” has a corresponding meaning.

(4) “Decision-maker” means the state acting through a department, agency, officer, or instrumentality, including a political subdivision, educational institution, board, or commission, or its employees[, or a government contractor, including a subcontractor, made subject to this [act] by contract, by law other than this [act], or by ordinance].

(5) “Disqualification” means a penalty, disability, or disadvantage, however denominated, that an administrative agency, governmental official, or court in a civil proceeding is authorized, but not required, to impose on an individual on grounds relating to the individual’s conviction of an offense.

(6) “Offense” means a felony, misdemeanor, [insert term for lesser offenses in enacting state], or [insert term for delinquent acts] under the law of this state, another state, or the United

States.

(7) “Person” means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, public corporation, government or governmental subdivision, agency, or instrumentality, or any other legal or commercial entity.

(8) “State” means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States.

Legislative Note: If the enacting jurisdiction uses different terms for imprisonment, probation or parole, they should be added to the second sentence of Section 2(2). If the statutes of the enacting jurisdiction provide for violations or other lesser offenses, the term used to refer to them should be identified in Section 2(6).

Comment

The definitions in paragraphs (2) and (5) are taken from the ABA Standards. *See* ABA STANDARDS FOR CRIMINAL JUSTICE: COLLATERAL SANCTIONS AND DISCRETIONARY DISQUALIFICATION OF CONVICTED PERSONS, Standard 19-1.1 (3d ed. 2004). They exclude from the definition of collateral sanction or disqualification direct criminal punishment, such as fine, imprisonment, capital punishment, probation, parole, or supervised release. They also exclude the incidents and conditions of those direct punishments. Accordingly, classification and assignment of prisoners, and conditions of probation or parole are neither collateral sanctions nor disqualifications. Private conduct, such as the hiring decisions of private employers, is also not included. Covered actions generally include such things as denial of government employment and elective or appointive office, ineligibility for government licenses, permits, or contracts, disqualification from public benefits, public education, public services, or participation in public programs, and elimination or impairment of civil rights, such as voting, or jury service.

Whether one of these disabilities is a “collateral sanction” or a “disqualification” depends on how it is applied. If a medical licensing board by law, regulation or policy “must” deny a license to an applicant with a felony conviction, then it is a collateral sanction, because the effect is automatic. If a medical licensing board “may” deny a license to those with felony convictions, then the regulation or policy is a “disqualification.” However, if a criminal court takes away a medical license as punishment at sentencing, the action is neither a collateral sanction nor a disqualification. *See, e.g.,* United States v. Singh, 390 F.3d 168 (2d Cir. 2004). Even if they are enforced by criminal sanctions, restrictions which are not part of the sentence imposed by the court and apply only to convicted individuals constitute collateral sanctions.

So long it is imposed by the government, it does not matter whether a collateral consequence is imposed by law, regulation, or formal or informal practice. Thus if a city

personnel office has an unwritten but unvarying practice of never hiring individuals with felony convictions, that could constitute a collateral sanction. Laws and policies requiring disclosure of criminal convictions, and allowing the decision-maker to consider them as part of a “good moral character” or general fitness analysis fall within the definition of a disqualification. Similarly, laws and policies requiring a criminal background check impliedly constitute disqualifications, since it may fairly be assumed that the only reason the information is sought is that the results may be considered by the decision-maker.

Some states have offenses lesser than misdemeanors or felonies, such as infractions or violations. *E.g.*, MODEL PENAL CODE § 1.04(5). While these may not be deemed crimes under the law of the state, it is possible for them to carry collateral consequences. Thus, these lesser offenses are included within the definition of “offense” in Section 2(6).

These definitions and the Act apply to juveniles prosecuted as adults. They also apply to juveniles prosecuted in a family, juvenile or similar court if the adjudication or judgment of conviction, however denominated, gives rise to collateral sanctions or disqualifications under state law.

SECTION 3. LIMITATION ON SCOPE.

(a) This [act] does not provide a basis for:

- (1) invalidating a plea, conviction, or sentence;
- (2) a cause of action for money damages; or
- (3) a claim for relief from or defense to the application of a collateral consequence

based on a failure to comply with Section 4, 5, or 6.

(b) This [act] does not affect:

- (1) the duty an individual’s attorney owes to the individual;
- (2) a claim or right of a victim of an offense; or
- (3) a right or remedy under law other than this [act] available to an individual

convicted of an offense.

Comment

Non-compliance with this Act does not give an individual the ability to attack a plea or conviction, or avoid application of a collateral sanction based on lack of notice. While states adopting this Act should comply with it, non-compliance does not necessarily render a

conviction or plea illegal or unfair. However, other law may apply to misleading or incomplete advice about collateral consequences. *See, e.g., Padilla v. Kentucky*, 130 S. Ct. 1473 (2010). Grounds or mechanisms for challenging a conviction, if any, must be supplied by law other than this Act. Section (b)(3) leaves in place any other remedies that exist in the enacting state.

SECTION 4. IDENTIFICATION, COLLECTION, AND PUBLICATION OF LAWS REGARDING COLLATERAL CONSEQUENCES.

(a) The [designated governmental agency or official]:

(1) shall identify or cause to be identified any provision in this state's Constitution, statutes, and administrative rules which imposes a collateral sanction or authorizes the imposition of a disqualification, and any provision of law that may afford relief from a collateral consequence;

(2) not later than [insert number of] days after [insert the effective date of this [act]], shall prepare or cause to be prepared a collection of citations to, and the text or short descriptions of, the provisions identified under paragraph (1);

(3) shall update or cause to be updated the collection within [insert number of] days after each [regular session] of the [legislature]; and

(4) in complying with paragraphs (1) and (2), may rely on the study of this state's collateral sanctions, disqualifications, and relief provisions prepared by the National Institute of Justice described in Section 510 of the Court Security Improvement Act of 2007, Pub. L. 110-177.

(b) The [designated governmental agency or official] shall include or cause to be included the following statements in a prominent manner at the beginning of the collection required by subsection (a):

(1) This collection has not been enacted into law and does not have the force of

law.

(2) An error or omission in this collection or in any reference work cited in this collection is not a reason for invalidating a plea, conviction, or sentence or for not imposing a collateral sanction or authorizing a disqualification.

(3) The laws of other jurisdictions and [insert term for local governments] which impose additional collateral sanctions and authorize additional disqualifications are not included in this collection.

(4) This collection does not include any law or other provision regarding the imposition of or relief from a collateral sanction or a disqualification enacted or adopted after [insert date the collection was prepared or last updated].

(c) The [designated governmental agency or official] shall publish or cause to be published the collection prepared and updated as required by subsection (a). If available, it shall publish or cause to be published, as part of the collection, the title and Internet address of the most recent collection of:

(1) the collateral consequences imposed by federal law; and

(2) any provision of federal law that may afford relief from a collateral consequence.

(d) The collection described in subsection (c) must be available to the public on the Internet without charge not later than [insert number of] days after it is created or updated.

Comment

In a real sense, convicted persons are regulated. Each state effectively has a title of its code called *Collateral Consequences*, regulating the legal status of this group in scores or hundreds of ways. But instead of publishing these laws together, the statutes are divided up and scattered. The sanctions have proliferated unsystematically, with a prohibition on individuals with felony convictions obtaining one kind of license popping up in one section of a state's code,

a prohibition on obtaining some other kind of government employment appearing in an agency's rules.

While some disabilities may be well known, such as disenfranchisement and the firearms prohibition, in most jurisdictions no judge, prosecutor, defense attorney, legislator or agency staffer could identify all of the statutes that would be triggered by conviction of the various offenses in the criminal code. Although the information would be useful to many people, including judges, prosecutors, defense lawyers and those supervising individuals with convictions, as well as legislators and other policymakers, it would be extremely costly for any of them to develop the information on their own. Dispersal of these laws and rules defeats the purpose of having published codes in the first place.

Section 4(a) requires an appropriate government official or agency in each state to create a collection with citations to and short descriptions of any provision in the state constitution, statutes and administrative rules that create collateral sanctions and authorize disqualifications. The appropriate agency could be, depending on the jurisdiction, the revisor of statutes, the attorney general's office, the judicial branch, or the legislative counsel's office. The task of collection has been simplified by a recent federal law which mandates the Director of the National Institute of Justice to identify collateral sanctions and disqualifications in the constitutions, codes and administrative rules of the 50 states. Court Security Improvement Act of 2007, Pub. L. 110-177 § 510, 121 Stat. 2534, 2544. Accordingly, the federal government will fund the bulk of the initial work. However, the federal government study may not extend to disqualifications in the form of official policies and practices that have not been formally promulgated in a statute or agency regulation, so that jurisdictions may want to expand their collections accordingly. *Cf.* 42 U.S.C. § 3797w(e)(4) (requiring applicants for grants under the Second Chance Act of 2007 to provide "a plan for analysis of the statutory, regulatory, rules-based, and practice-based hurdles to reintegration of offenders into the community")

This collection will not be positive law, nor will it alter existing law. Yet, collecting collateral sanctions and disqualifications in the state's law, and describing them in simple, plain language, would make the formal written law knowable to those who use and are affected by it. Compare II. Pub. Act 096-0593 (Aug. 18, 2009) (requiring inventory of all state laws and policies restricting employment of persons with criminal records); MICH. COMP. LAWS § 28.425a(9) (requiring collection and distribution to firearms licensees of state firearms laws).

Sections (a)(2) and (3) and (c) leave bracketed the time periods for preparation of the initial collection, updating it after legislative sessions, and posting it on the Internet, recognizing that different conditions exist in different jurisdictions. But reasonable periods for preparation of the initial collection would be 180 days, 45 days for updating it after a session of the legislature, and 14 days for posting on the Internet after the initial collection or revision.

In jurisdictions without codified regulations, the legislature should require boards, agencies and other promulgators of regulations to notify the agency assigned responsibility for the collection of new regulations creating collateral sanctions or disqualifications.

The ABA Standards recommended formal codification, i.e., removing such provisions from their current locations and transferring them wholesale to a new title. *See* ABA STANDARDS FOR CRIMINAL JUSTICE: COLLATERAL SANCTIONS AND DISCRETIONARY DISQUALIFICATION OF CONVICTED PERSONS, Standard 19-2.1 (3d ed. 2004). However, this approach was rejected because it might leave the amended laws confusing and difficult to understand. Most of the benefit of full codification can be achieved by creating the collections described here.

Once the collections are created, they should be made available widely; this is the goal of Section 4(c). These documents should be viewable and downloadable on the Internet without charge, and if feasible distributed as a hardcopy booklet in public libraries and courthouses for individuals without access to computers and the Internet.

Many collateral consequences that will be important to individuals are imposed by federal law, including deportation of non-citizens and ineligibility to possess firearms. This Act does not require each state to collect federal collateral sanctions. However, to assist in providing notice to defendants and facilitate compliance with the law, enacting jurisdictions must include in the collection a link to the most recent available collection of federal collateral sanctions. *See* 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>). *See also* Court Security Improvement Act of 2007 § 510(a), 121 Stat. at 2543 (directing the National Institute of Justice to collect federal as well as state collateral consequences).

SECTION 5. NOTICE OF COLLATERAL CONSEQUENCES IN PRETRIAL PROCEEDING AND AT GUILTY PLEA.

(a) When an individual receives formal notice that the individual is charged with an offense, [the designated governmental agency or official] shall cause information substantially similar to the following to be communicated to the individual:

NOTICE OF ADDITIONAL LEGAL CONSEQUENCES

If you plead guilty or are convicted of an offense you may suffer additional legal consequences beyond jail or prison, [probation] [insert jurisdiction's alternative term for probation], periods of [insert term for post-incarceration supervision], and fines. These consequences may include:

- being unable to get or keep some licenses, permits, or jobs;

- being unable to get or keep benefits such as public housing or education;
- receiving a harsher sentence if you are convicted of another offense in the future;
- having the government take your property; and
- being unable to vote or possess a firearm.

If you are not a United States citizen, a guilty plea or conviction may also result in your deportation, removal, exclusion from admission to the United States, or denial of citizenship.

The law may provide ways to obtain some relief from these consequences.

Further information about the consequences of conviction is available on the Internet at [insert Internet address of the collection of laws published under Section 4(c) and (d)].

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

Legislative Note: *The legislature should designate an appropriate agency or official to give the notice provided by Section 5(a). Appropriate actors to give notice, depending on state procedure, could include the court or court clerk, pretrial services, jail authorities, or the prosecution. Section 5(b) may be adopted as a court rule rather than a statute if appropriate under state law or practice.*

Comment

The Purpose of Advisement. Individuals charged with criminal offenses should understand what is at stake. Therefore, they should know about collateral sanctions. Collateral sanctions and disqualifications are also important for the court in sentencing. *See, e.g.,* United States v. Pacheco-Soto, 386 F. Supp.2d 1198 (D.N.M. 2005) (downward departure based on deportable alien status); State v. Yanez, 782 N.E.2d 146, 155 (Ohio App. 2002) (noting that deportation may affect sentence); ABA STANDARDS FOR CRIMINAL JUSTICE: COLLATERAL SANCTIONS AND DISCRETIONARY DISQUALIFICATION OF CONVICTED PERSONS, Standard 19-2.4(a) (3d ed. 2004). They also may be important to the prosecutor in making charging decisions and arguing for a particular sentence. *See* Robert M.A. Johnson, *Collateral Consequences, Message from the President of the National District Attorney's Association*, May-June, 2001 (http://www.ndaa-apri.org/ndaa/about/president_message_may_june_2001.html).

There is only a limited and as yet undeveloped constitutional requirement that collateral sanctions and disqualifications be considered as part of the criminal proceedings. Most courts

hold that under the due process clause of the Constitution, in order to make a guilty plea knowing, voluntary and intelligent, the court must tell a defendant of the term of imprisonment, fine, and post-release supervision that will result from their convictions, not the collateral consequences that will also ensue. While the Supreme Court held in 2010 that the constitutional right to effective assistance of counsel requires a defense lawyer to advise a non-citizen defendant of the possibility of deportation following a plea to a deportable offense, *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010) a number of decisions hold that there is no comparable constitutional requirement for a court to inform defendants pleading guilty. *Broomes v. Ashcroft*, 358 F.3d 1251 (10th Cir. 2004); *Commonwealth v. Fuartado*, 170 S.W.3d 384, 385-86 (Ky. 2005). Even before *Padilla*, however, a majority of states provided by statute or court rule for court advisement of individuals pleading guilty of the possibility of deportation if they are not citizens of the United States. Twenty six states, Puerto Rico and the District of Columbia provide for notice by court rule or statute. *See* ALASKA R. CRIM. P. 11(c)(3)(c); AZ. R. CRIM P. 17.2(f); CAL. PEN. CODE § 1016.5; CT. GEN. STAT. ANN. § 54-1j; D.C. STAT. § 16-713(a); FLA. R. CRIM. P. 3.172(C)(8); GA. CODE ANN. § 17-7-93(c); HAW. REV. STAT. § 802E-1 - E-3; IDAHO CRIM. R. 11(d)(1); 725 ILL. COMP. STAT. 5/113-8; IOWA CT. R. CRIM. 2.8(2)(b)(3); ME. R. CRIM. P. 11(h); MD. R. 4-242(e); MA. GEN. L. ANN. 278 § 29D; MA. R. CRIM P. 12(c)(3)(C); MINN. R. CRIM. P. 15.01(10)(d); MONT. CODE ANN. § 46-12-210(1)(f); NEB. REV. STAT. § 29-1819.02(1); N.M. R. CRIM. P. 5-303(F)(5); N.Y. CRIM. PROC. L. § 220.50(7); N.C. STAT. § 15A-1022(a)(7); OH. REV. CODE § 2943.031(A); OR. REV. STAT. § 135.385(d); PUERTO RICO R. CRIM. P. 70; R.I. GEN. L. § 12-12-22; TEX. CODE CRIM. P. ART. 26.13(a)(4); VT. STAT. ANN. Tit. 13, § 6565(c); WASH. REV. CODE § 10.40.200(2); WISC. STAT. ANN. § 971.08(1)(c). Kentucky and New Jersey provide for notice though standard plea forms. Ky. Plea Form AOC-491, at 2 ¶ 10(Ver. 1.01, Rev. 2-03) (<http://courts.ky.gov/NR/rdonlyres/55E1F54E-ED5C-4A30-B1D5-4C43C7ADD63C/0/491.pdf>); New Jersey Judiciary Plea Form, N.J. Dir. 14-08, at 3 ¶ 17 (plea form promulgated pursuant to N.J. R. CRIM. P. 3-9) (http://www.judiciary.state.nj.us/forms/10079_main_plea_form.pdf). Court decisions in Colorado and Indiana require advice of possible deportation in at least some cases. *People v. Pozo*, 746 P.2d 523 (Colo. 1987); *Segura v. State*, 749 N.E.2d 496 (Ind. 2001).

A few other jurisdictions require advisement of other collateral sanctions. Indiana and Wyoming require warnings that defendants will lose the right to possess firearms based on certain criminal convictions. IND. CODE § 35-35-1-2(a)(4); WY. STAT. ANN. § 7-11-507. Wyoming also requires the court to advise defendants “in controlled substance offenses [of] the potential loss of entitlement to federal benefits.” WY. R. CRIM. P. 11(b)(1). Military law requires defense counsel to advise of potential sex offender registration. *United States v. Miller*, 63 M.J. 452, 459 (C.A.A.F. 2006). Even jurisdictions not requiring advisement of particular collateral consequences often recognize that it is sound public policy. Thus, Utah court rules provide: “Unless specifically required by statute or rule, a court is not required to inquire into or advise concerning any collateral consequences of a plea.” UTAH R. CRIM. P. 11(e). Yet, the Advisory Committee Note explains that “the trial court may, but need not, advise defendants concerning the collateral consequences of a guilty plea.” *See also, e.g., United States v. Banda*, 1 F.3d 354, 356 (5th Cir. 1993). Accordingly, courts or prosecutors often advise defendants of collateral sanctions in the absence of a court rule or constitutional obligation. *See, e.g., United States v. Nam Hong*, No. 07-CR-172-S (01), 2009 WL 688610, ¶ 15 & 16 (W.D.N.Y. Jan. 28, 2009) (Plea

Agreement) (noting that the “defendant has had an opportunity to fully determine what the consequences of the defendant’s conviction may be on the defendant’s immigration status”).

A substantial majority of United States jurisdictions, then, require advice by the court of one or more collateral sanctions, showing broad support for the idea that sound public policy and fairness require advice beyond the constitutional floor. Yet, advising a defendant of some collateral sanctions without addressing all of them may be misleading. It could reasonably be understood to imply that the imprisonment, fine and other direct punishment, plus the collateral sanctions specifically mentioned, represent the totality of the legal effects of the conviction. *See, e.g., Padilla v. Kentucky*, 130 U.S. at 1491 (Alito J., concurring in the judgment) (“[I]f defense counsel must provide advice regarding only one of the many collateral consequences of a criminal conviction, many defendants are likely to be misled.”); *United States v. Glaser*, 14 F.3d 1213 (7th Cir. 1994) (notice of restoration of rights misleading in not mentioning firearms restriction). For example, it would be reasonable but incorrect for a defendant pleading guilty in Wyoming to assume that because the court advised that firearms privileges and “federal benefits” might be lost, no state benefits, such as access to public housing, were at risk. Accordingly, both fairness to individuals, and the possibility that the obligation of counsel recognized in *Padilla* could otherwise have a destabilizing effect on the plea process, suggest that states should provide clear and accurate information about collateral consequences as part of the criminal justice process.

To provide clear notice to individuals facing criminal charges, Section 5 requires information about a broad range of potential consequences in several categories. This is the approach of the ABA Criminal Justice Standards, which provide:

Before accepting a plea of guilty or nolo contendere, the court should also advise the defendant that by entering the plea, the defendant may face additional consequences including but not limited to the forfeiture of property, the loss of certain civil rights, disqualification from certain governmental benefits, enhanced punishment if the defendant is convicted of another crime in the future, and, if the defendant is not a United States citizen, a change in the defendant’s immigration status. The court should advise the defendant to consult with defense counsel if the defendant needs additional information concerning the potential consequences of the plea.

ABA STANDARDS FOR CRIMINAL JUSTICE: GUILTY PLEAS, Standard 14-1.4(c) (3d ed. 1999). *See also* ABA STANDARDS FOR CRIMINAL JUSTICE: COLLATERAL SANCTIONS AND DISCRETIONARY DISQUALIFICATIONS, Standard 19-2.3(a) (3d ed. 2004).

The ABA Standards also require defense counsel to inform clients about collateral consequences. ABA STANDARDS FOR CRIMINAL JUSTICE: GUILTY PLEAS, Standard 14-3.2(f) (3d ed. 1999) (“To the extent possible, defense counsel should determine and advise the defendant,

sufficiently in advance of the entry of any plea, as to the possible collateral consequences that might ensue from entry of the contemplated plea.”)

The Method and Timing of Advisement. Section 5(a) provides that notice will be given by a government agency or official. Appropriate actors to give notice, depending on state procedure, could include the court or court clerk, pretrial services, jail authorities, or the prosecution.

The method of notification is deliberately flexible. Notice could be given in writing, either separately or as part of another document. If service of charges on a defendant or a defendant’s appearance is by mail, notice may be given by mail. The information may be presented to people being arraigned as a group through a recording. Although the fact of notice should be in the record, it would be sufficient for defense counsel or another actor to confirm on the record that notice was given outside of open court.

The notice should accompany arraignment, or other proceeding at which the defendant receives notice of the issuance of formal charges, such as indictment, information, complaint, or other charging instrument sufficient to bring a defendant to trial. Informal notice that charges are forthcoming does not trigger this section. Nor does an arrest, even one based on specific charges, unless the arrest alone is sufficient for prosecution and conviction without an additional charging document. If arraignment is waived, notice should be given at or before waiver of arraignment.

The notice should be provided in a language that the defendant understands. Translation should create little additional cost, because there is generally an interpreter at arraignment for non-English speaking defendants.

Section 5(b) requires the court as part of a guilty plea colloquy to confirm that the individual pleading guilty received and understood the notice in Section 5(a), and had a chance to discuss it with counsel. For the sake of efficiency, Section 5(b) does not require reiteration of the notice, although that could be done if advisable under the circumstances. In addition, many cases hold that even if counsel fails to provide information to a client, or provides misinformation, that error can be cured if the court provides the necessary information. *United States v. Bell*, 283 Fed. Appx. 628, 631 (10th Cir. 2008) (“the magistrate judge correctly informed Defendant of the possible sentences and cured any prejudice that could have resulted from counsel’s representations”); *Barker v. United States*, 7 F.3d 629, 633 (7th Cir. 1993) (“even if advice from [the defendant’s] trial attorney had led to his misunderstanding of the consequences of his guilty plea, any such confusion was cured by the trial court.”) Accordingly, the court and prosecutor have the opportunity, if they wish, to ensure that the defendant has received notice, on the record, of any issues that may be significant.

The Effect of Non-Compliance with Section 5 on the Validity of the Plea. Compliance with this provision should be sufficiently simple, that questions of the consequences of non-compliance should rarely arise. However, the criminal justice system depends on the finality of judgments. Accordingly, there is strong reason not to upset a plea for a technical deficiency in guilty plea procedure, and this is the prevailing rule. *See, e.g.*, FED. R. CRIM. P. 11(h) (“A

variance from the requirements of this rule is harmless error if it does not affect substantial rights.”). Section 3(a)(1) provides that the general rule applies here, so failure to receive notice of collateral sanctions and disqualifications under the Act is not a basis for challenging a plea or conviction. However, as noted above, *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010) holds that defense counsel was obligated, under the Sixth Amendment, to advise of the possibility that a guilty plea would lead to deportation. The Court’s rationale may ultimately extend to other important collateral consequences.

**SECTION 6. NOTICE OF COLLATERAL CONSEQUENCES AT SENTENCING
AND UPON RELEASE.**

(a) An individual convicted of an offense shall be given notice as provided in subsections

(b) and (c):

(1) that collateral consequences may apply because of the conviction;

(2) of the Internet address of the collection of laws published under Section 4(c);

(3) that there may be ways to obtain relief from collateral consequences;

(4) of contact information for government or nonprofit agencies, groups, or organizations, if any, offering assistance to individuals seeking relief from collateral consequences; and

(5) of when an individual convicted of an offense may vote under this state’s law.

(b) The [designated government agency or official] shall provide the notice in subsection (a) as a part of sentencing.

(c) If an individual is sentenced to imprisonment or other incarceration, the officer or agency releasing the individual shall provide the notice in subsection (a) not more than [30], and, if practicable, at least [10], days before release.

Comment

Section 6 provides for notice of collateral consequences as a part of sentencing and, in addition, if an individual is sentenced to imprisonment or other incarceration, at the time of release. The requirement for notice upon release from “imprisonment or other incarceration”

does not apply to noncustodial sentences (e.g., electronic monitoring, halfway houses, home arrest, or other restraints on liberty less than jail or prison). Although Section 5 contemplates that individuals being sentenced will have received general notice of collateral sanctions at the beginning of the criminal proceeding and at plea, for many defendants such notice will have been months or years earlier. The point of notice is not fairness to the defendant in deciding how to proceed; the conviction by this stage is a fact. Rather, formal advisement promotes obedience to the law. If, for example, individuals convicted of felonies do not know they are prohibited from possessing firearms, they may violate the law out of ignorance when they would have complied with the law had they known. *See, e.g., United States v. Bethurum*, 343 F.3d 712 (5th Cir. 2003) (defendant properly convicted of being felon in possession of a firearm, notwithstanding claim that he would not have pleaded guilty had he realized he would not be entitled to possess a firearm); *Saadig v. State*, 387 N.W.2d 315 (Iowa) (conviction permissible in spite of defendant's claim that he was not told he could not possess a firearm), *appeal dismissed*, 479 U.S. 878 (1986). In *Lambert v. California*, 355 U.S. 225 (1957), the Court found a due process violation in convicting an individual with a felony conviction of violation of a registration provision of which she had no knowledge or reason to know.

This section also requires notice of provisions of law providing for relief from collateral sanctions. Several states require by statute or court rule that this information be made available, others no doubt make it available by policy or informally. *See, e.g., NEB. REV. STAT. § 29-2264(1); AZ. R. CRIM. P. 29.1; 15 CAL. CODE REGS. § 2511(B)(7); N.Y. R. UNIF. TRIAL COURTS § 200.9(a); cf. MD. CODE, CRIM PROC. § 6-232(a); MD. RULES, Rule 4-329.* States have concluded that it is fair to the individual and beneficial to society to let at least some individuals with convictions pay their debt to society. Notification to all individuals with convictions will facilitate the participation of deserving but legally unsophisticated individuals. However, failure to provide notice as contemplated in Section 6 does not invalidate the applicability of the collateral sanctions, or provide a cause of action for money damages. *See Section 3(a).* Section 6 does not of its own force repeal any other notice requirements that are part of the law of enacting jurisdictions.

The notice contemplated by this section is modest. It could be printed on a form issued in the ordinary course of sentencing or processing an individual for release. There is no right to counsel upon being discharged from prison, probation or parole, so the timing and form of the notice should account for the fact that in almost all cases, individual defendants will interpret the notice for themselves. At sentencing, it might be appropriate for notice to be given by the court, or by defense counsel or the prosecution. Upon release from jail or prison, corrections authorities will give the notice.

In a number of states, there has been confusion among both government officials and others about when persons convicted of an offense may vote. Accordingly, Section 6(a)(5) requires specific notice about voting rights. This will help to ensure not only that those convicted of disenfranchising offenses will not vote unless and until they satisfy any requirements provided by law, and that also those not convicted of disenfranchising offenses, and thus allowed to vote under state law, can understand their rights.

**SECTION 7. AUTHORIZATION REQUIRED FOR COLLATERAL SANCTION;
AMBIGUITY.**

(a) A collateral sanction may be imposed only by statute or ordinance, or by a rule authorized by law and adopted in accordance with [insert citation to state administrative procedure act or any other applicable law].

(b) A law creating a collateral consequence that is ambiguous as to whether it imposes a collateral sanction or authorizes a disqualification must be construed as authorizing a disqualification.

Comment

Reentry and reintegration of individuals with criminal convictions is a matter of important state policy. If a program of prisoner reentry and reintegration fails because convicted individuals are broadly and unreasonably excluded from opportunities and benefits, then the state as a whole suffers the consequences. Accordingly, Section 7(a) provides that blanket collateral sanctions may be created only by statute or ordinance, or through formal rulemaking by an agency authorized by statute to create collateral sanctions. Any collateral consequences imposed by the state constitution are, of course, unaffected by Section 7(a).

Section 7(b) is a rule of construction. In cases of ambiguity, a provision must be construed to impose a discretionary disqualification rather than an automatic collateral sanction.

SECTION 8. DECISION TO DISQUALIFY. In deciding whether to impose a disqualification, a decision-maker shall undertake an individualized assessment to determine whether the benefit or opportunity at issue should be denied the individual. In making that decision, the decision-maker may consider, if substantially related to the benefit or opportunity at issue: the particular facts and circumstances involved in the offense, and the essential elements of the offense. A conviction itself may not be considered except as having established the elements of the offense. The decision-maker shall also consider other relevant information, including the effect on third parties of granting the benefit or opportunity and whether the

individual has been granted relief such as an order of limited relief or a certificate of restoration of rights.

Comment

The principle that at least some licenses, benefits and employment opportunities should not be denied to people with criminal convictions unless the conviction is substantially or directly related to the opportunity is well established in state codes. More than 30 states have statutory restrictions on disqualifications imposed by state actors. *See* MARGARET COLGATE LOVE, *RELIEF FROM THE COLLATERAL CONSEQUENCES OF A CRIMINAL CONVICTION: A STATE-BY-STATE RESOURCE GUIDE*, Ch. 4 (William S. Hein & Co. 2006). A core principle of many of these laws is that individuals should be excluded from situations where their conviction presents a risk to public safety, but they should not be excluded if there is no connection between the crime committed and the opportunity or benefit sought. *See also* NATIONAL DISTRICT ATTORNEY’S ASSOCIATION, *POLICY POSITIONS ON PRISONER REENTRY ISSUES* § 7, at 10 (Adopted July 17, 2005) (while supporting collateral consequences necessary to protect the public, states that “[r]elief from some collateral sanctions may be appropriate if they do not relate to the conduct involved in the offense of conviction.”)

Section 8 offers guidance to decisionmakers imposing discretionary disqualifications. It is minimally directive, in order to give decision-makers flexibility to use factors reasonable under the circumstances. Section 8 requires decisionmakers to make disqualification decisions based on the conduct underlying the conviction, rather than on the fact that a person has been convicted alone. Thus, a decision-maker may take into account the particular facts and circumstances involved in the offense, as well as the essential elements of the offense, subject to a substantial relationship standard. For example, if the Plumber’s Board grants licenses to those, say, who were fired from a job or suspended from school for marijuana possession, then it is likely not unreasonably dangerous or risky to public safety to license applicants convicted of precisely the same conduct. On the other hand, if an agency would deny a position to a school bus driver applicant who had his parental rights terminated in a civil action based on child abuse, that is strong evidence that a conviction for child abuse is directly related to fitness for the employment. *See* ABA STANDARDS FOR CRIMINAL JUSTICE: COLLATERAL SANCTIONS AND DISCRETIONARY DISQUALIFICATION OF CONVICTED PERSONS, Standard 19-3.1 (3d ed. 2004).

This section does not change existing law to the extent that it allows rejection of an applicant based on lack of qualification or misconduct unrelated to a criminal conviction. Nothing in this Section or any other part of the Act authorizes or requires preferences for applicants who have criminal convictions.

The time elapsed since the misconduct occurred may be relevant. Some jurisdictions have a term of years, after which, if the individual has not been convicted of another crime, rehabilitation is presumed. *See, e.g.*, N.M. STAT. ANN. § 28-2-4(B) (three years after imprisonment or completion of parole and probation); N.D. CENT. CODE § 12.1-33-02.1(2)(c) (five years after discharge from parole, probation or imprisonment). *See* Alfred Blumstein & Kiminori Nakamura, *Redemption in the Presence of Widespread Criminal Background Checks*,

47 CRIMINOLOGY 327, 327 (2009) (“Recidivism probability declines with time ‘clean,’ so there is some point in time when a person with a criminal record who remained free of further contact with the criminal justice system is of no greater risk than any counterpart of the same age, an indication of redemption from the mark of crime.”)

Some sources provide more specific guidelines which may be helpful to decision-makers. The following is from the Model Sentencing and Corrections Act:

**Model Sentencing and Corrections Act, § 4-1005.
[Discrimination; Direct Relationship].**

(a) This section applies only to acts of discrimination directed at persons who have been convicted of an offense and discharged from their sentence.

(b) It is unlawful discrimination, solely by reason of a conviction:

(1) for an employer to discharge, refuse to hire, or otherwise to discriminate against a person with respect to the compensation, terms, conditions, or privileges of his employment. For purposes of this section, "employer" means this State and its political subdivisions and a private individual or organization [employing 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year];

(2) for a trade, vocational, or professional school to suspend, expel, refuse to admit, or otherwise discriminate against a person;

(3) for a labor organization or other organization in which membership is a condition of employment or of the practice of an occupation or profession to exclude or to expel from membership or otherwise to discriminate against a person; or

(4) for this State or any of its political subdivisions to suspend or refuse to issue or renew a license, permit, or certificate necessary to practice or engage in an occupation or profession.

(c) It is not unlawful discrimination to discriminate against a person because of a conviction if the underlying offense directly relates to the particular occupation, profession, or educational endeavor involved. In making the determination of direct relationship the following factors must be considered:

(1) whether the occupation, profession, or educational

endeavor provides an opportunity for the commission of similar offenses;

(2) whether the circumstances leading to the offense will recur;

(3) whether the person has committed other offenses since conviction or his conduct since conviction makes it likely that he will commit other offenses;

(4) whether the person seeks to establish or maintain a relationship with an individual or organization with which his victim is associated or was associated at the time of the offense; and

(5) the time elapsed since release.

(d) [The State Equal Employment-Opportunity Commission has jurisdiction over allegations of violations of this section in a like manner with its jurisdiction over other allegations of discrimination.]

See also, e.g., MINN. STAT. § 364.03; N.Y. CORR. L. § 753; N.D. CENT. CODE § 12.1-33-02.1; VA. STAT. ANN. § 54.1-204(B).

SECTION 9. EFFECT OF CONVICTION BY ANOTHER STATE OR THE UNITED STATES; RELIEVED OR PARDONED CONVICTION.

(a) For purposes of authorizing or imposing a collateral consequence in this state, a conviction of an offense in a court of another state or the United States is deemed a conviction of the offense in this state with the same elements. If there is no offense in this state with the same elements, the conviction is deemed a conviction of the most serious offense in this state which is established by the elements of the offense. A misdemeanor in the jurisdiction of conviction may not be deemed a felony in this state, and an offense lesser than a misdemeanor in the jurisdiction of conviction may not be deemed a conviction of a felony or misdemeanor in this state.

(b) For purposes of authorizing or imposing a collateral consequence in this state, a

juvenile adjudication in another state or the United States may not be deemed a conviction of a felony, misdemeanor, or offense lesser than a misdemeanor in this state, but may be deemed a juvenile adjudication for the delinquent act in this state with the same elements. If there is no delinquent act in this state with the same elements, the juvenile adjudication is deemed an adjudication of the most serious delinquent act in this state which is established by the elements of the offense.

(c) A conviction that is reversed, overturned, or otherwise vacated by a court of competent jurisdiction of this state, another state, or the United States on grounds other than rehabilitation or good behavior may not serve as the basis for authorizing or imposing a collateral consequence in this state.

(d) A pardon issued by another state or the United States has the same effect for purposes of authorizing, imposing, and relieving a collateral consequence in this state as it has in the issuing jurisdiction.

Alternative A

(e) A conviction that has been relieved by expungement, sealing, annulment, set-aside, or vacation by a court of competent jurisdiction of another state or the United States on grounds of rehabilitation or good behavior, or for which civil rights are restored pursuant to statute, has the same effect for purposes of authorizing or imposing collateral consequences in this state as it has in the jurisdiction of conviction. However, such relief or restoration of civil rights does not relieve collateral consequences applicable under the law of this state for which relief could not be granted under Section 12 or for which relief was expressly withheld by the court order or by the law of the jurisdiction that relieved the conviction. An individual convicted in another jurisdiction may seek relief under Section 10 or 11 from any collateral consequence for which

relief was not granted in the issuing jurisdiction, other than those listed in Section 12, and the [designated board or agency] shall consider that the conviction was relieved or civil rights restored in deciding whether to issue an order of limited relief or certificate of restoration of rights.

Alternative B

(e) A conviction that has been relieved by expungement, sealing, annulment, set-aside, or vacation by a court of competent jurisdiction of another state or the United States on grounds of rehabilitation or good behavior, or for which civil rights are restored pursuant to statute, is deemed a conviction for purposes of authorizing or imposing collateral consequences in this state as provided in subsection (a). An individual convicted in another jurisdiction may seek relief under Section 10 or 11 from any authorized or imposed collateral consequence, other than those listed in Section 12, and the [designated board or agency] shall consider that the conviction was relieved or civil rights restored in deciding whether to issue an order of limited relief or certificate of restoration of rights.

End of Alternatives

(f) A charge or prosecution in any jurisdiction which has been finally terminated without a conviction and imposition of sentence based on participation in a deferred adjudication or diversion program may not serve as the basis for authorizing or imposing a collateral consequence in this state. This subsection does not affect the validity of any restriction or condition imposed by law as part of participation in the deferred adjudication or diversion program, before or after the termination of the charge or prosecution.

Comment

Sections 9(a) and (b) provide for imposing collateral consequences in the enacting state based on convictions from other states. Because the definitions of offenses vary from state to

state, an out-of-state conviction, in many cases, will not be identical to a conviction in the enacting state. Out-of-state convictions are domesticated using essentially the approach of *Blockburger v. United States*, 284 U.S. 299 (1932), comparing the elements of the offense of conviction to offenses in the enacting state. However, an out-of-state sub-criminal offense cannot become a misdemeanor or felony, and a misdemeanor cannot become a felony.

Section 9(b) explains how out-of-state juvenile adjudications are treated in the enacting jurisdiction. This section neither suggests as a policy matter that collateral consequences should apply based on juvenile adjudications, nor changes existing state law. Thus, if state law other than this act imposes collateral consequences based on juvenile adjudications, 9(b) explains how out of state adjudications will be treated. But if existing state law does not impose collateral consequences for juvenile adjudications, nothing in this Section or this Act alters existing law.

Section 9(c) provides that convictions that have been overturned on the merits do not give rise to collateral consequences. If the conviction has been overturned based on legal or factual error, on appeal, motion for a new trial, or collateral review, it does not give rise to a collateral consequence in this state. Similarly, Section 9(f) provides that a prosecution that has finally terminated without a conviction based on participation in a deferred adjudication or diversion program does not give rise to collateral consequences. Section 9(f) applies whether or not a defendant is required to enter a plea as part of the program, if at the end of the program there is no final judgment of conviction in place. Section 9(d) gives comity in the enacting state to pardons from other jurisdictions, giving them the same effect that they would have in the state where the pardon occurred.

Some states have forms of relief from collateral consequences based on rehabilitation or good behavior, variously denominated expungement, vacation, set-aside and sealing. In the state where the relief is granted, this Act does not change its legal effect; it has whatever force it has in that jurisdiction. Section 9(e) contains bracketed options for the effect of out-of-state relief based on rehabilitation or good behavior. The first option gives out-of-state relief the same effect as it has in the jurisdiction of conviction; the second option gives no prescriptive effect to relief granted in other jurisdictions based on rehabilitation or good behavior, but permits consideration of such relief when individuals with out-of-state convictions seek relief in the enacting jurisdiction under Sections 10 and 11.

This Section does not address judgments of tribal courts. The problems in considering tribal convictions are significant. Tribal court records are not always publically available to agencies imposing collateral consequences, which could make their imposition arbitrary. Further, the maximum penalty a tribal court can impose for an offense is one year, 25 U.S.C. § 1302(7), traditionally a misdemeanor sentence. In addition, the U.S. Sentencing Guidelines generally do not count tribal sentences for purposes of calculating criminal history. U.S.S.G. § 4A1.2(i) (2008). Perhaps this is because, while the Supreme Court has not resolved the issue, many courts hold that tribal judgments are not entitled to full faith and credit under the Constitution, although they can be recognized under rules of comity. *Wilson v. Marchington*, 127 F.3d 805 (9th Cir. 1997). The law of the states now varies widely on treatment of tribal court judgments (except in certain areas, such as child custody, where federal law requires full faith and credit. 25 U.S.C. § 1911(d)). Without pretending that there are not serious arguments on the

other side, or denying that circumstances might not change in a way warranting a different answer, it seemed that a uniform resolution was unattainable at the moment.

SECTION 10. ORDER OF LIMITED RELIEF.

(a) An individual convicted of an offense may petition for an order of limited relief from one or more collateral sanctions related to employment, education, housing, public benefits, or occupational licensing. The petition may be presented to the:

- (1) sentencing court at or before sentencing; or
- (2) [designated board or agency] at any time after sentencing.

(b) Except as otherwise provided in Section 12, the court or the [designated board or agency] may issue an order of limited relief relieving one or more of the collateral sanctions described in subsection (a) if, after reviewing the petition, the individual's criminal history, any filing by a victim under Section 15 or a prosecutor, and any other relevant evidence, it finds the individual has established by a preponderance of the evidence that:

- (1) granting the petition will materially assist the individual in obtaining or maintaining employment, education, housing, public benefits, or occupational licensing;
- (2) the individual has substantial need for the relief requested in order to live a law-abiding life; and
- (3) granting the petition would not pose an unreasonable risk to the safety or welfare of the public or any individual.

(c) the order of limited relief must specify:

- (1) the collateral sanction from which relief is granted; and
- (2) any restriction imposed pursuant to Section 13(a).

(d) An order of limited relief relieves a collateral sanction to the extent provided in the

order.

(e) If a collateral sanction has been relieved pursuant to this Section, a decision-maker may consider the conduct underlying a conviction as provided in Section 8.

Comment

Sections 10 and 11 attempt to harmonize society's interests in public safety and its interest in offender reentry and reintegrating offenders into society. Sections 10 and 11 create new mechanisms for relief of collateral sanctions under some circumstances. Section 10 is aimed at removing specific legal barriers for individuals first reentering society. It allows an individual to apply for relief from a collateral sanction relating to employment, education, housing, public benefits, or occupational licensing on a showing that the relief will assist in leading a law-abiding life. Section 11 allows an individual to seek general restoration of rights after a period of time has passed in which the individual has demonstrated adherence to the law.

Sections 10 and 11 are based in part on the Model Sentencing and Corrections Act ("MSCA"), § 4-1005. However, this Act does not identify a list of prohibited collateral consequences, as do the MSCA and the ABA Standards. The MSCA, § 4-1001(b) provides that a convicted individual "retains all rights, political, personal, civil and otherwise", including, among others it lists, the right to vote. The ABA Standards has a list of sanctions which should never be imposed under any circumstances, such as "deprivation of the right to vote, except during actual confinement." ABA STANDARDS FOR CRIMINAL JUSTICE: COLLATERAL SANCTIONS AND DISCRETIONARY DISQUALIFICATION OF CONVICTED PERSONS, Standard 2.6(a) (3d ed. 2004).

Relief under Section 10 (an Order of Limited Relief) may be granted by the court as a part of sentencing, that is, as part of the guilty plea process or after a jury's guilty verdict, until the close of the proceeding at which sentencing is imposed. If the individual does not obtain relief at sentencing, the order can be issued only by the board or agency (in many states it is likely to be the parole board) assigned responsibility for issuing the orders. The board or agency may act after sentencing even if the individual is still on parole, probation, or otherwise under the control of the court for other purposes. The procedure and evidence to be considered is addressed in Section 13.

Issuance of an Order of Limited Relief does not guarantee that an individual will receive the benefit or opportunity sought; it merely allows case-by-case determination under Section 10(e), and Section 8. Thus, while Section 10(d) provides that the state shall not impose a collateral sanction that has been relieved by an Order, Section 10(e) specifically provides that the decision-maker may examine the facts of the holder's misconduct under Section 8. In effect, a Section 10 Order converts a collateral sanction from which relief is granted into a disqualification.

For example, a regulation might prohibit all individuals with felony convictions from being licensed as Paramedics. An individual who had been a paramedic before conviction, or completed paramedic training after conviction, might persuade a court or the designated board or

agency that it was appropriate for the individual to be licensed and employed as a paramedic, and therefore to issue an Order of Limited Relief. That would lift the absolute bar, but would not restrict the Paramedic licensing board from considering whether a license should issue, based on the conduct underlying the conviction, and the board's knowledge of the particular duties and functions of licensees. The decision maker is also entitled to consider the conviction conclusive proof that the individual committed every element of the offense of conviction. Agencies may by rule or policy require applicants to provide or disclose information necessary or helpful to the agency's decision.

The individual 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. The "materially assist" requirement means that with the relief, alone or through satisfaction of additional conditions, the individual would be eligible for the benefit. The "substantial need" requirement means that the individual must show that the benefit is important in the particular case. Having some housing and employment or other lawful support are important to every individual. But if, for example, an individual already had private housing, and sought relief in order to enter public housing, the individual would be required to show that living in public housing will facilitate living a law-abiding life. This might be shown if the public housing is in a location that will make employment feasible, or move the applicant away from an area that her probation officer says offers too many temptations to crime. A person already employed might nevertheless show substantial need for an occupational license if with the license the individual would earn enough to pay child support, restitution, or educational expenses.

Sections 10 and 11 differ from the MSCA by limiting its coverage to state actors, excluding private employers. Regulation of public employment and licensing is less controversial than would be reaching into the decisions of private businesses. In addition, public employment and licensing are often done with the public interest in mind (for example, in the context of veteran's preferences, or reserved opportunities for the disabled). If any category of employer is going to take a chance by helping individuals with convictions, it is likely to be the public sector. *See, e.g.*, ABA Commission on Effective Criminal Sanctions, Report to the House of Delegates on Employment and Licensure of Persons with a Criminal Record, No. 103C at 7-9 (Feb. 2007) (discussing municipal and state anti-discrimination policies and programs in New York, Florida, Chicago and Boston); Editorial, *Cities that Lead the Way*, N.Y. TIMES, Mar. 31, 2006 (discussing anti-discrimination policies for city agencies and city contractors in Boston, Chicago and San Francisco).

However, the Act contemplates that enacting states might choose to make private corporations performing government functions or services, by contract or statute, subject to Sections 10 and 11 through the definition of "decision-maker" in Section 2(4). It is far less intrusive to ask private companies who choose to do business with the state to comply with a policy like this; if a private company finds it objectionable, they may forego the business. Further, even if this is not a point upon which uniformity is likely, this section is not meant to discourage states from deciding on their own that private employers as a group should be covered; some now do and there is no reason they should not continue if it is consistent with

their public policy. States should examine their laws governing public employment and licensing to ensure that they conform to this policy.

Sections 10 and 11 can be invoked by individuals facing collateral sanctions in the enacting state based on federal or out-of-state convictions. Section 10 relief granted in one state has effect only in that state, because no state has the power to relieve a sanction imposed by the law of a second state, in the second state's territory. Whether Section 11 relief from one state will be given effect in a second state depends on which alternative version of Section 9(e) is in force in the second state.

SECTION 11. CERTIFICATE OF RESTORATION OF RIGHTS.

(a) An individual convicted of an offense may petition the [designated board or agency] for a certificate of restoration of rights relieving collateral sanctions not sooner than [five] years after the individual's most recent conviction of a felony [or misdemeanor] in any jurisdiction, or not sooner than [five] years after the individual's release from confinement pursuant to a criminal sentence in any jurisdiction, whichever is later.

(b) Except as otherwise provided in Section 12, the [designated board or agency] may issue a certificate of restoration of rights if, after reviewing the petition, the individual's criminal history, any filing by a victim under Section 15 or a prosecutor, and any other relevant evidence, it finds the individual has established by a preponderance of the evidence that:

(1) the individual is engaged in, or seeking to engage in, a lawful occupation or activity, including employment, training, education, or rehabilitative programs, or the individual otherwise has a lawful source of support;

(2) the individual is not in violation of the terms of any criminal sentence, or that any failure to comply is justified, excused, involuntary, or insubstantial;

(3) a criminal charge is not pending against the individual; and

(4) granting the petition would not pose an unreasonable risk to the safety or welfare of the public or any individual.

(c) A certificate of restoration of rights must specify any restriction imposed and collateral sanction from which relief has not been granted under Section 13(a).

(d) A certificate of restoration of rights relieves all collateral sanctions, except those listed in Section 12 and any others specifically excluded in the certificate.

(e) If a collateral sanction has been relieved pursuant to this Section, a decision-maker may consider the conduct underlying a conviction as provided in Section 8.

Comment

Like Section 10, Section 11 allows the designated board or agency to relieve collateral sanctions. Section 11 relief, called a Certificate of Restoration of Rights, is more comprehensive; relieving all collateral sanctions imposed by the law of the issuing state (except those listed in Section 12 or withheld pursuant to 13(a)). There is no required showing of substantial need. However, the applicant must show good behavior for a period of years prior to the issuance of the Certificate. (The number of years is to be determined by enacting states, but the Act brackets five years.) For that period, the individual must have no disqualifying convictions and no incarceration pursuant to sentence, have been employed, in school, or in rehabilitation, or, if retired or disabled, show a lawful source of income (which could include public assistance), and have complied with all terms of any criminal sentence.

The Act brackets whether conviction of a misdemeanor will render an individual ineligible, because a state might conclude that some minor traffic or parking offenses and the like should not be disqualifying. However, Section 11(b) makes issuance of a Certificate discretionary by providing that the board “may issue” one. Accordingly, even in a state not providing for automatic ineligibility based on misdemeanor convictions, a misdemeanor involving violence or dishonesty, or a pattern of low-level violations, might be grounds for denial.

Section 11(d) provides that a Certificate of Restoration of Rights relieves all collateral sanctions, except those listed in Section 12, and any that the board elects not to relieve pursuant to Section 13(a). The certificate also would not relieve collateral sanctions imposed by the state constitution which the legislature has no power to relieve. With those exceptions, the holder of a certificate would enjoy the same civil rights and the same opportunity to apply for all benefits and opportunities as someone who had never been convicted of a crime. This does not mean, however, that the conviction of a person holding a Section 11 certificate may not be considered by a decision-maker. Thus, while Section 11(d) provides that the state shall not impose a collateral sanction that has been relieved by a Certificate, it specifically provides that the decision-maker may examine the facts of the holder’s misconduct under Section 8. In effect, a Section 11 certificate converts a collateral sanction from which relief is granted into a disqualification.

Section 13(a) contemplates that a Section 11 certificate may be granted with case-by-case restrictions. For example, under Section 13(a), the board might conclude that an individual has demonstrated good behavior, warranting general relief from the burdens of a conviction, yet because the individual's past offenses involved alcohol, might not want the individual to have a liquor license, or work in the liquor business. In such a case, the Certificate will so state. Section 11(c).

SECTION 12. COLLATERAL SANCTIONS NOT SUBJECT TO ORDER OF LIMITED RELIEF OR CERTIFICATE OF RESTORATION OF RIGHTS. An order of limited relief or certificate of restoration of rights may not be issued to relieve the following collateral sanctions:

(1) requirements imposed by [insert citation to state's sex offender registration and notification act enacted pursuant to 42 U.S.C. Section 14071 or 42 U.S.C. Section 16901 et seq. or with regulations promulgated thereunder];

(2) a motor vehicle license suspension, revocation, limitation, or ineligibility pursuant to [insert citation to state DWI laws], or [insert citation to provision for motor vehicle license suspension, revocation, limitation, or ineligibility based on traffic offenses], for which restoration or relief is available pursuant to [insert citation to occupational, temporary, and restricted licensing provisions]; or

(3) ineligibility for employment pursuant to [insert references to laws restricting employment of convicted individuals by law enforcement agencies, including the attorney general, prosecutor's office, police department, sheriff's department, state police, or department of corrections].

Comment

Section 12 provides that Orders of Limited Relief from Collateral Sanctions issued under Section 10 and Certificates of Restoration of Rights issued under Section 11 do not relieve certain collateral sanctions. Section 12(1) provides that sex offender registration requirements cannot be relieved. Section 12(2) provides that sanctions related to motor vehicle licensing

cannot be relieved. In these particular areas, additional methods of relief would be duplicative and perhaps inconsistent with the detailed and elaborate provisions for individual evaluation that now exist. Section 12(3) provides that laws prohibiting hiring of persons with criminal records by law enforcement agencies may not be relieved by a Section 10 Order or Section 11 Certificate. However, that some states exclude persons with convictions from law enforcement-related employment does not mean they must or always do. Nothing in this Section prohibits states from permitting law enforcement agencies to consider hiring individuals with criminal records.

Although not specifically mentioned in this section, if the state constitution imposes collateral consequences that the legislature has no power to remove, no relief granted under this Act purports to cover them.

SECTION 13. ISSUANCE, MODIFICATION, AND REVOCATION OF ORDER OF LIMITED RELIEF AND CERTIFICATE OF RESTORATION OF RIGHTS.

(a) When a petition is filed under Section 10 or 11, including a petition for enlargement of an existing order of limited relief or certificate of restoration of rights, the [designated board or agency] shall notify the office that prosecuted the offense giving rise to the collateral consequence from which relief is sought and, if the conviction was not obtained in a court of this state, the [Office of the Attorney General of this state or an appropriate prosecuting office in this state]. The court may issue an order and the [designated board or agency] may issue an order or certificate subject to restriction, condition, or additional requirement. When issuing, denying, modifying, or revoking an order or certificate, the [designated board or agency] may impose conditions for reapplication.

(b) The [designated board or agency] may restrict or revoke an order of limited relief or certificate of restoration of rights it issued or an order of limited relief issued by a court in this state if it finds just cause by a preponderance of the evidence. Just cause includes subsequent conviction of a felony in this state or of an offense in another jurisdiction that is deemed a felony in this state under Section 9(a). An order of restriction or revocation may be issued:

(1) on motion of the [designated board or agency], the office of the prosecutor that obtained the conviction, or a government agency designated by that prosecutor;

(2) after notice to the individual and any prosecutor that has appeared in the matter; and

(3) after a hearing under the [insert reference to the state administrative procedure act] if requested by the individual or the prosecutor that made the motion or any prosecutor that has appeared in the matter.

(c) The court or [designated board or agency] shall order any test, report, investigation, or disclosure by the individual it reasonably believes necessary to its decision to issue, modify, or revoke an order of limited relief or certificate of restoration of rights. If there are material disputed issues of fact or law, the individual and any prosecutor notified under subsection (a) or another prosecutorial agency designated by a prosecutor notified under subsection (a) may submit evidence and be heard on those issues.

(d) The [designated board or agency] shall maintain a public record of the issuance, modification, and revocation of orders of limited relief and certificates of restoration of rights. The criminal history record system of the [state criminal justice record agency] must include issuance, modification, and revocation of orders and certificates.

(e) The [designated board or agency] may adopt rules for application, determination, modification, and revocation of orders of limited relief and certificates of restoration of rights, in accordance with [insert reference to state administrative procedure act].

Comment

Section 13(a) provides for notice to the prosecution of a request for an Order of Limited Relief or Certificate of Restoration of Rights. If a request is made at sentencing, the ordinary rules of criminal procedure require notice to the prosecutor. If a request is made after sentencing, Section 13(a) provides for the board or agency to notify the prosecutor. Because

many applicants will be unrepresented, notice directly from the board will ensure that prosecutors actually receive notice. For out-of-state convictions, both the original prosecutor and an appropriate prosecutor in this state must be notified. An out-of-state prosecutor may have useful information, but may choose not to participate, because the conviction is old or minor, for example. In that event, an in-state prosecutor must have the opportunity to appear and participate. If an applicant seeks relief from more than one conviction, every prosecutor's office that obtained a conviction from which relief is sought must receive notice. Sections 13(a) and (c) contemplate both that more than one prosecutor can participate in a particular case, and that prosecutors may elect not to appear, and decision may be rendered without their participation. However, relief cannot be granted based on default; non-participation by the prosecution does not relieve the board of ordering tests it deems necessary under Section 13(c) or determining whether relief is warranted based on the available information.

Section 13(a) allows the grant of conditional relief. For example, a Certificate of Restoration of Rights could withhold the right to seek public housing in the building where the victim lives, or could condition relief on participation in a rehabilitative program. If relief is denied, reapplication can also be conditioned. An applicant could be required to wait for a period of time to reapply, or to reapply only after specified rehabilitation or training.

Section 13(b) allows for restriction or revocation of a previously issued Order or Certificate. It should be noted that to some extent restriction or revocation will be automatic based on some subsequent convictions, because Orders and Certificates relieve collateral consequences from past offenses. A new conviction generates its own collateral consequences, which are not relieved by a previously issued Order or Certificate. Nevertheless, because Orders and Certificates are part of the records of the criminal justice system, it is appropriate that their status be formally recognized. An Order or Certificate can be restricted or revoked based on non-criminal conduct if the conduct renders the continued effectiveness of relief unwarranted or improvident.

The fact that an Order or Certificate has been issued, modified or revoked, must be available to the public. However, to the extent that applications of individuals or statements of prosecutors or victims contain personal or sensitive information, this Section itself does not require that they be disclosed to the public. Their availability will be governed by rule or other law of the enacting jurisdiction.

Section 13(e), granting the board rulemaking authority, is bracketed. Courts have procedural authority from other sources. If board already has rulemaking authority, the section is unnecessary. Whether the board obtains rulemaking authority from Section 13(e) or from other law, it includes the authority to require reasonable fees of applicants with the ability to pay.

SECTION 14. RELIANCE ON ORDER OR CERTIFICATE AS EVIDENCE OF DUE CARE. In a judicial or administrative proceeding alleging negligence or other fault, an order of limited relief or a certificate of restoration of rights may be introduced as evidence of a

person's due care in hiring, retaining, licensing, leasing to, admitting to a school or program, or otherwise transacting business or engaging in activity with the individual to whom the order was issued, if the person knew of the order or certificate at the time of the alleged negligence or other fault.

Comment

This section provides protection for public and private entities transacting with holders of Orders of Limited Relief and Certificates of Restoration of Rights by making reliance admissible evidence of due care. Unless persons with criminal records are to be permanently unemployed and homeless, some businesses must transact with them, yet, they take legal risks if they do. Business owners have limited sources of objective evidence about the backgrounds of applicants, and they may reasonably rely on an Order of Limited Relief or Certificate of Restoration of Rights issued by government authority after investigation.

SECTION 15. VICTIM'S RIGHTS. A victim of an offense may participate in a proceeding for issuance, modification, or revocation of an order of limited relief or a certificate of restoration of rights [in the same manner as at a sentencing proceeding pursuant to [insert citation to state crime victim's act]] [to the extent permitted by rules adopted by the [designated board or agency]].

Legislative Note: If the enacting state has a victim's rights act, applications for an order of limited relief or a certificate of restoration of rights should be treated as a sentencing, and the appropriate statutory citation inserted in the first bracket. Otherwise, use the second bracket.

Comment

This section contemplates that victims will receive notice and have an opportunity to participate in proceedings under Section 10 and 11. Both Orders of Limited Relief and Certificates of Restoration of Rights take into account the effect on public safety in determining whether the relief should be granted. The victim will often be in a position to provide useful information about the potential impact on public safety. Accordingly, the act provides for notice to victims through the victim's rights act if one exists in the state. If there is no victim's rights act, then the designated board or agency is required to establish a method for notice and participation under its rulemaking power.

SECTION 16. UNIFORMITY OF APPLICATION AND CONSTRUCTION. In

applying and construing this uniform act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

SECTION 17. SAVINGS AND TRANSITIONAL PROVISIONS.

(a) This [act] applies to collateral consequences whenever enacted or imposed, unless the law creating the collateral consequence expressly states that this [act] does not apply.

(b) This [act] does not invalidate the imposition of a collateral sanction on an individual before [the effective date of this [act]], but a collateral sanction validly imposed before [the effective date of this [act]] may be the subject of relief under this [act].

Comment

Section (a) provides that an Order of Limited Relief or Certificate of Restoration of Rights granted applies to subsequently enacted collateral consequences that are within the scope of the relief. Thus, a Certificate issued without condition or exception would apply to newly created collateral consequences, unless the collateral consequences are within Section 12, or the law creating the collateral consequence expressly provides that it cannot be relieved by a Certificate. An Order relieving a particular collateral consequence would continue to apply after the law creating the consequence is amended, renumbered or recodified, unless the new law expressly states that it cannot be relieved by an Order of Limited Relief.

Under Section (b), individuals who have lost a license, office or other benefit or opportunity based on criminal conviction are not automatically restored upon receiving relief under Section 10 or 11. However, upon receiving relief, they may reapply for any available benefits for which they are otherwise eligible.

SECTION 18. EFFECTIVE DATE. This [act] takes effect . . .