

To: Members of the Uniform Laws Commission
From: Richard Cassidy, Chair, Standby Committee on the Uniform Collateral Consequences of Conviction Act
Re: Proposed Revisions to the Uniform Collateral Consequences of Conviction Act
Date: June 11, 2010

As you may recall from Katie Robinson's April 13, 2010 email, on March 31, 2010, the United States Supreme Court issued its decision in *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010). The Court's decision in *Padilla* requires that lawyers inform clients of the detrimental impact a conviction or guilty plea can have on immigration status.

Let me recap the decision:

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

The rationale of the majority opinion rejected the conclusion that the distinction between a direct sanction of conviction and a "collateral" one is meaningful in terms of determining whether competence requires that a consequence of conviction be disclosed to a defendant in connection with plea negotiations. Instead Justice Stevens focused on the importance and certainty of a particular consequence. This suggests that *Padilla* may well be extended to require accurate counseling about the collateral consequences of a conviction far beyond immigration issues.

Padilla presents a significant enactment opportunity for the UCCCA. The decision has significantly raised the profile of the problem of collateral consequences with the public and the bar. Judges, prosecutors, and other policy makers who understand the risk that defense counsel's failure to adequately advise as to important and certain collateral consequences will want to put measures in place to be sure that such consequences are addressed.

The UCCCA facilitates notification of collateral consequences before, during, and after sentencing. Under the Act, states must create a collection of all collateral consequences, with citations and descriptions of the relevant statutes. It requires simple notice of the concept of collateral consequences at or before arraignment. Notice must also be given at the time of sentencing, and if an individual is sentenced to prison, at the time of release. The Act also provides mechanisms for relieving collateral sanctions imposed by law, helping to facilitate reentry into society.

However *Padilla* also presents a problem for the enactment of the UCCCA, at least if the Act is left in its present form. As the UCCCA was adopted in Santa Fe, it does not require that a Court accepting a plea take any step to insure that the defendant has received adequate advice relating to collateral consequences. This is an obvious step that courts could take to reduce the risk that *Padilla* will have a

destabilizing effect on the plea process. It has been suggested that a *Padilla* notice may become commonplace.

Since *Padilla* the Committee has met on several occasions by conference telephone to consider what if any action should be taken to address this issue. The consensus of the Committee is that Act should be revised to provide for a “*Padilla* colloquy.”

Accordingly, you will find a draft of the Act accompanying this memorandum that contains revisions intended to achieve this objective. The primary change is the addition of a new subsection (b) to Section 5 of the Act which would instruct trial courts to confirm that the defendant has received and understood notice of collateral consequences and had an opportunity to discuss them with defense counsel.

Because *Padilla* involves collateral consequences imposed as result of federal law, the Committee also recommends that the identification and collection of collateral consequences required under Section 4 of the Act be expanded to include reference to the most recent collection of collateral consequences impose by federal law.

Because we considering these changes to the Act, it also seems appropriate to change the reference to a state’s Megan’s Law in Section 12 (1) to add reference to more recent federal legislation relating to sex offender registration and notification.

Of course, the addition of new statutory language arising from *Padilla* requires some considerable changes to the comments to explain the relationship between the UCCCA and *Padilla*. This draft contains those changes as well.

Here is the list of all the proposed changes:

- Prefatory note, pages 1, 3 – 5
- Section 3, comment
- Sections 4(b & c), and comments
- Section 5 – title, new subsection (b), and comments
- Section 6 – comment at p. 19
- Section 10 – comment at p. 30
- Section 12

In my view, the changes contained in the attached draft are changes the Executive Committee would be empowered to make (subject to the ultimate authority of the members of the Conference) pursuant to the provisions of Section 4.3 of the ULC Constitution in order to “conform the Act to federal law” and “to a trend of judicial decisions, or to achieve a similar purposes.” However, the Executive Committee is of the view, with which I agree, that the changes are significant enough to merit direct consideration by the entire Conference.

Adopting these changes will avoid criticism that the Act fails to deal in a comprehensive way with the problem of the collateral consequences of criminal convictions and make the UCCCA enactable as a “*Padilla* fix.”

I urge that the changes be adopted.