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Collateral Consequences of a Criminal Conviction

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In the context of a criminal prosecution, trial counsel must be aware of the many different collateral consequences of a criminal conviction. This article reviews recent case law and the tests employed in discerning the distinction between punitive and collateral consequences of a criminal conviction of which counsel must be aware and properly communicate to their client.

On December 7, 2012, the Pennsylvania Supreme Court decided the case of *Commonwealth v. Abraham*. A public school teacher for 27 years, Joseph Abraham was accused of corrupting the morals of a minor and indecent assault, in violation of 18 Pa. C.S.A. §§ 6301 and 3126, respectively. Upon the advice of counsel, he resigned, plead guilty to both charges, and received probation. No direct appeal was filed. Subsequently, the state pension board, in accordance with the Public Employee Pension Forfeiture Act, 43 P.S. §1311-1315 (PEPFA), sought forfeiture of Abraham's \$1,500-per-month pension.

Abraham filed a timely Post-Conviction Relief Act petition alleging that his trial counsel was ineffective for failing to advise him of PEPFA's collateral consequence to the guilty plea. The PCRA court denied Abraham's petition, holding that counsel's admitted failure to explain the significant monetary consequence of the guilty plea is not relevant to whether his guilty plea was knowing and voluntarily. Abraham appealed.

The Superior Court reversed, permitting Abraham to withdraw his guilty plea, stating that pension forfeiture, similar to deportation discussed in *Padilla v. Kentucky*,



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130 S. Ct. 1473 (2010), is so intimately connected to the criminal process that *Padilla* rendered inapplicable the direct versus collateral consequence analysis historically employed by the courts to determine whether a consequence is civil or penal. The commonwealth appealed this new basis for a successful PCRA ineffective assistance of counsel claim.

The Pennsylvania Supreme Court reversed, holding that the PEPFA's pension forfeiture provisions are not so punitive in force and effect to conclude that a monetary penalty equated to deportation, warranting a per se rule of counsel notification prior to a guilty plea and that failure to advise vitiates a guilty plea. The court found that because the PEPFA's purpose is remedial, to ensure integrity and honesty in government employees, it is subject to the historical direct versus collateral consequences analysis.

Turning to that analysis, the court restated the long held differentiation between direct and collateral consequence of a guilty plea as the distinction between a criminal penalty and a civil requirement over which a sentencing judge has no control. That the criminal court orders a civil requirement is not relevant to the determination of whether the result is a direct or

collateral consequence of the plea. Rather, punitive legislative intent must first be determined. If non-punitive, and therefore civil, the trial court must ascertain whether the statute is "so punitive either in purpose or effect as to negate the intention to deem it civil," according to the opinion.

Quoting *Commonwealth v. Williams*, 832 A.2d 962 (Pa. 2003), Justice J. Michael Eakin set forth the seven factors to be considered: "(1) whether the sanction involves an affirmative disability or restraint; (2) whether it has historically been regarded as punishment; (3) whether it comes into play only on a finding of scienter; (4) whether its operation will promote the traditional aims of punishment — retribution and deterrence; (5) whether the behavior to which it applies is already a crime; (6) whether an alternative purpose to which it may rationally be connected is assignable for it; and (7) whether it appears excessive in relation to the alternative purpose assigned." After carefully applying the PEPFA's forfeiture provision to this test, the court concluded the civil, non-penal, character of the statute. Having done so, in this age of economic depression, the court eliminated untold financial ruin as a new basis for a PCRA ineffective assistance of counsel claim.

The civil-penal analysis has been employed in many collateral consequence cases that are systemic to criminal prosecutions. These cases arise, similar to *Abraham*, in the context of counsel's failure to advise their client pre-plea of a consequence of the conviction. Upon suffering the consequence, the client files an unsuccessful PCRA petition or a motion to withdraw a guilty plea arguing ineffectiveness and an unknowing guilty plea.

In *Commonwealth v. Leidig*, 598 Pa. 211, 956 A.2d 399 (2008), the collateral

consequence of the Megan's Law sex-offender registration program and its successive reclassifications were concluded to be remedial in nature and non-punitive, not warranting pre-plea notification. As a result of *Commonwealth v. Duffey*, 536 Pa. 436, 440 (Pa. 1994), and its progeny, the myriad of driver's license suspension provisions set forth in 18 Pa. C.S.A. § 6308 (underage drinking), 75 Pa. C.S.A. § 1532 (traffic violations), 75 Pa. C.S.A. § 3802 (DUI) and 35 P.S. § 780-101 (the Drug Act) are non-punitive and merely collateral. *Duffey* also identifies guilty plea collateral consequences for which no notice is required to include the loss of the right to vote, to enlist in the armed services, to own a firearm or fishing license, to inherit property, and to be a licensed funeral director or architect.

Federal and state regulations allow for temporary or permanent revocation of public housing subsidies and cash, medical and child care assistance after conviction of a variety of offenses. Felony drug convictions, regardless of custodial status, can be the basis for denial of student loans or scholarships and employment in any capacity in an elder care facility or public or private school. Chapter 63 of Purdon's sets forth mandatory denial or suspension of over 20 different occupational licenses after conviction of a felonious drug offense. For educators, in 2011 the General Assembly amended 24 P.S. § 1-111 to require an old conviction previously unreported to be reported and certain new offenses to be the basis for immediate termination of employment in any public school.

There are not many cases dealing with medical, nursing, banking, real estate, securities or insurance professional licensees contesting a suspension or revocation of their professional license as an unknown collateral consequence of a criminal conviction. The reason for this is maybe two-fold; either counsel advises these professionals of this inevitability for which due process is afforded or the professional board has determined that the criminal conduct did not warrant disciplinary action.

Nonetheless, counsel must be aware that state and federal professional license schemes typically include a moral turpitude or conduct unbecoming disciplinary

provision for which a guilty plea to almost any misdemeanor or felony will trigger enforcement proceedings. The professional deciding whether to plead guilty in either state or federal court must be advised of both the potential license revocation consequence and federal time bar for future participation, in any capacity, in any federal or state administered government funded or supervised program or profession.

In Pennsylvania, the medical professional must also be advised that pursuant to 49 Pa. Code § 16.16, a guilty plea, no contest plea, and even admission into pretrial probation (accelerated rehabilitative disposition, or ARD) that has not been expunged at the time of renewal must be reported to the board and may result in collateral disciplinary action. The collateral consequence will be predicated upon the offense committed and the historical restrictions the board has imposed upon professionals who have committed similar offenses.

Significantly, enrollment in a voluntary recovery program to save a professional license may result in many unanticipated collateral restrictions on the doctor's license not addressed in any criminal court colloquy. Restrictions can include practice monitors, reduced hospital privileges, loss of DEA prescription writing authority, termination of HMO contracts and/or Medicaid and Medicare participation preclusion under state administered federal regulations. While the professional may have his or her license after an unexpunged ARD, the collateral consequences on that license could be extreme.

In response to *Padilla* and the 2011 amendments to the Pennsylvania child custody statute, 23 Pa.C.S. § 5321, courts now include in every guilty plea and ARD admission colloquy language advising a defendant of child custody and deportation consequences. As well, some county court administrators require separate written Megan's Law colloquies to confirm on the record a defendant's awareness of the Megan's Law consequence, post-conviction compliance requirements, and subsequent criminal consequences for reporting failures. In March 2012, the U.S. Supreme Court stated in *Missouri v. Frye*, 132 S. Ct. 1399 (2012), that to be effective defense counsel must also confirm in writing

that they have communicated all guilty plea offers to a defendant before such are rejected and a trial may proceed. These are examples of the courts protecting the defendant, if counsel does not, to eliminate additional PCRA petitions.

In sum, regardless of how successful counsel may be in limiting jail consequences of a criminal conviction, the legislatures have concluded that criminal convictions must carry penalties that are beyond the discretion of objective, law-trained sentencing judges. Counsel must clearly advise their client in writing of collateral, monetary and/or license penalties to effectively represent them and their family. Expediently securing a probationary sentence but failing to advise a client that he or she will not be able to drive to work, see his or her children, engage in his or her chosen profession, must register under Megan's Law for 10 years or life, or will lose his or her pension, cannot be said to have properly represented that client.

More importantly, in this time of extremely limited judicial resources and restricted PCRA jurisprudence, the Pennsylvania Supreme Court will not give the client a second chance as a result of his or her counsel's shortcomings.

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