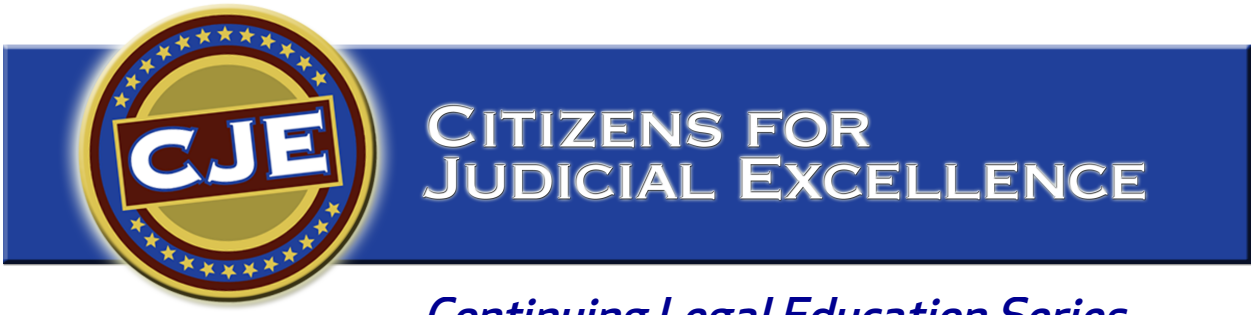

Continuing Legal Education Series

Criminal Convictions & Canada

WSBA Activity # 1014055

2016 September 23

Rainier Club
Seattle, Washington

Instructors

Samuel D. Hyman, Attorney
Burns Fitzpatrick LLP

Sheryl Pewitt, Attorney
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"Criminal Convictions & Canada"

CLE Program Agenda

Friday, 2016 September 23

11:30 am - 12:00 pm	Registration & Complimentary Lunch
12:00 pm – 1:15 pm	"Can I Still Go To Canada? — Washington Convictions That Trigger Inadmissibility and Resolutions That May Keep the Border Open for Your Client" *Presented by Samuel D. Hyman, Burns Fitzpatrick LLP*
1:15pm - 1:30 pm	Break
1:30 pm – 2:30 pm	"Can I Still Go To Canada?" *continued* *Presented by Samuel D. Hyman, Burns Fitzpatrick LLP*
2:30pm - 3:00 pm	Q&A
3:00 pm - 4:00 pm	"Ethics: Collateral Consequences of Conviction — Canada & Beyond" *Presented by Sheryl Pewitt, Pewitt Law PLLC*
4:00 pm	Q&A Closing remarks and course evaluations

Can I Still Go To Canada?
Washington Convictions That Trigger Inadmissibility and Resolutions That May Keep the Border Open for Your Client

Sam Hyman practices Citizenship, Immigration, and Customs Law. He divides his practice between those areas and ICBC/Personal Injury Law (Plaintiff and Defence). He has presented papers on Citizenship, Immigration, and Customs Law for the Immigration Subsection of the Canadian Bar Association, for various continuing legal education programs in British Columbia and the United States, and at public legal education talks and seminars within the larger community and overseas. He has authored a number of papers covering a variety of Citizenship, Immigration, and Customs Law topics and, since 2002, is the author of the Law Society of British Columbia Practice Manual Checklists for Refugee Protection claims and Immigration Appeal Division deportation appeals (criminality) and refugee claims. Sam has appeared before all court levels in British Columbia, the Federal Court and Federal Court of Appeal. In addition, Sam has represented clients before all three divisions of the Immigration and Refugee Board and in administrative review proceedings involving the Canada Border Services Agency Recourse Directorate in respect of enforcement actions appeals. Sam received his LL.B. degree from the University of Victoria in 1983 and was called to the British Columbia Bar in May, 1984.

Although much of Sam's immigration work focuses upon assisting foreign nationals, Refugee Protected persons and permanent residents to overcome inadmissibility to Canada by reason of their criminality, he is most proud of his court challenge work, particularly in *Liebmann v. The Queen (Minister of National Defence)*, (2002) 1 F.C. 29 (C.A.) and for efforts in support of what became the Bill C-37 amendments to *Canada's Citizenship Act* that restored citizenship to countless Canadian minors and adults who lost their citizenship between January 1, 1947 and February 14, 1977.

Canada and Collateral Immigration Consequences for Foreign Nationals Seeking Entry to Canada with a History of Arrests, Charges, and Convictions in the USA

I. Introduction

The scope and focus of this paper is limited to explaining to US criminal law practitioners why and how foreign nationals may be inadmissible to Canada by reason of their US criminal conduct and convictions, outside Canada, and explaining how such persons may overcome their inadmissibility in order to gain temporary or permanent admission to Canada. These are the situations that you as American criminal law practitioners will generally confront (at least collaterally) when defending or prosecuting persons who are foreign nationals, citizens or residents of the United States, who have a compelling need to travel and seek entry to Canada.

Canada's Immigration and Refugee Protection Act, S.C. 2001, c. 27 ("*IRPA*") came into force on June 28, 2002 at 9:00 PM (PDT). That moment marks a fundamental shift in immigration law and policy to treat criminals and security threats less leniently than under Canada's former *Immigration Act*. This shift is discussed in *Medovarski v. Canada (Minister of Citizenship and Immigration)*, 2005 SCC 51, (2005) 2 S.C.R. 539 at para. 10 per McLachlin CJC:

> [10] The objectives as expressed in the *IRPA* indicate an intent to prioritize security. This objective is given effect by preventing the entry of applicants with criminal records, by removing applicants with such records from Canada, and by emphasizing the obligation of permanent residents to behave lawfully while in Canada. This marks a change from the focus in the predecessor statute, which emphasized the successful integration of applicants more than security: e.g., see s. 3(1) (i) of the *IRPA* versus s. 3(j) of the former Act; s. 3(1)(e) of the *IRPA* versus s. 3(d) of the former Act; s. 3(1)(h) of the *IRPA* versus s. 3(i) of the former Act. Viewed collectively, the objectives of the *IRPA* and its provisions concerning permanent residents, communicate a strong desire to treat criminals and security threats less leniently than under the former Act.

The *IRPA* sets out at section 3 the legislative objectives of the *Act* with respect to permanent residence, foreign nationals, and refugees. The legislative objectives include:

- protecting public health and safety of Canadians and to maintain the security of Canadian society; and,

- promoting international justice and security by fostering respect for human rights and by denying access to Canadian territory to persons who are criminals or security risks.

The *IRPA* is to be construed and applied in a manner that furthers the domestic and international interests of Canada, and complies with international human rights instruments to which Canada is a signatory (see s. 3(3)).

There are many grounds of inadmissibility to Canada. A permanent resident or foreign national is inadmissible to Canada on security grounds (as set out in section 34 of the *IRPA*) for engaging in an act of espionage or an act of subversion against a democratic government, institution or processes as they are understood in Canada; engaging in or instigating the subversion by force of any government; engaging in terrorism; being a danger to the security of Canada; engaging in acts of violence that would or might endanger the lives or safety of persons in Canada; or being a member of an organization that there are reasonable grounds to believe engages, has engaged or will engage in acts referred to in paragraphs 34(1)(a) through (f). A permanent resident or foreign national is also inadmissible on grounds of violating human or international rights under section 35 of the *IRPA*.

The consequence of these legislative changes, and the language of section 36 of the *IRPA* setting out grounds of criminal inadmissibility, is to render foreign nationals who are convicted for an indictable offence under an Act of Parliament or multiple summary offences, inadmissible to Canada. As was observed in *Medovarski* at paragraph 46, due to his lack of status, a foreign national is not afforded the unqualified right to enter or remain in Canada:

> [46] The most fundamental principle of immigration law is that non-citizens do not have an unqualified right to enter or remain in Canada: *Chiarelli v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 711, at p. 733. Thus the deportation of a non-citizen in itself cannot implicate the liberty and security interests protected by s. 7 of the *Canadian Charter of Rights and Freedoms*.

A. Law

1. Permanent Resident – Defined

"Permanent Resident" is defined in subsection 2(1) *IRPA* and means a person who has acquired permanent resident status and has not subsequently lost that status under section 46 (for instance, when they acquire Canadian Citizenship, on a final determination that they have failed to comply with the residency obligation under section 28, when a removal order made against them comes into force, or on a final determination under section 109 to vacate a decision to allow their claim for refugee protection or a final determination under subsection 114(3) to vacate a decision to allow their application for protection).

2. Foreign National – Defined

"Foreign National" is defined by subsection 2(1) of the *IRPA* and means a person who is not a Canadian citizen or permanent resident, and includes a stateless person.

3. Protected Person – Defined

"Protected Person" is defined by subsection 95(2) of the *IRPA* and means a person on whom refugee protection is conferred (when the person has been determined to be a Convention refugee or a person in similar circumstances under a visa application and becomes a permanent resident under the visa or a temporary resident under a Temporary Resident Permit for protection reasons; when the Refugee Protection Division of the Immigration and Refugee Board determines the person to be a Convention refugee or a person in need of protection; or when the Minster allows the application for protection), has not subsequently been deemed to be rejected under *IRPA* subsections 108(3), 109(3) or 114(4).

4. Criminality

Persons inadmissible to Canada by reason of their criminality are described in section 36 of Canada's *IRPA*, which states:

> **Serious Criminality**
>
> 36. (1) Serious Criminality - A permanent resident or a foreign national is inadmissible on grounds of serious criminality for

(a) having been convicted in Canada of an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years, or of an offence under an Act of Parliament for which a term of imprisonment of more than six months has been imposed;

(b) having been convicted of an offence outside Canada that, if committed in Canada, would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years; or

(c) committing an act outside Canada that is an offence in the place where it was committed and that, if committed in Canada, would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years.

Criminality

(2) Criminality - A foreign national is inadmissible on grounds of criminality for

(a) having been convicted in Canada of an offence under an Act of Parliament punishable by way of indictment, or of two offences under any Act of Parliament not arising out of a single occurrence;

(b) having been convicted outside Canada of an offence that, if committed in Canada, would constitute an indictable offence under an Act of Parliament, or of two offences not arising out of a single occurrence that, if committed in Canada, would constitute offences under an Act of Parliament;

(c) committing an act outside Canada that is an offence in the place where it was committed and that, if committed in Canada, would constitute an indictable offence under an Act of Parliament; or

(d) committing, on entering Canada, an offence under an Act of Parliament prescribed by regulations.

***IRPA* s. 36(3)-Application**

(3) Application - The following provisions govern subsections (1) and (2):

(a) an offence that may be prosecuted either summarily or by way of indictment is deemed to be an indictable offence, even if it has been prosecuted summarily;

(b) inadmissibility under subsections (1) and (2) may not be based on a conviction in respect of which a pardon has been granted and has not ceased to have effect or been revoked under the *Criminal Records*

> *Act*, or in respect of which there has been a final determination of an acquittal;
>
> (c) the matters referred to in paragraphs (1)(b) and (c) and (2)(b) and (c) do not constitute inadmissibility in respect of a permanent resident or foreign national who, after the prescribed period, satisfies the Minister that they have been rehabilitated or who is a member of a prescribed class that is deemed to have been rehabilitated;
>
> (d) a determination of whether a permanent resident has committed an act described in paragraph (1)(c) must be based on a balance of probabilities; and
>
> (e) inadmissibility under subsections (1) and (2) may not be based on an offence designated as a contravention under the *Contraventions Act* or an offence under the *Young Offenders Act*. (Now the *Youth Criminal Justice Act*).

There are nine classes of criminality, including two classes which specifically relate to organized criminality and which are outside the scope of s. 36 of *IRPA*. The remaining seven classes of criminality are specified within s. 36 of *IRPA* and are distinguished by whether the foreign national has:

(a) been convicted in Canada;
(b) been convicted outside Canada; or
(c) committed an "act" outside Canada or upon entering Canada.

The scope and focus of this paper is limited to explaining foreign nationals and permanent residents' inadmissibility to Canada by reason of their arrests, pending charges and convictions outside Canada, and explaining how such persons may overcome their inadmissibility in order to gain temporary or permanent admission to Canada. The reason is simple: these are the situations that you as American criminal law practitioners will generally confront when defending or prosecuting persons who are foreign nationals or permanent residents in the United States.

B. Dispositions and Attendant Immigration Consequences- Convictions

For the purpose of determining admissibility to Canada, a conviction does exist when: a court delivers a suspended sentence; a court imposes a fine; a court imposes a conditional sentence; a court imposes a term of imprisonment with or without probation; a person unsuccessfully appeals

the conviction; or the person is convicted in abstentia. Certain dispositions raise confusing questions about whether there has been a conviction that will trigger inadmissibility.

1. Peace Bonds – Criminal Code of Canada ("CCC"), Section 810

Section 810 of the Criminal Code, R.S.C. 1985, c. C-34 ("Criminal Code") provides a procedure for an order that requires a person to keep the peace and be of good behaviour in the absence of the formal criminal prosecution. Section 810 does not create an offence. (see: *R. v. Allen* (1985), 18 C.C.C (3d) 155 (Ont. C.A.).

The section 810 hearing before a provincial court judge is not to determine whether the person concerned is "guilty" or "not guilty", but only to determine whether, on the evidence adduced, the informant had reasonable grounds for their fears. No plea is entered. A Section 810 recognisance does not give rise to inadmissibility under the Immigration and Refugee Protection Act. However, a breach of the Peace Bond recognisance under Section 811 is a summary conviction offence. Two breaches resulting in convictions arising from separate sets of facts are sufficient to trigger inadmissibility for a foreign national, but not a permanent resident.

2. Conditional and Absolute Discharges – Criminal Code, Section 730

Where the court grants a discharge, a finding of guilt is recorded, but no conviction is entered. For Canadian immigration law purposes, a conditional or absolute discharge is not a conviction.

C. Classification of Canadian Offenses: Summary Conviction, Indictable, and Hybrid

Before analyzing the provisions of s. 36 in respect of convictions outside Canada, it is necessary to first explain the Canadian classification of offences as "summary conviction", "indictable", and "hybrid offences". Canadian criminal law does not distinguish between "misdemeanours" and "felonies".

1. Summary Conviction Offences

A "summary conviction offence" is an offence which is tried summarily in summary conviction court. "Summary conviction court" is defined in s. 785(1) of the Canadian Criminal Code, in R.S.C. 1985, c. 46, as amended by *Criminal Law Amendment Act,* R.S.C. 1985 (first supplement), c. 27, s. 170:

> "A person who has jurisdiction in the territorial division where the subject matter of the proceeding is alleged to have arisen and who: (a) is given jurisdiction over the proceedings by the enactment under which the proceedings are taken; (b) is a justice or provincial court judge, where the enactment under which the proceedings are taken does not expressly given jurisdiction to any person or any class of persons; or is a provincial court judge, where the enactment under which the proceedings are taking gives jurisdiction in respect thereof to two or more justices."

Relatively few *Criminal Code of Canada* offences in Canada are pure summary conviction offences. One example is found in section 175 of the *Criminal Code of Canada*, which provides:

"175. Causing disturbance, indecent exhibition, loitering, etc."- (1) Everyone who

(a) not being in a dwelling-house, causes a disturbance in or near a public place,

(i) by fighting, screaming, shouting, swearing, singing or using insulting or obscene language,
(ii) by being drunk, or
(iii) by impeding or molesting other persons,

(b) openly exposes or exhibits an indecent exhibition in a public place,

(c) loiters in a public place and in any way obstructs persons who are in that place, or

(d) disturbs the peace and quiet of the occupants of a dwelling-house by discharging firearms or by other disorderly conduct in a public place or who, not being an occupant of a dwelling-house comprised in a particular building or structure, disturbs the peace and quiet of the occupants of a dwelling-house comprised in the building or structure by discharging firearms or by other disorderly conduct in any part of a building or structure to which, at the time of such conduct, the occupants of two or more dwelling-houses comprised in the building or structure have access as of right or by invitation, express or implied, is guilty of an offence punishable on summary conviction."

The offence is tried under Part: XXVll of the Canadian Criminal Code and punished under s. 787(1) which provides:

"Punishment – 787

> 787- (1) General penalty-Except where otherwise provided by law, everyone who is convicted of an offence punishable on summary conviction is liable to a **fine of not more than $2,000.00, or to imprisonment for six months, or to both.**
>
> (2) Imprisonment in default where notwithstanding specified - Where the imposition of a fine or the making of an order for payment of money is authorized by law, but the law does not provide that imprisonment may be imposed in default of payment of the fine or compliance with the order, as the case may be, the defendant shall be imprisoned for a term not exceeding six months."

Summary conviction offences under other federal statutes may have maximum punishment greater than the general penalty under section 787 of the *Criminal Code of Canada.*

Many provincial statutory offences are summary conviction offences. As they are offences under provincial and not federal laws they do not render a foreign national inadmissible to Canada. An example, of such an offence is driving without valid registration and insurance contrary to s. 3 under British Columbia *Motor Vehicle Act,* R.S.B.C. 1996, c. 318. Another is careless driving contrary to section 144 of the (B.C) *Motor Vehicle Act.*

2. Indictable Offences

An "indictable offence" is a criminal offence which is triable by way of indictment. An indictment includes an information or charge in respect of which a person has been tried for an indictable offence under Part XIX of the Criminal Code of Canada, R.S.C. 1985, c. C-46, s. 673. There are several offences which can only be tried by way of indictment. Examples of such offences are dangerous operation of a motor vehicle causing bodily harm and dangerous operation of a motor vehicle while causing death contrary to sections 249(3) and (4) of the Criminal Code of Canada.

3. "Hybrid" Offences

A "hybrid offence" is a crime by which the Crown (prosecution) may choose to prosecute summarily or by indictment. Most Canadian Criminal Code and other federal penal legislation offences are hybrid offences.

Mischief

430 (1) Every one commits mischief who wilfully

(a) destroys or damages property;

(b) renders property dangerous, useless, inoperative or ineffective;

(c) obstructs, interrupts or interferes with the lawful use, enjoyment or operation of property; or

(d) obstructs, interrupts or interferes with any person in the lawful use, enjoyment or operation of property.

Punishment

(3) Every one who commits mischief in relation to property that is a testamentary instrument or the value of which exceeds five thousand dollars

(a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years; or

(b) is guilty of an offence punishable on summary conviction.

Idem

(4) Every one who commits mischief in relation to property, other than property described in subsection (3),

(a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years; or

(b) is guilty of an offence punishable on summary conviction.

Canada's impaired driving related offences are all Canadian Criminal Code hybrid offences. These include:

253(1) Operation while impaired – Every one commits an offence who operates a motor vehicle or vessel or operates or assists in the operation of an aircraft or railway equipment, whether it is in motion or not,

(a) While the person's ability to operate the vehicle, vessel, aircraft or railway equipment is impaired by alcohol or a drug; or

(b) Having consumed alcohol in such a quantity that the concentration in the person's blood exceeds eighty milligrams of alcohol in one hundred millilitres of blood.

253(2) For greater certainty – For greater certainty, the reference to impairment by alcohol or a drug in paragraph (1)(a) includes impairment by a combination of alcohol and a drug.

254(5) Failure or refusal to comply with demand – Everyone commits an offence who, without reasonable excuse, fails or refuses to comply with a demand made under this section.

254(6) Only one determination of guilt – A person who is convicted of an offence under section (5) for failure or refusal to comply with a demand may not be convinced of another offence under that subsection in respect of the same transaction.

CCC 255(1) Punishment – Every one who commits an offence under section 253 or 254 is guilty of an indictable offence or an offence punishable on summary convictions and is liable,

(a) Whether the offence is prosecuted by indictment or punishable on summary conviction, to the following minimum punishment, namely,
   (i) for a first offence, to a fine of not less than $1,000,
   (ii) for a second offence, to imprisonment for not less than 30 days, and
   (iii) for each subsequent offence, to imprisonment for not less than 120 days;

(b) where the offence is prosecuted by indictment, to imprisonment for a term of nor exceeding five years and

(c) if the offence is punishable on summary conviction, to imprisonment for a term of not more than 18 months.

Another example of a hybrid offence is **Dangerous operation of a motor vehicle** at section 249(1)(a) of the Canadian Criminal Code. Section 249(1)(a) defines the essential elements of the offence of dangerous operation of motor vehicles. Section 249(2) provides for the punishment of the offence in its simple form. Sections 249(3) and (4) provides for the punishment of the offence in its aggravated forms (dangerous operation causing bodily harm and death respectively).

CCC 249 (1) Every one commits an offence who operates

(a) a motor vehicle in a manner that is dangerous to the public, having regard to all the circumstances, including the nature, condition and use of the place at which the motor vehicle is being operated and the amount of traffic that at the time is or might reasonably be expected to be at that place;

(b) a vessel or any water skis, surf-board, water sled or other towed object on or over any of the internal waters of Canada or the territorial sea of Canada, in a manner that is dangerous to the public, having regard to all the circumstances, including the nature and condition of those waters or sea and the use that at the time is or might reasonably be expected to be made of those waters or sea;

(c) an aircraft in a manner that is dangerous to the public, having regard to all the circumstances, including the nature and condition of that aircraft or the place or air space in or through which the aircraft is operated; or

(d) railway equipment in a manner that is dangerous to the public, having regard to all the circumstances, including the nature and condition of the equipment or the place in or through which the equipment is operated.

Punishment

(2) Everyone who commits an offence under subsection (1)

(a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years; or

(b) is guilty of an offence punishable on summary conviction.

Dangerous Operation Causing Bodily Harm

(3) Everyone who commits an offence under subsection (1) and thereby causes bodily harm to any other person is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years.

Dangerous Operation Causing Death

(4) Everyone who commits an offence under subsection (1) and thereby causes the death of any other person is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years.

II. Equivalency and Acts or Omissions - IRPA 36(1)(c) and (2)(c)

As has already been pointed out, even in the absence of a conviction where there are charges pending trial or disposition, a US foreign national may still be inadmissible for having committed an act or omission that is both an offense in the jurisdiction within which it was committed and which, if committed in Canada, would constitute an equivalent offense under a Canadian federal statute. **Canada Immigration manual ENF 2 OP/18, at paragraphs 3.5 through 3.9** direct Border Services Officers and immigration officers in the exercise of their discretion when assessing cases under the act or omission sections of *IRPA*. Paragraph 3.9 instructs officers that they are not to use the act or omission provisions when a conviction has been pardoned or expunged:

3.5. "Committing an act" provisions – A36(1)(c) and A36(2)(c)

The "committing an act" provisions are not to be used where a conviction has been registered and where the appropriate evidence of conviction has been obtained. However, where it is not possible to obtain a certificate of conviction as indicated above, then the provisions may be used.

As part of Canada's international commitment to combat transnational crime, the policy intent in applying the provisions is first and foremost to deny entry into Canada and thereby prevent Canadian territory being used as a safe haven by persons who are subject to a criminal proceeding in a foreign jurisdiction; or are fleeing from such proceedings.

The "committing an act" provisions of the Act are not intended to bar the entry into Canada of persons who may have committed, but have not been convicted of, one or more summary offences.

The practical application of the policy with respect to the "committing an act" provisions is to deny entry into Canada to persons against whom there is evidence of criminal activity that could result in a conviction if there were a prosecution in Canada. Good judgment is important to ensure that the objectives of the Act are supported in applying these provisions.

Officers should also recognize that a decision by a local policing authority not to prosecute is often a result of considerations that are specific to the criminal justice context and not necessarily consistent with the objectives of managing access to Canada. In other words, a decision by a local policing authority not to lay or proceed with charges should not automatically be considered as *prima facie* evidence that an offence was not committed; nor should officers be overly capricious in the use of the Act's inadmissibility provisions.

The matters referred to in paragraphs A36(1)(c) and A36(2)(c) do not constitute inadmissibility in respect of a person who, after the prescribed period, satisfies the CIC Minister that they have been rehabilitated or who is a member of a prescribed class that is deemed to have been rehabilitated [A36(3)(c); R17 and R18]. For Relief provisions,

3.7 Essential case elements

In determining, on reasonable grounds for a foreign national, and a balance of probabilities for a permanent resident, that an act was committed, the following case elements must be established:

- an act was committed;
- the act occurred outside Canada;
- the act is an offence under the laws of the place where it occurred; and
- for foreign nationals, the offence in question has a Canadian equivalent that is an indictable offence;
- for permanent residents or foreign nationals, the offence in question has a Canadian equivalent that is an offence punishable by a maximum term of imprisonment of at least 10 years.

3.8. When to use the "committing an act" provisions

The "committing an act" inadmissibility provisions would generally be applied in the following scenarios:

- an officer is in possession of intelligence or other credible information indicating that the person committed an offence outside Canada;
-
- authorities in the foreign jurisdiction indicate that the alleged offence is one where charges would be, or may be, laid;
- the person is the subject of a warrant where a formal charge is to be laid;
- charges are pending
- the person has been charged but the trial has not concluded;
- the person is fleeing prosecution in a foreign jurisdiction
- a conviction has been registered for the offence, however a certificate of conviction is not available.

3.9. When not to use the "committing an act" provisions

The "committing an act" inadmissibility provisions would generally not be applied in the following scenarios:

- in most cases, when authorities in the foreign jurisdiction indicate they would not lay a charge or make known to an officer their decision or intent to drop the charges;
- the trial is concluded and no conviction results (for example, acquittal, discharge, deferral);
- the person admits to committing the act but has been pardoned or the record is expunged;
- the act was committed in Canada.

III. Equivalency- Assessment of Foreign Convictions

1. Introduction

In cases of convictions outside Canada, the offence must be equivalent to an offence in Canada under an act of the Canadian or federal Parliament. In Steward v. Canada (Minister of Employment and Immigration) (1988), 84 N.R. 236 the Federal Court of Appeal articulated the procedure to be followed when deciding the question of equivalency. The court stated that whatever the names given the foreign offences or the words used in defining them, one must determine the essential elements of each and be satisfied that the essential elements correspond. One must, of course, expect differences in the wording of statutory offences in different countries.
The Court held:

"Equivalency" can be determined in three ways:

(1) By comparison of the precise wording in each statute both through documents and, if available, through the evidence of an expert or experts in the foreign law with a view to determining the essential ingredients of the respective offences;

(2) By examining the evidence adduced before the adjudicator, both oral and documentary, to ascertain whether or not that evidence was sufficient to establish that the essential ingredients of the offence in Canada have been proven in the

> foreign proceedings, whether precisely described in the initiating documents soaring the statutory provisions of the same words or not; and,

(3) By a combination of the two.

In the *Dayan v. Canada* (Minister of Employment and Immigration) (1987), 78 N.R. 134, the Federal Court of Appeal dealt with the case of an Israeli national who was convicted of an offence involving the theft of money and the use of a weapon. No evidence was adduced of the criminal statutes of Israel, so that a comparison of any provisions of the Israeli criminal statutes could not be made with the *Canadian Criminal Code*.

Because no comparison of the foreign statute provisions with the appropriate Canadian Criminal Code provisions was possible, the issue for the court was whether the findings of fact established that the essential ingredients of the offence in Canada must have been proven in order to secure the applicant's conviction in Israel.

Transcripts of the applicant's evidence in the record established, beyond doubt, that he was a party to a theft of money to which none of the participants had any colour of right, and the stealing of which was unlawful. The tribunal accepted that the applicant had been convicted of robbery in Israel, and that a weapon had been used in the commission of the offence. The court upheld the tribunal's finding that the applicant was convicted of an offence punishable under s. 302 of the *Canadian Criminal Code*, for which a sentence of more than 10 years could be imposed, and that the applicant was therefore a member of an inadmissible class described in s. 19(1)(c) of the (former) *Immigration Act* (now s. 36 (1)(c) of *IRPA*).

In *Dayan* and the Federal Court of Appeal noted that proof of the statutory provisions of the law of Israel ought to have been made. Alternatively, the absence of such provisions in the statute law, if that is the fact, ought to have been established. Reliance on the concept of offences as *malum in se* to prove equivalency with the provisions of the *Criminal Code of Canada* is a device that should be resorted to only when, for very good reason, proof of foreign law has been difficult to make, and then, only when the foreign law is that of a non-common law country.

2. Equivalency and Washington State Driving Offences: Reckless Driving

A search of the Canadian Federal Court case authorities respecting equivalency and Washington State convictions for Negligent or Reckless driving yields one decision: *Alberto Lei* v. *Solicitor General of Canada* (1994), 24 F.T.R 67 (T.D). The facts are relatively straight forward. Mr. Lei, the applicant, was convicted of Reckless driving pursuant to section 46.61.500 of the Revised Code of Washington ("RCW"). The adjudicator who ruled on Mr. Lei's admissibility to Canada did not go beyond a comparison of the wording of section 46.61.500 and section 249(1) of the *Criminal Code of Canada* when he determined the provisions were equivalent. Mr. Lei was ordered to depart Canada on the basis he was found inadmissible because there were reasonable grounds to believe he was convicted of an offence outside of Canada that if committed in Canada, would constitute an offence punishable by way of indictment under an Act of Parliament by a maximum term of less than 10 years imprisonment. Mr. Lei thereafter sought judicial review.

Section 249(1) of the *Criminal Code of Canada* and RCW s. 46.61.500 read as follows:

CCC 249. (1) Everyone commits an offence who operates

(a) a motor vehicle in a manner that is dangerous to the public, having regard to all the circumstances, including the nature, condition and use of the place at which the motor vehicle is being operated and the amount of traffic that at the time is or might reasonably be expected to be at that place;

RCW 46.61.500 Reckless Driving - Penalty

(1) Any person who drives any vehicle in wilful or wanton disregard for the safety of persons or property is guilty of reckless driving. Violation of the provisions of this section is a misdemeanour.

(2) The license or permit to drive or any non resident privilege of any person convicted of Reckless driving shall be suspended by the department for not less than thirty days.

The applicable tests for determining equivalency were set out in the *Brannson* and *Hill* decisions referred to in *Lei*. Nadon J held that section 249 of the *Criminal Code of Canada* is narrower than that of the Washington Statute for four reasons at paragraph 14 of the decision:

(1) Section 249 of the *Criminal Code of Canada* is directed at the operation of a motor vehicle in a manner which endangers the life or safety of others. The section does not, in my view, apply where the operation of the vehicle endangers property only.

(2) Section 46.61.500 of the Washington Statute clearly covers the operation of a vehicle which endangers property only.

(3) The dangerous driving pursuant to s. 249 of the *Criminal Code of Canada* must occur in a public place.

(4) The applicability of s. 46.61.500 of the Washington Statute is not limited to a public place.

The Court held that:

> "A comparison of the wording of the two statutes leads to the conclusion that the Canadian Statute is narrower than its American counterpart. Thus, it was necessary for the adjudicator to go beyond the wording of the statute in order to determine whether the essential ingredients of the offence in Canada had been proven in the foreign proceedings. This could only be accomplished by obtaining evidence of the circumstances which resulted in the charge in the State of Washington"

Without such evidence the adjudicator could not determine whether the essential elements of section 249 of the *Criminal Code of Canada* had been proven in the Washington State proceedings.

IV. Equivalency of Offense Analysis: Dangerous Operation of a Motor Vehicle contrary to Section 249 of the C*riminal Code of Canada* and Reckless Driving contrary to Revised Code of Washington Section 46.61.500

Let us turn to focus on an assessment of the ***mens rea*** **elements** of a Reckless driving conviction under in RCW 46.61.500 and **Dangerous operation of a motor vehicle** under the Section 249(1)(a) of the *Canadian Criminal Code* for the purpose of determining whether a foreign national is inadmissible to Canada by reason of their criminality pursuant to Section 36 of Canada's *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 ("*IRPA*").

1. Nature and Elements of Dangerous Operation of a Motor Vehicle: *R. v. Beatty*, [2008] 1 S.C.R. 49, 2008 SCC 5 and *R.* v. *Roy*, 2012 SCC 26

i. The Actus Reus

In *Beatty* the Supreme Court of Canada held that the *actus reus* for dangerous driving is set out in Section 249(1)(a) of the *Code*, that is, driving "in a manner that is dangerous to the public, having regard to all the circumstances, including the nature, condition and use of the place at which the motor vehicle is being operated and the amount of traffic at the time is or might reasonably be expected to be at that place. The question is whether the driving, viewed objectively, was dangerous to the public in all the circumstances. The focus of this inquiry must be on the risks created by the accused's manner of driving, not the consequences, such as an accident in which he or she was involved. As Charron J put it, at paragraph 46 of *Beatty*:

> "the court must not leap to its conclusion about the manner of driving based on the consequence. There must be a meaningful inquiry into the manner of the driving. A manner of driving can rightly be qualified as dangerous when it endangers the public. It is the risk of damage or injury created by the manner of driving that is relevant, not the consequences of a subsequent accident. In conducting this inquiry into the manner of driving, it must be borne in mind that driving is an inherently dangerous activity, but one that is both legal and of social value. Accidents caused by these inherent risks materializing should generally not result in criminal convictions."

To summarize, the Supreme Court in *Roy* held that the focus of the analysis in relation to the *actus reus* of the offenses and the manner of operation of the motor vehicle. The trier of fact must not simply leap from the consequences of the driving to a conclusion about dangerousness. There must be a meaningful inquiry into the manner of driving.

ii. The Mens Rea

In *Beatty* at paragraph 48 and *Roy* at paragraph 36 the Supreme Court of Canada states that the focus of the *mens rea* analysis is on whether the dangerous manner of driving was the result of a marked departure from the standard of care which a reasonable person would have exercised in the same circumstances. The Supreme Court of Canada articulates a framework of analysis for distinguishing criminal fault from civil fault under a provincial statute (such as driving without undue care and attention under Section 144 of the BC *Motor Vehicle Act*) when assessing whether an accused's driving is a marked departure from the standard of care expected of a reasonable person in the accused's circumstances, as distinct from a mere departure. The court framed the issue in this way: the fault component ensures that criminal punishment is only imposed on those deserving the stigma of a criminal conviction. Determining whether the fault component is present may in turn be done by asking two questions. First, in light of all the relevant evidence, would a reasonable person have foreseen the risk and taken steps to avoid it if possible? Second, was the accused failure to foresee the risk and take steps to avoid it, if possible, a marked departure from the standard of care expected of a reasonable person in the accused circumstances? The court held that the distinction between a mere departure, which may support civil liability, and the marked departure required for criminal fault, is a matter of degree, but the trier of fact must identify how and in what way the driver went markedly beyond mere carelessness. This will generally be done by drawing inferences from all the circumstances.

2. The Revised Code of Washington 46.61.500-Reckless Driving-Penalty

(1) Any person who drives any vehicle in wilful or wanton and disregard for the safety of persons or property is guilty of reckless driving. Violation of the provisions of this section is a misdemeanour.

(2) The license or permit to drive or any non-resident privilege of any person convicted of reckless driving shall be suspended by the department for not less than 30 days.

i. Reckless Driving-Mens Rea

Black's Law Dictionary (5th Edition) (St. Paul Minnesota: West Publishing Company, 1979) defines reckless driving as follows:

> "operation of an automobile manifesting reckless disregard of possible consequences and indifference to others' rights. To establish the statutory offense of reckless driving requires proof that defendant in management of an automobile intentionally did something with knowledge that injury to another was probable or acted with wanton and reckless disregard for safety of others and in reckless disregard of consequences of acts."

Black's Law Dictionary (5th Edition) defines "Wanton and Reckless Misconduct" as (occurring) when a person, with no intent to cause harm, intentionally performs an act so unreasonable and dangerous that he knows, or should know, that it is highly probable that harm will result."

"Wanton Conduct" is defined as (occurring) when a person though possessing no intent to cause harm performs an act which is so unreasonable and dangerous that imminent likelihood of harm or injury to another is reasonably apparent."

"Wanton Misconduct" is defined as an act or failure to act, when there is a duty to act, in reckless disregard of rights of another, coupled with a consciousness that injury is a probable consequence of act or omission. The term refers to an intentional act of unreasonable character performed in the disregard of the risk known to him or so obvious that he must be taken to have been aware of it and so great as to make it highly probable that harm would follow and it is usually accompanied by conscious indifference to the consequences. "

3. Analyzing RCW 46.61.500 and Canadian Criminal Code Section 249(1)(a) For Equivalency

To begin, compare and analyze the language of RCW 46.61.500 and *Canadian Criminal Code* Section 249(1)(a) to determine the essential elements of the respective Washington and Canadian *Code* offenses. This will establish *the actus reus* and *mens rea* which must be proven for a finding of guilt in each offense. In *Regina v. McDowell* (1980), 52 CCC (2d) 298, the Ontario Court of Appeal held that **recklessness** is not necessary to provide the requisite element of fault. If an accused has consumed alcohol when he or she knew or ought to have known their ability to operate a motor vehicle would

be impaired the fault required to establish the offence of Dangerous operation under *Criminal Code of Canada* section 249(1) is present.

Notwithstanding that RCW 46.61.500 is "broader" than *CCC* 249(1)(a), because it is not limited to a public place and covers the operation of a vehicle which endangers property only, equivalency may still be established if, based on the evidence, the facts proven establish that all of the elements of *CCC* 249(1)(a) were contained in the acts committed by the foreign national. Put another way, if evidence of the actual activity for which the foreign national was convicted under RCW 46.61.500 in Washington falls within the scope of *CCC* 249(1)(a), and is adduced, or available, it is possible to establish equivalency. In *Lei*, Nadon J held:

> "A comparison of the wording of the two statutes leads to the conclusion that the Canadian statute is narrower than its American counterpart. Thus, it was necessary for the adjudicator [Canadian equivalent of an immigration judge] to go beyond the wording of the statute in order to determine whether the essential ingredients of the offense in Canada had been proven in the foreign proceedings. This could only be accomplished by obtaining evidence of the circumstances which resulted in the charge in the State of Washington." [my emphasis added]

Without such evidence the adjudicator could not determine whether the essential elements of *CCC* 249(1)(a) had been proven in the Washington State proceedings.

Equivalency is not established where the RCW offense is broader than the *CCC* offense and the particulars or circumstances of the offending would not render the foreign national's actions culpable in Canada. Another example of such an offence, in certain circumstances, is RCW 46.61.503 **DUI under 21 years**.

Equivalency may not be established where there is no equivalency of defences and the defences available in Canada are broader than in Washington.

Canada Immigration and Canada Border Services Agency officers may consider how RCW 46.61.500 and *CCC* 249(1)(a) have been interpreted in the respective jurisprudence in Washington and in Canada. For example, on the issues of intoxication and dangerous driving, evidence of alcohol consumption by the driver is always admissible on a charge of dangerous driving under *CCC*

249. It is relevant to show the cause of the dangerous driving and to negate any defence that the driving was the result of something beyond the control of the accused: See, *R.* v. *Peda* (1969) 4 C.C.C. 245 (S.C.C.). In *R.* v. *Settle* (2010) 261 C.C.C. (3d) 45 (B.C.C.A.), a joint trial of impaired driving and dangerous operation, a finding that the defendant's ability to operate a motor vehicle was not impaired by the consumption of alcohol does not prevent the judge from relying on evidence of the defendant's alcohol consumption in order to determine whether the defendant's objectively dangerous driving constituted a marked departure from the standard of the reasonably prudent driver.

Thus a U.S. citizen or resident who is found guilty or who has pleaded guilty to Negligent driving – First degree contrary to RCW 46.61.5249 for having "operat[ed] a motor vehicle in a manner that is both negligent and endangers or is likely to endanger any person or property and exhibits the effects of having consumed liquor or marihuana or any drug ..." is not likely to avoid an assessment of equivalence to Dangerous operation under CCC 249(1) where the offering takes place on a public road or highway or such other place to which the public has access. RCW 46.61.5249(2)(a) defines "negligent" as the failure to execute ordinary care, and is the doing of some act that a reasonably careful person would not do under the same or similar circumstances or the failure to do something that a reasonably careful person would do under the same or similar circumstances."

The central issue for CBSA and Canada Immigration officers to decide in equivalence cases is whether there is a Canadian equivalent for the offense of which the foreign national was convicted outside of Canada, before determining whether the foreign national would have been convicted in Canada. A "wet" reckless driving in Washington (generally reduced from a DUI charge) in circumstances where there isn't a marked departure from the standard of care (as that term and analysis is used in Canada), and the conflicting duty of candour later owed to the Canada Border Services Agency and Canada Immigration when disclosing all material facts concerning (a) cheques(s) and/or conviction(s) to avoid a finding by Canada Border Services Agency or visa officers of having engaged in misrepresentation under Canada's *IRPA* Section 40(1) and possible exclusion for withholding or concealing material facts when describing the circumstances of the offending (that is, alcohol consumption).

V. Equivalency of Dispositions

1. When is a Disposition a Conviction?

A "conviction" is a finding of guilt by a competent authority or a plea of guilty to an offense. A conviction does not exist where: it is set aside on appeal; the court grants and absolute or conditional discharge as provided for in section 730 of the *Canadian Criminal Code*; or, the charges are stayed or withdrawn. If a person is granted a pardon (now called a record suspension) under the *Criminal Records Act* a conviction is deemed no longer to exist. A person granting jurisdiction or a disposition such as expungement or vacation that deems the conviction dismissed, or to no longer exist, may be recognized as equivalent to a Canadian pardon depending upon its legal effect.

2. Canadian Conditional and Absolute Discharges

Section 730 discharges are sentencing options which result in no record to an individual accused in respect of an offense. If the accused is an individual person who is convicted of an offense for which there is no minimum punishment for which the maximum punishment is less than 14 years, the court may, if it considers it to be in the best interests of the accused, and not contrary to the public interest, discharge the accused absolutely wrong conditions. An absolute discharge takes effect immediately. The legal effect of the discharge is that the accused is deemed not to have been convicted.

3. Record Suspensions (formerly "Pardons")

A record suspension permits individuals convicted of a criminal offense and who have completed their sentence and demonstrated they are a law-abiding citizens to have their criminal record separate and apart from other criminal records under the Canadian *Criminal Records Act*. All information pertaining to convictions will be taken out of the Canadian Police Information Center (CPIC) and may not be disclosed without permission from the Minister of Public Safety Canada. A records suspension does not erase the fact that a person was convicted of an offense. It will not cancel prohibition orders against driving, or firearms possession, as two examples. Individuals convicted of certain offenses (particularly sexual assault offenses involving a child) are not eligible for a records suspension. A foreign pardon, expungement, or vacation does not always render a

foreign national admissible to Canada. The foreign legislation under which the pardon, expungement or vacation is issued must be carefully examined. It is important to determine whether the effect of the disposition is to erase a conviction as distinct from merely recognizing a person's rehabilitation has taken place. As with the equivalency test applied to foreign convictions, one must assess whether the issuing country's legal system is based on similar foundations and values as Canada's. Some jurisdictions automatically pardon eligible individuals without their having to apply in certain defined situations (see, for example, the UK *Rehabilitation of Offenders Act*, 1974).

In *Barnett,* Jerome ACJ considered the (UK) *Rehabilitation of Offenders Act 1974* under which the applicant was deemed not to have been convicted of burglary to be consistent with Canadian pardon legislation (now a record suspension). Therefore, the court determined Mr. Barnett was not a member of an inadmissible class of persons. In *Barnett,* Jerome ACJ stated that the penal legislation in Canada allows for the elimination of criminal convictions from the records of deserving individuals in certain circumstances so as to facilitate their rehabilitation. He ruled this was consistent with the intention of the *Rehabilitation of Offenders Act 1974*. In *Barnett,* the Federal Court recognized the UK legislation under which the applicant was deemed not to have been convicted of the offense of burglary, and determined that Mr. Barnett was not a member of an inadmissible class of persons.

Additionally at ENF 2/ OP 18 paragraph 3.3 Immigration and Canada Border Services Agency Officers are cautioned: Inadmissibility may not be based on a conviction in respect of which a pardon has been granted and has not ceased to have effect or been revoked under the *Criminal Records Act*. There is also other language in that Manual to the effect that officers should respect the laws and legal concepts used in jurisdictions with similar legal systems to Canada's. Clearly, Washington State, like the United Kingdom is a common law jurisdiction with similar legal concepts to Canada's as explicitly recognized in *Barnett*.

Canadian authorities and are not bound by a pardon or disposition in which there is an absence of evidence of the motivating considerations that led to the grant of the pardon or disposition by the foreign state. Regardless of whether equivalent to a Canadian record suspension, a disposition issued by a foreign state in recognition of a foreign national's rehabilitation is helpful evidence to

demonstrate that individual's rehabilitation as recognized by the authorities in the foreign country with jurisdiction over the offense.

4. US Criminal Dispositions

US criminal dispositions vary from jurisdiction to jurisdiction, and raise confusing questions about whether there has actually been any "conviction", as that term is applied in Canadian law. The following table from ENF 2/0P 18-Evaluating Inadmissibility at pages 60-61, is used by Canada Immigration and Canada Border Services Agency officials to interpret some commonly used terminology in the United States and apply it to an assessment of whether the United States criminal disposition equates-or does not equate-to a "conviction" under Canadian law:

Terminology used	**Defined**
Acquittal contemplating dismissal	Not a conviction; would likely have the same effect as a conditional discharge.
Deferral of sentence	This is a conviction providing the offence equates to Canadian law; similar to a suspended sentence in Canadian law.
Deferral of prosecution	Not a conviction. A deferral indicates that no trial on the merits of the charge has been held; similar to a stay in Canadian law.
Deferral of judgment	Not a conviction. If the conditions imposed in the deferral are fulfilled, the judgment finally rendered may be a finding of "not guilty."
Deferral of conviction	Not a conviction. It is a form of disposition equivalent to a conditional discharge in Canada.
Nolo contendre	A Latin phrase meaning "I will not contest it." It is a plea that may be allowed by the court in which the accused does not deny or admit to the charges. This plea is similar to pleading guilty and a conviction results.
Nolle prosequi	A Latin phrase meaning "I will no longer prosecute." The effect is similar to a stay of prosecution in Canada and no conviction results.
Sealed record	A sealed record is, for the purposes of IRPA, a

	criminal record. The fact that a sealed record exists does not in and of itself constitute inadmissibility. An officer should determine the circumstances of the sealed record by questioning the person concerned. A sealed record is usually the process used in the case of young offenders; however, a sealed record may also be used because of an agreement between the prosecutor and the defendant or in security cases. In the state of Vermont, for example, a record may be sealed if a person abides by terms and conditions imposed by the court. A sealed record will appear on a person's "rap sheet", however, the record will not be made public without a court order. In the case of a sealed record, an officer should ask whether the record was the result of a conviction as a minor. If the person was a minor, then if would most likely equate to an offence under the *Young Offenders Act* - unless the case would have been eligible for transfer to an adult court.
Convicted of several counts	Multiple convictions. Counts in the U.S. are equivalent to charges in Canadian law.
Expunged	Not a conviction. Expunged means to strike out; obliterate; mark for deletion; to efface completely; deemed to have never occurred.

5. RCW 94A.060 – Vacation of offender record of conviction

Washington law provides for a sentencing court to vacate an offender's records of conviction after the offender's discharged under RCW 9.94A.637 and where the requirements of subsection RCW 94A.060(2) are met. Subsection (1) provides that the court may clear the record of conviction by:

"(a) Permitting the offender to withdraw his or her plea of guilty and to enter a plea of not guilty; or,

(b) if the offender has been convicted after a plea of not guilty, by the court setting aside the verdict of guilty; and,

(c) by the court dismissing the information or indictment against the offender."

Subsection (3) provides that once the court vacates a record of conviction:

- the fact that the offender has been convicted of the offence shall not be included in the offender's criminal history for purposes of determining a sentence in any subsequent conviction;

- the offender shall be released from all penalties and disabilities resulting from the offence; and,

- for all purposes, including responding to questions on employment applications, an offender whose conviction has been vacated may state that the offender has never been convicted of that crime.

Notwithstanding the language that provides for the use of the prior conviction in a later criminal prosecution, there has been increasing but inconsistent treatment of the vacation section and orders as an "expungement" by Citizenship and Immigration Canada and the Canada Border Services Agency. Regrettably, the Canada Border Services Agency has declined to issue a broad policy statement on its consistent treatment of such vacation orders as a removal to the bar to admissibility, saying it will look at each case on a case-by-case basis.

The problem for such offenders is that they may require admission to Canada before the five and ten eligibility requirements for a vacation order can be met (so as to necessitate their applying for a Temporary Resident Permit and/or Rehabilitation Certificate to overcome their inadmissibility).

VI. Exceptions to Criminal Inadmissibility

Criminal inadmissibility does not apply to persons who:

- have been pardoned (issued a records suspension or foreign equivalent thereof);

- satisfied the Minister of Citizenship and Immigration that they have been rehabilitated; and,

- are deemed to have been rehabilitated.

VII. Foreign Nationals Overcoming Inadmissibility by Reason of Serious or Non- serious Criminality

1. Foreign Nationals Overcoming Inadmissibility by Reason of Serious or Non-Serious Criminality

A. Pardon for Convictions in Canada

The *Criminal Records Act* provides authority for the granting of a pardon to persons who have convictions in Canada. The effect of a pardon in Canada is to erase a conviction as distinct from merely recognizing the person's rehabilitation has taken place. The granting of a pardon overcomes inadmissibility for that criminal conviction. A pardon is essential for persons seeking to overcome their inadmissibility for reasons of (a) Canadian conviction(s).

Inadmissibility under 36(1) and (2) may not be based on a conviction in Canada in respect of which a pardon has been granted and has not ceased to have effect or been revoked under the *Criminal Records Act*, or in respect of which there has been a final determination of an acquittal [see: *IRPA,* paragraph 36(3)(b)].

B. Rehabilitation - *IRPA* Paragraphs 36 (3)(c) and (e)

No discussion about overcoming inadmissibility would be complete without canvassing rehabilitation. Criminal convictions outside of Canada referred to in *IRPA* subsections 36(1) and 36(2) do not constitute inadmissibility in respect of a permanent resident or foreign national, who, after the prescribed period, satisfies the Minister that they have been rehabilitated, or is a member of a prescribed class that is deemed to have been rehabilitated.

Inadmissibility under *IRPA* subsections 36(1) and 36(2) may not be based on an offence designated as a contravention under Canada's *Contravention Act* (regulatory offences) or an offence under the *Youth Criminal Justice Act* (formerly, the *Young Offenders Act*).

The provisions governing rehabilitation are set out in the *Immigration and Refugee Protection Regulations* at Regulations 17 and 18. These Regulations speak of classes of rehabilitated persons, and are read in conjunction with the provisions of *IRPA* s. 36 (3)(c).

C. Regulation 17 - Prescribed Period

For the purposes of *IRPA* s. 36 (3)(c), the prescribed period is five years:

(a) after the completion of an imposed sentence, in the case of a conviction outside Canada for serious criminality under s. 36 (1)(b) or criminality under s. 36(2)(b), if the person has not been convicted of a subsequent offence other than an offence designated as a contravention under the *Contraventions Act*, or an offence under the *Youth Criminal Justice Act*; and

(b) after committing an offence, in the case of acts or omissions constituting an offence in the place where it was committed, and which equates to an indictable offence in Canada, if the person has not been convicted of a subsequent offence other than an offence designated as a contravention under the *Contraventions Act*, or an offence under the *Youth Criminal Justice Act*.

D. Regulation 18(1) – Prescribed Class

IRPA R18(1) states that for the purposes of *IRPA* s. 36 (3)(c), the class of persons deemed to have been rehabilitated is a prescribed class.

E. Regulation 18(2) – Deemed Rehabilitation

Regulation 18(2) lists the following persons as members of the class of persons deemed to have been rehabilitated:

R18(2) Members of the class

(a) persons who have been convicted outside Canada of no more that one offence that, if committed in Canada, would constitute an indictable offence under an Act of Parliament, **if all of the following conditions apply, namely,** • the offence is punishable in Canada by a maximum term of	R18(2)(a)

imprisonment of less than 10 years, • at least 10 years have elapsed since the day after the completion of the imposed sentence, • the person has not been convicted in Canada of an indictable offence under an Act of Parliament, • the person has not been convicted in Canada of any summary conviction offence within the last 10 years under an Act of Parliament or of more than one summary conviction offence before the last 10 years, other than an offence designated as a contravention under the *Contraventions Act* or an offence under the *Youth Criminal Justice Act*, • the person has not within the last 10 years been convicted outside Canada of an offence that, if committed in Canada, would constitute an offence under an Act of Parliament, other than an offence designated as a contravention under the *Contraventions Act* or an offence under the *Youth Criminal Justice Act,* • the person has not before the last 10 years been convicted outside Canada of more than one offence that, if committed in Canada, would constitute a summary conviction offence under an Act of Parliament, and • the person has not committed an act described in paragraph 36(2)(c) of the Act.	
(b) persons convicted outside Canada of two or more offences that, if committed in Canada, would constitute summary conviction offences under any Act of Parliament, **if all of the following conditions apply, namely,** • at least five years have elapsed since the day after the completion of the imposed sentences, • the person has not been convicted in Canada of an indictable offence under an Act of Parliament, • the person has not within the last five years been convicted in Canada of an offence under an Parliament, other than an offence designated as a Act of contravention under the *Contraventions Act* or an offence under the Youth *Criminal Justice Act*, • the person has not within the last five years been convicted outside Canada of an offence that, if committed in Canada, would constitute an offence under an Act of Parliament, other than an offence	R18(2)(b)

designated as a contravention under the *Contraventions Act* or an offence under the Youth *Criminal Justice Act*, • the person has not within the last five years been convicted outside Canada of an offence that, if committed in Canada, would constitute an offence under an Act of Parliament, other than an offence designated as a contravention under the *Contraventions Act* or an offence under the *Youth Criminal Justice Act*, • the person has not before the last five years been convicted in Canada of more than one summary conviction offence under an Act of Parliament, other than offence designated as a contravention under the *Contraventions Act* or an offence under the *Youth Criminal Justice Act,* • the person has not been convicted of an offence referred to in paragraph 36(2)(b) of the Act that, if committed in Canada, would constitute an indictable offence, and • the person has not committed an act descried in paragraph 36(2)(c) of the Act.	
(c) persons who have committed no more than one act outside Canada that is an offence in the place where it was committed and that, if committed in Canada, would constitute an indictable offence under an Act of Parliament, **if all of the following conditions apply, namely,** • the offence is punishable in Canada by a maximum term of imprisonment of less than 10 years, • at least 10 years have elapsed since the day after commission of the offence, • the person has not been convicted in Canada of an indictable offence under an Act of Parliament, • the person has not been convicted in Canada of any summary conviction offence within the last 10 years under an Act of Parliament or of more than one summary conviction offence before the last 10 years, other than an offence designated as a contravention under the *Contraventions Act* or an offence under the *Youth Criminal Justice Act*, • the person has not before the last 10 years been convicted outside Canada of more than one offence that, if committed in Canada, would constitute a summary conviction offence under an Act of Parliament, and	R18(2)(c)

• the person has not been convicted outside Canada of an offence that, if committed in Canada, would constitute an indictable offence under an Act of Parliament.	

F. Individual Rehabilitation

The "deemed rehabilitation" provisions do not apply, and cannot be used to overcome inadmissibility for offences in the following situations:

- The prescribed period of time of five years has not elapsed for a person who has committed two or more summary offences;
- The prescribed period of time of 10 years has not elapsed for a person who has committed one indictable offence;
- A person has committed one indictable offence, and then committed a subsequent indictable offence;
- A person was deemed rehabilitated, and then committed a subsequent offence.

With respect to the prescribed eligibility periods applicable to individual rehabilitation applications, it is important to keep in mind that there are different types of sentences when calculating the five year waiting period.

The following is a useful grid from Canada Immigration:

Type of Sentence	**Determining the Eligibility Date**
Suspended Sentence	Count five years from the date of sentencing
Suspended Sentence with a fine	Count five years from the date the fine was paid. In case of varying payment dates, the rehabilitation period starts on the date of the last payment.
Imprisonment without Parole	Count five years from the end of the term of imprisonment
Imprisonment and Parole	Count five years from the completion of parole.
Probation	Probation is part of the sentence. Therefore, count five years from the end of the probation period.

Driving Prohibition*	Count five years from the end of the prohibition

*The defendant is prohibited by the Criminal Court from driving.

A subsequent conviction has the effect of removing the application of the deemed rehabilitation provisions for an earlier offence. The offence under s. 36 (2)(b) is also described in s 36 (1)(b) (concerning serious criminality). Persons not eligible for deemed rehabilitation may, nonetheless, apply for individual rehabilitation and/or discretionary entry to Canada by requesting a Temporary Resident Permit, on making an application for same at a visa office outside Canada or at a port of entry. Persons inside Canada are also able to submit rehabilitation applications via an inland procedure. Inland, Temporary Resident Permit applications are submitted through case processing centres Vegreville, Alberta or at a local Canada immigration office. Temporary Resident Permits may be applied for at a port of entry.

G. Applicant's Duty of Candor Owed to Citizenship and Immigration Canada/CBSA When Applying for Rehabilitation or a TRP: IRPA section 40(1)(a) – Misinterpretation

An applicant for a TRP or Rehabilitation certificate to overcome inadmissibility is required to **list all the offences in the application form which may make them inadmissible and on a separate sheet of paper, to explain in detail the events/circumstances leading to the offence(s)/convictions and certify all the information provided is true and complete to the best of their knowledge (my emphasis added).**

The form contains the following warning:

Details of all offences and convictions must be accurately recorded on this document. Providing false or misleading information will likely result in a refusal of your application and may permanently bar your admission to Canada.

Most importantly, *IRPA* **section 40(1)(a)** creates the offences of **misrepresentation**:

"for directly or indirectly misrepresenting or withholding material facts relating to a relevant matter that induces or could induce an error in the administration of this Act"

40(2)(a) provides for a five year ban or exclusion a foreign national that has engaged in misrepresentation.

This creates a potential dilemma for the applicant and their Canadian immigration counsel when, for example, the applicant and their U.S. criminal defence counsel negotiate a DUI to a guilty plea for Negligent driving - First degree or Reckless driving. What and how much do I disclose to the CBSA? If the original charge was not withdrawn and relayed, there is no question an applicant must disclose the original charge(s) laid in their Rehabilitation or TRP application. My advice to clients is to provide a complete, accurate and true account of what happened so as to avoid any risk of going down the slippery slope of misrepresentation under *IRPA*.

Top Ten Practice Points

1. As early as the initial interview, canvass with your client whether he or she is required to travel outside the USA for work or other compelling reasons.

2. Do not over think or fixate on access to Canada issues. To what makes sense for your client and what is in their "best interests" as an American citizen and resident.

3. When negotiating pleas/crafting dispositions explore alternate measures and disposition that do not result in a conviction.

4. Where relevant as a factor relating to fitness of the disposition, ensure the prosecution and court are aware of your client's needs to travel to Canada.

5. Avoid where possible, a plea to an offence that is equivalent to a hybrid or indictable offence and particularly one that carries a minimum punishment.

6. Avoid lengthy probation orders where possible to reduce periods of ineligibility for rehabilitation to overcome inadmissibility.

7. Advise your client to retain you to consult with US Immigration and Canadian counsel to identify potential immigration loss of status issues.

8. Advise your client to immediately take steps to address inadmissibility well before planned travel dates to Canada.

9. At the conclusion of your client's case provide your client with copies of court records of the disposition (especially the court docket file, sentencing materials, court records of the disposition, transcripts of the sentencing, agreed facts or admissions or which (a) plea(s) as/are based; and any medical evidence or testing (if substances/alcohol) whether pursuant to court orders or voluntarily undergone. If applicable, inform your client when he or she becomes eligible to apply to vacate his or her record of conviction and diarize it.

10. Note your client's place and country of birth. Inquire as to whether your client has relatives in Canada, and, if so, whether you client has a parent who was born in Canada. If so, make certain your client consults a Canadian citizenship lawyer to determine whether he or she has a claim to Canadian citizenship.

Attachments:

- Document Checklist – Rehabilitation
- Application for Criminal Rehabilitation

DOCUMENT CHECKLIST REHABILITATION

This document checklist will help ensure that you attach all the required documents to your application. Your entire application will be returned to you with a letter asking for the necessary documents if any information is missing. This will delay processing of your application. If you cannot get documents listed on the checklist and the court, country, and arresting police department do not have the information you require, you must obtain a written explanation from them and include it with your application. In the event you are not able to get a written explanation, you must provide details of your efforts to obtain the information and why it is not available. Documents you submit that are not in English or French must be accompanied by a certified translation.

I have enclosed the following items:

FORMS

- ☐ *Application for Criminal Rehabilitation* (IMM 1444)
- ☐ *Use of a Representative* (IMM 5476), if applicable

PHOTOCOPIES OF THE FOLLOWING DOCUMENTS

- ☐ Pages from your passport showing your name, date of birth, and country of birth.
- ☐ **For citizens of the United States only:** If you do not have a passport, a copy of your driver's licence and USA birth certificate
- ☐ Each court judgement made against you which must clearly show the charge, the section of the law under which you were charged, the verdict and the sentence
- ☐ The foreign or Canadian laws under which you were charged or convicted. You can obtain copies of foreign laws by contacting local police authorities, lawyers, the courthouse where the offence occurred, visiting your local law library, or searching the Internet. If you need information about another country, their local embassy or consulate may be able to help you
- ☐ Any documents relating to sentence imposed, parole, probation or pardon; e.g. court records, judge's comments (including recommendation concerning parole), probation or parole reports, certificate of rehabilitation, letters of recommendation from public officials or respected private citizens, etc. These documents must clearly show when your sentence was completed

ORIGINAL DOCUMENTS

- ☐ A criminal clearance from the police authorities in all countries (including Canada) where you have lived for six consecutive months or longer since reaching the age of 18
- ☐ **For people who have lived in the United States:** Provide a state certificate (or a letter from a police authority) for each state in which you have lived for six consecutive months or longer since reaching the age of 18 **and** a national FBI certificate
- ☐ If you were a juvenile offender (see *Determining inadmissibility*), a letter or document proving that the country you were convicted in has special measures for juvenile offenders
- ☐ If you are applying from within Canada: Provide the form - *Fee for Immigration Service, Approval of Rehabilitation* (IMM 5310)
- ☐ If you are applying from outside Canada: **Provide the internet receipt** (consult "Pay the fee" section of the instruction guide for more instruction)

Citizenship and Immigration Canada | Citoyenneté et Immigration Canada

PROTECTED WHEN COMPLETED - B

APPLICATION FOR CRIMINAL REHABILITATION

Language of correspondence
☐ English OR ☐ French

SECTION A TO BE COMPLETED BY APPLICANT

1	☐ APPLICATION FOR APPROVAL OF REHABILITATION	2	☐ FOR INFORMATION ONLY

SECTION B TO BE COMPLETED BY APPLICANT

1	Family name			Given name(s) - Do not use initials					
2	Date of birth (YYYY-MM-DD)	3	Sex ☐ Male ☐ Female	4	Country of birth	5	Citizenship		
6	Marital status ☐ Single ☐ Married ☐ Common-law ☐ Widowed ☐ Divorced ☐ Separated								
7	All other names that I use or have used (Include maiden name, previous married name(s), aliases and nicknames, legal change of name)								
	1) Family name		Given name(s)		2) Family name		Given name(s)		
8	My home address is								
	No. & street						Apt./Unit		
	City/Town		Province / State / Country				Postal / ZIP code		
9	Mailing address All correspondence should be mailed to box 8 ☐ or to:								
	No. & street						Apt./Unit		
	City/Town		Province / State / Country				Postal / ZIP code		
10	Home telephone no.	11	Business telephone no.	12	Fax no.	13	Indicate most convenient time to reach you by telephone	Time ____ ☐ AM ____ ☐ PM	
14	E-mail address (Indicating an e-mail address will authorize all correspondence, including file and personal information, to be sent to the e-mail address you specify.)								

15	I may be inadmissible to Canada because of the following offence(s): (use a separate sheet if necessary, entitled #15: Offences / Convictions)				
	OFFENCE(S)/CONVICTION	DATE(S) OF OFFENCE(S)/ CONVICTION (YYYY-MM-DD)	PLACE OF OFFENCE(S)/CONVICTION	SENTENCE(S)	STATUTE NUMBER(S)
16	On a separate sheet of paper, explain in detail the events/circumstances leading to the offence(s)/conviction(s). Indicate #16: Events / Circumstances on the sheet of paper.				

WARNING

DETAILS OF ALL OFFENCES AND CONVICTIONS MUST BE ACCURATELY RECORDED ON THIS DOCUMENT. PROVIDING FALSE OR MISLEADING INFORMATION WILL LIKELY RESULT IN A REFUSAL OF YOUR APPLICATION AND MAY PERMANENTLY BAR YOUR ADMISSION TO CANADA.

17 Explain the purpose of your visit or stay in Canada

18 On a separate sheet of paper, provide reasons why you consider yourself to be rehabilitated and why you do not represent a risk to public safety. Indicate #18: Rehabilitation Factor on the sheet of paper.

19 Addresses since the age of 18. (Use a separate sheet if necessary)

Forms will be returned if there is any period of time for which you have not shown an address. Do not use post office (P.O.) box addresses.

DATES FROM (YYYY-MM)	DATES TO (YYYY-MM)	NUMBER AND STREET (Do not use P.O. boxes)	APT. NO.	CITY OR TOWN	PROVINCE / STATE COUNTRY

20 Provide the details of your employment history since the age of 18. Start with the most recent information. Under "OCCUPATION", write your occupation or job title if you were working. If you were not working, provide information on what you were doing (for example: unemployed, studying, traveling, in detention, etc.)

Note: Please ensure that you do not leave any gaps in time.

Failure to account for all time periods will result in a delay in the processing of your application.

DATES FROM (YYYY-MM)	DATES TO (YYYY-MM)	NAME AND ADDRESS OF COMPANY (Write name in full, do not use abbreviations)	OCCUPATION

THE INFORMATION YOU PROVIDE IN THIS DOCUMENT IS COLLECTED UNDER THE AUTHORITY OF THE CANADA *IMMIGRATION AND REFUGEE PROCTECTION ACT* AND IS STORED IN PERONAL INFORMATION BANK NUMBER CIC PPU 042, 054 OR 300. THE INFORMATION IS PROTECTED UNDER THE PROVISIONS OF THE *PRIVACY ACT* AND IS ACCESSIBLE TO YOU UPON REQUEST.

21 I certify that the information provided by me is true and complete to the best of my knowledge.
I also certify that I am not currently charged with any criminal offence.

SIGNATURE OF APPLICANT | Date (YYYY-MM-DD)

SECTION C TO BE COMPLETED BY THE OFFICER.

1	Name of originating office	2	File no.	3	NHQ file no. (if known)

4	Cost recovery code	Fee	GST	Receipt no.	5	FOSS / NCMS ID no.

6	Equivalent offence(s) under Canadian law	7	Maximum penalty under Canadian law

8 Inadmissibility provision(s) ▶ ☐ A36(1)a) ☐ A36(1)b) ☐ A36(1)c) ☐ A36(2)a) ☐ A36(2)b) ☐ A36(2)c)

9 Eligible to apply for rehabilitation? ▶ ☐ Yes ☐ No

10 Date when subject was / will be eligible ▶ (YYYY-MM-DD)

11 If subject is not eligible, state reason(s)

12 Officer's recommendation

☐ I recommend approval of rehabilitation

☐ I recommend an application for a Temporary Resident's Permit

☐ I do not recommend approval of rehabilitation

☐ I do not recommend an application for a Temporary Resident's Permit

13 Reasons for recommendation

14	Name of officer	15	Signature of officer	Date (YYYY-MM-DD)

Reviewing officer's recommendation ▶	16 ☐ I concur / approve	17 ☐ I do not concur / approve

18	Comments

19	Name of reviewing officer	20	Signature of reviewing officer	Date (YYYY-MM-DD)

21 List of documents or photocopies attached - check those attached

- ☐ Passport
- ☐ Driver's License and USA Birth of Certificate (USA-born citizens only)
- ☐ Court judgement(s)
- ☐ Text of non-Canadian statutes
- ☐ Police certificate
- ☐ Documentation re: sentence, parole, probation, fine or pardon
- ☐ Documentation re: juvenile offender
- ☐ Other documentation (specify)

I certify that a copy of these documents has been provided to the applicant and that the applicant has been given an opportunity to provide comments.

22	Name of officer	23	Signature of officer	Date (YYYY-MM-DD)

SECTION D FOR OFFICE USE ONLY

Notification by (fax/e-mail) received that authority from the Minister for relief under A36(1)(b) or A36(1)(c) was: ▶ ☐ Granted ☐ Refused	Initials	Date (YYYY-MM-DD)
Authority from the Minister's delegate for relief under A36(2)(b) or A36(2)(c) granted ▶ ☐ Yes ☐ No		Date (YYYY-MM-DD)

Name (please print)	Title

SIGNATURE Date (YYYY-MM-DD)

***Medovarski v. Canada (Minister of Citizenship and Immigration)*, 2005 SCC 51, (2005) 2 S.C.R. 539 at para. 10 per McLachlin CJC:**

> [10] The objectives as expressed in the *IRPA* indicate an intent to prioritize security. This objective is given effect by preventing the entry of applicants with criminal records, by removing applicants with such records from Canada, and by emphasizing the obligation of permanent residents to behave lawfully while in Canada. This marks a change from the focus in the predecessor statute, which emphasized the successful integration of applicants more than security…

Canada and Collateral Immigration Consequences for Foreign Nationals Seeking Entry to Canada with a History of Arrests, Charges, and Convictions in the USA

Presented by Samuel D. Hyman

As was observed in *Medovarski* at paragraph 46, due to his lack of status, a foreign national is not afforded the unqualified right to enter or remain in Canada:

> [46] The most fundamental principle of immigration law is that non-citizens do not have an unqualified right to enter or remain in Canada: *Chiarelli v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 711, at p. 733. Thus the deportation of a non-citizen in itself cannot implicate the liberty and security interests protected by s. 7 of the *Canadian Charter of Rights and Freedoms*.

The legislative objectives include:

- protecting public health and safety of Canadians and to maintain the security of Canadian society; and

- promoting international justice and security by fostering respect for human rights and by denying access to Canadian territory to persons who are criminals or security risks.

Foreign National – Defined

"Foreign National" is defined by subsection 2(1) of the *IRPA* and means a person who is not a Canadian citizen or permanent resident, and includes a stateless person.

Permanent Resident – Defined

"Permanent Resident" is defined in subsection 2(1) *IRPA* and means a person who has acquired permanent resident status and has not subsequently lost that status under section 46.

Examples of how a person might lose status:

- when they acquire Canadian Citizenship
- on a final determination that they have failed to comply with the residency obligation under section 28
- when a removal order made against them comes into force
- on a final determination under section 109 to vacate a decision to allow their claim for refugee protection or a final determination under subsection 114(3) to vacate a decision to allow their application for protection

Serious Criminality (Outside Canada)

36. (1) Serious Criminality - A permanent resident or a foreign national is inadmissible on grounds of serious criminality for

(b) having been convicted of an offence outside Canada that, if committed in Canada, would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years; or

(c) committing an act outside Canada that is an offence in the place where it was committed and that, if committed in Canada, would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years.

Protected Person – Defined

"Protected Person" is defined by subsection 95(2) of the *IRPA* and means a person on whom refugee protection is conferred (a Convention refugee or a person in similar circumstances who becomes a permanent resident under a visa application or a temporary resident under a Temporary Resident Permit for protection reasons; when the Refugee Protection Division of the Immigration and Refugee Board determines the person to be a Convention refugee or a person in need of protection; or when the Minster allows the application for protection), has not subsequently been deemed to be rejected under *IRPA* subsections 108(3), 109(3) or 114(4).

IRPA s. 36(3) - Application

(3) Application - The following provisions govern subsections (1) and (2):

(a) an offence that may be prosecuted either summarily or by way of indictment is deemed to be an indictable offence, even if it has been prosecuted summarily;

(b) inadmissibility under subsections (1) and (2) may not be based on a conviction in respect of which a pardon has been granted and has not ceased to have effect or been revoked under the *Criminal Records Act*, or in respect of which there has been a final determination of an acquittal;

Criminality (Outside Canada)

(2) Criminality - A foreign national is inadmissible on grounds of criminality for

(b) having been convicted outside Canada of an offence that, if committed in Canada, would constitute an indictable offence under an Act of Parliament, or of two offences not arising out of a single occurrence that, if committed in Canada, would constitute offences under an Act of Parliament;

(c) committing an act outside Canada that is an offence in the place where it was committed and that, if committed in Canada, would constitute an indictable offence under an Act of Parliament; or

(d) committing, on entering Canada, an offence under an Act of Parliament prescribed by regulations.

The scope and focus of this seminar is limited to explaining foreign nationals' and permanent residents' inadmissibility to Canada by reason of their arrests, pending charges and convictions outside Canada, and explaining how such persons may overcome their inadmissibility in order to gain temporary or permanent admission to Canada.

IRPA s. 36(3) - Application (cont.)

(c) the matters referred to in paragraphs (1)(b) and (c) and (2)(b) and (c) do not constitute inadmissibility in respect of a permanent resident or foreign national who, after the prescribed period, satisfies the Minister that they have been rehabilitated or who is a member of a prescribed class that is deemed to have been rehabilitated;

(d) a determination of whether a permanent resident has committed an act described in paragraph (1)(c) must be based on a balance of probabilities; and

(e) inadmissibility under subsections (1) and (2) may not be based on an offence designated as a contravention under the *Contraventions Act* or an offence under the *Young Offenders Act*. (Now the *Youth Criminal Justice Act*).

Alternative Dispositions

1. **Peace Bonds – Criminal Code of Canada ("CCC"), Section 810**

Section 810 of the CCC provides a procedure for an order that requires a person to keep the peace and be of good behaviour in the absence of the formal criminal prosecution. Section 810 does not create an offence. (see: *R. v. Allen* (1985), 18 C.C.C (3d) 155 (Ont. C.A.).

In Canada, a conviction does exist when:

- a court delivers a suspended sentence
- a court imposes a fine
- a court imposes a conditional sentence
- a court imposes a term of imprisonment with or without probation
- a person unsuccessfully appeals the conviction
- the person is convicted in abstentia

Alternative Dispositions (cont.)

2. Conditional and Absolute Discharges – CCC, Section 730

Where the court grants a discharge, a finding of guilt is recorded, but no conviction is entered. For Canadian immigration law purposes, a conditional or absolute discharge is not a conviction.

The section 810 hearing before a provincial court judge:

- not to determine whether the person concerned is "guilty" or "not guilty"
- to determine whether, on the evidence adduced, the informant had reasonable grounds for their fears
- No plea is entered

A Section 810 recognisance does not give rise to inadmissibility under the IRPA. However, a breach of the Peace Bond recognisance under Section 811 is a summary conviction offence. Two breaches resulting in convictions arising from separate sets of facts are sufficient to trigger inadmissibility for a foreign national, but not a permanent resident.

1. Summary Conviction Offences

A "summary conviction offence" is an offence which is tried summarily in summary conviction court.

Classification of Canadian Offences:

1. Summary Conviction
2. Indictable
3. Hybrid

The offence is tried under Part: XXVll of the CCC and punished under s. 787(1) which provides:

Punishment – 787

787- (1) General penalty-Except where otherwise provided by law, everyone who is convicted of an offence punishable on summary conviction is liable to a **fine of not more than $2,000.00, or to imprisonment for six months, or to both.**

(2) Where the imposition of a fine or the making of an order for payment of money is authorized by law, but the law does not provide that imprisonment may be imposed in default of payment of the fine or compliance with the order, as the case may be, the defendant shall be imprisoned for a term not exceeding six months.

CCC 175. Causing disturbance, indecent exhibition, loitering, etc. - (1) Everyone who

(a) not being in a dwelling-house, causes a disturbance in or near a public place,

(i) by fighting, screaming, shouting, swearing, singing or using insulting or obscene language,

(ii) by being drunk, or

(iii) by impeding or molesting other persons,

(b) openly exposes or exhibits an indecent exhibition in a public place,

(c) loiters in a public place and in any way obstructs persons who are in that place, or

(d) disturbs the peace and quiet of the occupants of a dwelling-house by discharging firearms or by other disorderly conduct in a public place or who, not being an occupant of a dwelling-house comprised in a particular building or structure, disturbs the peace and quiet of the occupants of a dwelling-house comprised in the building or structure by discharging firearms or by other disorderly conduct in any part of a building or structure to which, at the time of such conduct, the occupants of two or more dwelling-houses comprised in the building or structure have access as of right or by invitation, express or implied, is guilty of an offence punishable on summary conviction.

3. "Hybrid" Offences

A "hybrid offence" is a crime by which the Crown (prosecution) may choose to prosecute summarily or by indictment. Most CCC and other federal penal legislation offences are hybrid offences.

2. Indictable Offences

An "indictable offence" is a criminal offence which is triable by way of indictment.

An indictment includes an information or charge in respect of which a person has been tried for an indictable offence under Part XIX of the CCC, s. 673. Several offences can only be tried by way of indictment:

- dangerous operation of a motor vehicle causing bodily harm contrary to section 249(3) of the CCC
- dangerous operation of a motor vehicle while causing death contrary to section 249(4) of the CCC

CCC 253(1) Operation while impaired – Every one commits an offence who operates a motor vehicle or vessel or operates or assists in the operation of an aircraft or railway equipment, whether it is in motion or not,

(a) While the person's ability to operate the vehicle, vessel, aircraft or railway equipment is impaired by alcohol or a drug; or

(b) Having consumed alcohol in such a quantity that the concentration in the person's blood exceeds eighty milligrams of alcohol in one hundred millilitres of blood.

Canada's impaired driving related offences are all CCC hybrid offences. These include:

- **Operation while impaired** at section 253 of the CCC
- **Dangerous operation of a motor vehicle** at section 249(1)(a) of the CCC

CCC 255(1) Punishment – Every one who commits an offence under section 253 or 254 is guilty of an indictable offence or an offence punishable on summary convictions and is liable,

(a) Whether the offence is prosecuted by indictment or punishable on summary conviction, to the following minimum punishment, namely,

(i) for a first offence, to a fine of not less than $1,000,

(ii) for a second offence, to imprisonment for not less than 30 days, and

(iii) for each subsequent offence, to imprisonment for not less than 120 days;

(b) where the offence is prosecuted by indictment, to imprisonment for a term of nor exceeding five years and

(c) if the offence is punishable on summary conviction, to imprisonment for a term of not more than 18 months.

CCC 253(2) For greater certainty – For greater certainty, the reference to impairment by alcohol or a drug in paragraph (1)(a) includes impairment by a combination of alcohol and a drug.

CCC 254(5) Failure or refusal to comply with demand – Everyone commits an offence who, without reasonable excuse, fails or refuses to comply with a demand made under this section.

CCC 254(6) Only one determination of guilt – A person who is convicted of an offence under section (5) for failure or refusal to comply with a demand may not be convinced of another offence under that subsection in respect of the same transaction.

CCC 225(2) Punishment – Everyone who commits an offence under subsection (1)

(a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years; or

(b) is guilty of an offence punishable on summary conviction.

CCC 249 (1) Every one commits an offence who operates

(a) a motor vehicle in a manner that is dangerous to the public, having regard to all the circumstances, including the nature, condition and use of the place at which the motor vehicle is being operated and the amount of traffic that at the time is or might reasonably be expected to be at that place;

(b) a vessel or any water skis, surf-board, water sled or other towed object on or over any of the internal waters of Canada or the territorial sea of Canada, in a manner that is dangerous to the public, having regard to all the circumstances, including the nature and condition of those waters or sea and the use that at the time is or might reasonably be expected to be made of those waters or sea;

(c) an aircraft in a manner that is dangerous to the public, having regard to all the circumstances, including the nature and condition of that aircraft or the place or air space in or through which the aircraft is operated; or

(d) railway equipment in a manner that is dangerous to the public, having regard to all the circumstances, including the nature and condition of the equipment or the place in or through which the equipment is operated.

3.5. “Committing an act” provisions – A36(1)(c) and A36(2)(c)

The “committing an act” provisions are not to be used where a conviction has been registered and where the appropriate evidence of conviction has been obtained. However, where it is not possible to obtain a certificate of conviction as indicated above, then the provisions may be used.

Equivalency and Acts or Omissions

- IRPA 36(1)(c)
- IRPA 36(2)(c)

Essential case elements

In determining, on reasonable grounds for a foreign national, and a balance of probabilities for a permanent resident, that an act was committed, the following case elements must be established:

- an act was committed;
- the act occurred outside Canada;
- the act is an offence under the laws of the place where it occurred; and
- for foreign nationals, the offence in question has a Canadian equivalent that is an indictable offence;
- for permanent residents or foreign nationals, the offence in question has a Canadian equivalent that is an offence punishable by a maximum term of imprisonment of at least 10 years.

The “committing an act" provisions of the Act are not intended to bar the entry into Canada of persons who may have committed, but have not been convicted of, one or more summary offences.

When not to use the “committing an act” provisions

The “committing an act” inadmissibility provisions would generally not be applied in the following scenarios:

- in most cases, when authorities in the foreign jurisdiction indicate they would not lay a charge or make known to an officer their decision or intent to drop the charges;
- the trial is concluded and no conviction results (for example, acquittal, discharge, deferral);
- the person admits to committing the act but has been pardoned or the record is expunged;
- the act was committed in Canada.

When to use the “committing an act” provisions

The “committing an act” inadmissibility provisions would generally be applied in the following scenarios:

- an officer is in possession of intelligence or other credible information indicating that the person committed an offence outside Canada;
- authorities in the foreign jurisdiction indicate that the alleged offence is one where charges would be, or may be, laid;
- the person is the subject of a warrant where a formal charge is to be laid;
- charges are pending;
- the person has been charged but the trial has not concluded;
- the person is fleeing prosecution in a foreign jurisdiction;
- a conviction has been registered for the offence, however a certificate of conviction is not available.

Dayan v. Canada (Minister of Employment and Immigration) (1987), 78 N.R. 134

In *Dayan*, the Federal Court of Appeal noted that proof of the statutory provisions of the law of Israel ought to have been made. Alternatively, the absence of such provisions in the statute law, if that is the fact, ought to have been established.

Reliance on the concept of offences as *malum in se* to prove equivalency with the provisions of the CCC is a device that should be resorted to only when, for very good reason, proof of foreign law has been difficult to make, and then, only when the foreign law is that of a non-common law country.

Equivalency- Assessment of Foreign Convictions

"Equivalency" can be determined in three ways:

1. By comparison of the precise wording in each statute both through documents and, if available, through expert evidence with a view to determining the essential ingredients of the respective offences;

2. By examining the evidence adduced before the adjudicator, both oral and documentary, to ascertain whether or not that evidence was sufficient to establish that the essential ingredients of the offence in Canada have been proven in the foreign proceedings, whether precisely described in the initiating documents soaring the statutory provisions of the same words or not; and,

3. By a combination of the two.

Tests for Determining Equivalency

The applicable tests for determining equivalency were set out in the *Brannson* and *Hill* decisions referred to in *Lei.* Nadon J held that section 249 of the CCC is narrower than that of the Washington Statute for four reasons at paragraph 14 of the decision:

(1) Section 249 of the CCC is directed at the operation of a motor vehicle in a manner which endangers the life or safety of others. The section does not, in my view, apply where the operation of the vehicle endangers property only.

(2) Section 46.61.500 of the Washington Statute clearly covers the operation of a vehicle which endangers property only.

(3) The dangerous driving pursuant to s. 249 of the CCC must occur in a public place.

(4) The applicability of s. 46.61.500 of the Washington Statute is not limited to a public place.

RCW 46.61.500 Reckless Driving - Penalty

(1) Any person who drives any vehicle in wilful or wanton disregard for the safety of persons or property is guilty of reckless driving. Violation of the provisions of this section is a misdemeanour.

(2) The license or permit to drive or any non resident privilege of any person convicted of Reckless driving shall be suspended by the department for not less than thirty days.

Nature and Elements of Dangerous Operation of a Motor Vehicle

- *R. v. Beatty*, [2008] 1 S.C.R. 49, 2008 SCC 5
- *R.* v. *Roy*, 2012 SCC 26

The Court held that:

> "A comparison of the wording of the two statutes leads to the conclusion that the Canadian Statute is narrower than its American counterpart. Thus, it was necessary for the adjudicator to go beyond the wording of the statute in order to determine whether the essential ingredients of the offence in Canada had been proven in the foreign proceedings. This could only be accomplished by obtaining evidence of the circumstances which resulted in the charge in the State of Washington"

Without such evidence the adjudicator could not determine whether the essential elements of section 249 of the CCC had been proven in the Washington State proceedings.

The focus of this inquiry must be on the risks created by the accused's manner of driving, not the consequences, such as an accident in which he or she was involved. As Charron J put it, at paragraph 46 of *Beatty*:

> …the court must not leap to its conclusion about the manner of driving based on the consequence. There must be a meaningful inquiry into the manner of the driving. A manner of driving can rightly be qualified as dangerous when it endangers the public. It is the risk of damage or injury created by the manner of driving that is relevant, not the consequences of a subsequent accident. In conducting this inquiry into the manner of driving, it must be borne in mind that driving is an inherently dangerous activity, but one that is both legal and of social value. Accidents caused by these inherent risks materializing should generally not result in criminal convictions.

The Actus Reus

In *Beatty,* the Supreme Court of Canada held that the *actus reus* for dangerous driving is set out in Section 249(1)(a) if the CCC:

> driving "in a manner that is dangerous to the public, having regard to all the circumstances, including the nature, condition and use of the place at which the motor vehicle is being operated and the amount of traffic at the time is or might reasonably be expected to be at that place."

To determine whether the **fault element** in dangerous operation is established, the trier of fact must answer two questions:

1. In light of all the relevant evidence, would a reasonable person have foreseen the risk and taken steps to avoid it if possible?

2. Was the accused's failure to foresee the risk and take steps to avoid it, if possible, a marked departure from the standard of care expected of a reasonable person in the accused's circumstances?

Elements of CCC 249(1)(a) Dangerous Operation

R. v. *Roy*, 2012 SCC 26

Nature and Elements of CCC 249(1) consists of:

1. **Prohibited conduct** – operating a motor vehicle in a dangerous manner; and,
2. **The required degree of fault** – a marked departure from the standard of care a reasonable person would observe in all the circumstances.

The Mens Rea

Black's Law Dictionary (5th Edition) defines "Wanton and Reckless Misconduct" as (occurring) when a person, with no intent to cause harm, intentionally performs an act so unreasonable and dangerous that he knows, or should know, that it is highly probable that harm will result."

The accused's personal attributes will be relevant only if they go to his capacity to appreciate or avoid the risk.

“Wanton Misconduct" is defined as an act or failure to act, when there is a duty to act, in reckless disregard of rights of another, coupled with a consciousness that injury is a probable consequence of act or omission. The term refers to an intentional act of unreasonable character performed in the disregard of the risk known to him or so obvious that he must be taken to have been aware of it and so great as to make it highly probable that harm would follow and it is usually accompanied by conscious indifference to the consequences. "

"Wanton Conduct" is defined as (occurring) when “a person though possessing no intent to cause harm performs an act which is so unreasonable and dangerous that imminent likelihood of harm or injury to another is reasonably apparent."

Equivalency is not established where the RCW offense is broader than the *CCC* offense and the particulars or circumstances of the offending would not render the foreign national's actions culpable in Canada. Another example of such an offence, in certain circumstances, is RCW 46.61.503 **DUI under 21 years**.

Analyzing RCW 46.61.500 and Canadian Criminal Code Section 249(1)(a) For Equivalency

To begin, compare and analyze the language of RCW 46.61.500 and CCC Section 249(1)(a) to determine the essential elements of the respective Washington and Canadian *Code* offenses. This will establish *the actus reus* and *mens rea* which must be proven for a finding of guilt in each offense.

Canada Immigration and Canada Border Services Agency officers may consider how RCW 46.61.500 and *CCC* 249(1)(a) have been interpreted in the respective jurisprudence in Washington and in Canada.

For example, on the issues of intoxication and dangerous driving, evidence of alcohol consumption by the driver is always admissible on a charge of dangerous driving under *CCC* 249. It is relevant to show the cause of the dangerous driving and to negate any defence that the driving was the result of something beyond the control of the accused: See, *R.* v. *Peda* (1969) 4 C.C.C. 245 (S.C.C.).

Equivalency may not be established where there is no equivalency of defences and the defences available in Canada are broader than in Washington.

A U.S. citizen or resident who is found guilty or who has pleaded guilty to Negligent driving – First degree contrary to RCW 46.61.5249 for having "operat[ed] a motor vehicle in a manner that is both negligent and endangers or is likely to endanger any person or property and exhibits the effects of having consumed liquor or marihuana or any drug ..." is not likely to avoid an assessment of equivalence to Dangerous operation under CCC 249(1) where the offering takes place on a public road or highway or such other place to which the public has access.

In *R.* v. *Settle* (2010) 261 C.C.C. (3d) 45 (B.C.C.A.), a joint trial of impaired driving and dangerous operation, a finding that the defendant's ability to operate a motor vehicle was not impaired by the consumption of alcohol does not prevent the judge from relying on evidence of the defendant's alcohol consumption in order to determine whether the defendant's objectively dangerous driving constituted a marked departure from the standard of the reasonably prudent driver.

Equivalency of Dispositions

1. When is a Disposition a Conviction?

A "conviction" is a finding of guilt by a competent authority or a plea of guilty to an offense. A conviction does not exist where:

- it is set aside on appeal;
- the court grants and absolute or conditional discharge as provided for in section 730 of the CCC; or,
- the charges are stayed or withdrawn.

If a person is granted a pardon (now called a record suspension) under the *Criminal Records Act* a conviction is deemed no longer to exist. A person granting jurisdiction or a disposition such as expungement or vacation that deems the conviction dismissed, or to no longer exist, may be recognized as equivalent to a Canadian pardon depending upon its legal effect.

The central issue for CBSA and Canada Immigration officers to decide in equivalence cases is whether there is a Canadian equivalent for the offense of which the foreign national was convicted outside of Canada, before determining whether the foreign national would have been convicted in Canada.

3. Record Suspensions (formerly "Pardons")

A record suspension permits individuals convicted of a criminal offense and who have completed their sentence and demonstrated they are a law-abiding citizens to have their criminal record separate and apart from other criminal records under the Canadian *Criminal Records Act*.

All information pertaining to convictions will be taken out of the Canadian Police Information Center (CPIC) and may not be disclosed without permission from the Minister of Public Safety Canada. A records suspension does not erase the fact that a person was convicted of an offense.

2. Canadian Conditional and Absolute Discharges

The legal effect of the discharge is that the accused is deemed not to have been convicted.

Section 730 discharges are sentencing options which result in no record to an individual accused in respect of an offense. If the accused is an individual person who is convicted of an offense for which there is no minimum punishment for which the maximum punishment is less than 14 years, the court may, if in the best interests of the accused, and not contrary to the public interest, discharge the accused absolutely on conditions. An absolute discharge takes effect immediately.

Canadian authorities are not bound by a pardon or disposition in which there is an absence of evidence of the motivating considerations that led to the grant of the pardon or disposition by the foreign state.

Regardless of whether equivalent to a Canadian record suspension, a disposition issued by a foreign state in recognition of a foreign national's rehabilitation is helpful evidence to demonstrate that individual's rehabilitation as recognized by the authorities in the foreign country with jurisdiction over the offense.

A foreign pardon, expungement, or vacation does not always render a foreign national admissible to Canada. The foreign legislation under which the pardon, expungement or vacation is issued must be carefully examined.

Additionally, at ENF 2/ OP 18 paragraph 3.3, Immigration and Canada Border Services Agency Officers are cautioned:

> Inadmissibility may not be based on a conviction in respect of which a pardon has been granted and has not ceased to have effect or been revoked under the *Criminal Records Act*.

Terminology used	Defined
Acquittal contemplating dismissal	Not a conviction; would likely have the same effect as a conditional discharge.
Deferral of sentence	This is a conviction providing the offence equates to Canadian law; similar to a suspended sentence in Canadian law.
Deferral of prosecution	Not a conviction. A deferral indicates that no trial on the merits of the charge has been held; similar to a stay in Canadian law.
Deferral of judgment	Not a conviction. If the conditions imposed in the deferral are fulfilled, the judgment finally rendered may be a finding of "not guilty."
Deferral of conviction	Not a conviction. It is a form of disposition equivalent to a conditional discharge in Canada.
Nolo contendre	A Latin phrase meaning "I will not contest it." It is a plea that may be allowed by the court in which the accused does not deny or admit to the charges. This plea is similar to pleading guilty and a conviction results.
Nolle prosequi	A Latin phrase meaning "I will no longer prosecute." The effect is similar to a stay of prosecution in Canada and no conviction results.
Sealed record	A sealed record is, for the purposes of IRPA, a criminal record. The fact that a sealed record exists does not in and of itself constitute inadmissibility. An officer should determine the circumstances of the sealed record by questioning the person concerned.
Convicted of several counts	Multiple convictions. Counts in the U.S. are equivalent to charges in Canadian law.
Expunged	Not a conviction. Expunged means to strike out; obliterate; mark for deletion; to efface completely; deemed to have never occurred.

4. US Criminal Dispositions

The following table from ENF 2/0P 18-Evaluating Inadmissibility at pages 60-61, is used by Canada Immigration and Canada Border Services Agency officials to interpret some commonly used terminology in the United States and apply it to an assessment of whether the United States criminal disposition equates-or does not equate-to a "conviction" under Canadian law:

Subsection (3) provides that once the court vacates a record of conviction:

- the fact that the offender has been convicted of the offence shall not be included in the offender's criminal history for purposes of determining a sentence in any subsequent conviction;
- the offender shall be released from all penalties and disabilities resulting from the offence; and,
- for all purposes, including responding to questions on employment applications, an offender whose conviction has been vacated may state that the offender has never been convicted of that crime.

RCW 94A.060 – Vacation of offender record of conviction

Subsection (1) provides that the court may clear the record of conviction by:

(a) Permitting the offender to withdraw his or her plea of guilty and to enter a plea of not guilty; or,

(b) if the offender has been convicted after a plea of not guilty, by the court setting aside the verdict of guilty; and,

(c) by the court dismissing the information or indictment against the offender.

Rehabilitation - *IRPA* Paragraphs 36 (3)(c) and (e)

Criminal convictions outside of Canada referred to in *IRPA* subsections 36(1) and 36(2) do not constitute inadmissibility in respect of a permanent resident or foreign national, who, after the prescribed period, satisfies the Minister that they have been rehabilitated, or is a member of a prescribed class that is deemed to have been rehabilitated.

Exceptions to Criminal Inadmissibility

Criminal inadmissibility does not apply to persons who:

- have been pardoned (issued a records suspension or foreign equivalent thereof);
- satisfied the Minister of Citizenship and Immigration that they have been rehabilitated; and,
- are deemed to have been rehabilitated.

Regulation 17 - Prescribed Period

For the purposes of *IRPA* s. 36 (3)(c), the prescribed period is five years:

(a) after the completion of an imposed sentence, in the case of a conviction outside Canada for serious criminality under s. 36 (1)(b) or criminality under s. 36(2)(b), if the person has not been convicted of a subsequent offence other than an offence designated as a contravention under the *Contraventions Act*, or an offence under the *Youth Criminal Justice Act*; and

(b) after committing an offence, in the case of acts or omissions constituting an offence in the place where it was committed, and which equates to an indictable offence in Canada, if the person has not been convicted of a subsequent offence other than an offence designated as a contravention under the *Contraventions Act*, or an offence under the *Youth Criminal Justice Act*.

Inadmissibility under *IRPA* subsections 36(1) and 36(2) may not be based on an offence designated as a contravention under Canada's *Contravention Act* (regulatory offences) or an offence under the *Youth Criminal Justice Act* (formerly, the *Young Offenders Act*).

Regulation 18(2) – Deemed Rehabilitation

The following persons as members of the class of persons deemed to have been rehabilitated:

(b) persons convicted outside Canada of two or more offences that, if committed in Canada, would constitute summary conviction offences under any Act of Parliament, **if all of the following conditions apply, namely,**

- at least five years have elapsed since the day after the completion of the imposed sentences,
- the person has not within the last five years been convicted outside Canada of an offence that, if committed in Canada, would constitute an offence under an Act of Parliament, other than an offence designated as a contravention under the *Contraventions Act* or an offence under the *Youth Criminal Justice Act*,
- the person has not committed an act described in paragraph 36(2)(c) of the Act.

Regulation 18(2) – Deemed Rehabilitation

The following persons as members of the class of persons deemed to have been rehabilitated:

(a) persons who have been convicted outside Canada of no more that one offence that, if committed in Canada, would constitute an indictable offence under an Act of Parliament, **if all of the following conditions apply, namely,**

- the offence is punishable in Canada by a maximum term of imprisonment of less than 10 years,
- at least 10 years have elapsed since the day after the completion of the imposed sentence,
- the person has not within the last 10 years been convicted outside Canada of an offence that, if committed in Canada, would constitute an offence under an Act of Parliament, other than an offence designated as a contravention under the *Contraventions Act* or an offence under the *Youth Criminal Justice Act,*
- the person has not committed an act described in paragraph 36(2)(c) of the Act.

Prescribed Eligibility Periods

Type of Sentence	Determining the Eligibility Date
Suspended Sentence	Count five years from the date of sentencing
Suspended Sentence with a fine	Count five years from the date the fine was paid. In case of varying payment dates, the rehabilitation period starts on the date of the last payment.
Imprisonment without Parole	Count five years from the end of the term of imprisonment
Imprisonment and Parole	Count five years from the completion of parole.
Probation	Probation is part of the sentence. Therefore, count five years from the end of the probation period.
Driving Prohibition*	Count five years from the end of the prohibition

* The defendant is prohibited by the Criminal Court from driving

Individual Rehabilitation

The “deemed rehabilitation” provisions do not apply, and cannot be used to overcome inadmissibility for offences in the following situations:

- The prescribed period of time of five years has not elapsed for a person who has committed two or more summary offences;
- The prescribed period of time of 10 years has not elapsed for a person who has committed one indictable offence;
- A person has committed one indictable offence, and then committed a subsequent indictable offence;
- A person was deemed rehabilitated, and then committed a subsequent offence.

Top 10 Practice Points

1. As early as the initial interview, canvass with your client whether he or she is required to travel outside the USA for work or other compelling reasons.

2. Do not over think or fixate on access to Canada issues. To what makes sense for your client and what is in their "best interests" as an American citizen and resident.

3. When negotiating pleas/crafting dispositions explore alternate measures and disposition that do not result in a conviction.

Applicant's Duty of Candor Owed to Citizenship and Immigration Canada/CBSA When Applying for Rehabilitation or a TRP: IRPA section 40(1)(a) – Misinterpretation

***IRPA* section 40(1)(a)** creates the offences of **misrepresentation**:

> for directly or indirectly misrepresenting or withholding material facts relating to a relevant matter that induces or could induce an error in the administration of this Act

This creates a potential dilemma for the applicant and their Canadian immigration counsel when, for example, the applicant and their U.S. criminal defence counsel negotiate a DUI to a guilty plea for Negligent driving - First degree or Reckless driving. What and how much do I disclose to the CBSA?

Top 10 Practice Points (cont.)

8. Advise your client to immediately take steps to address inadmissibility well before planned travel dates to Canada.

9. At the conclusion of your client's case provide your client with copies of court records of the disposition (especially the court docket file, sentencing materials, court records of the disposition, transcripts of the sentencing, agreed facts or admissions or which (a) plea(s) as/are based; and any medical evidence or testing (if substances/alcohol) whether pursuant to court orders or voluntarily undergone. If applicable, inform your client when he or she becomes eligible to apply to vacate his or her record of conviction and diarize it.

10. Note your client's place and country of birth. Inquire as to whether your client has relatives in Canada, and, if so, whether you client has a parent who was born in Canada. If so, make certain your client consults a Canadian citizenship lawyer to determine whether he or she has a claim to Canadian citizenship.

Top 10 Practice Points (cont.)

4. Where relevant as a factor relating to fitness of the disposition, ensure the prosecution and court are aware of your client's needs to travel to Canada.

5. Avoid where possible, a plea to an offence that is equivalent to a hybrid or indictable offence and particularly one that carries a minimum punishment.

6. Avoid lengthy probation orders where possible to reduce periods of ineligibility for rehabilitation to overcome inadmissibility.

7. Advise your client to retain you to consult with US Immigration and Canadian counsel to identify potential immigration loss of status issues.

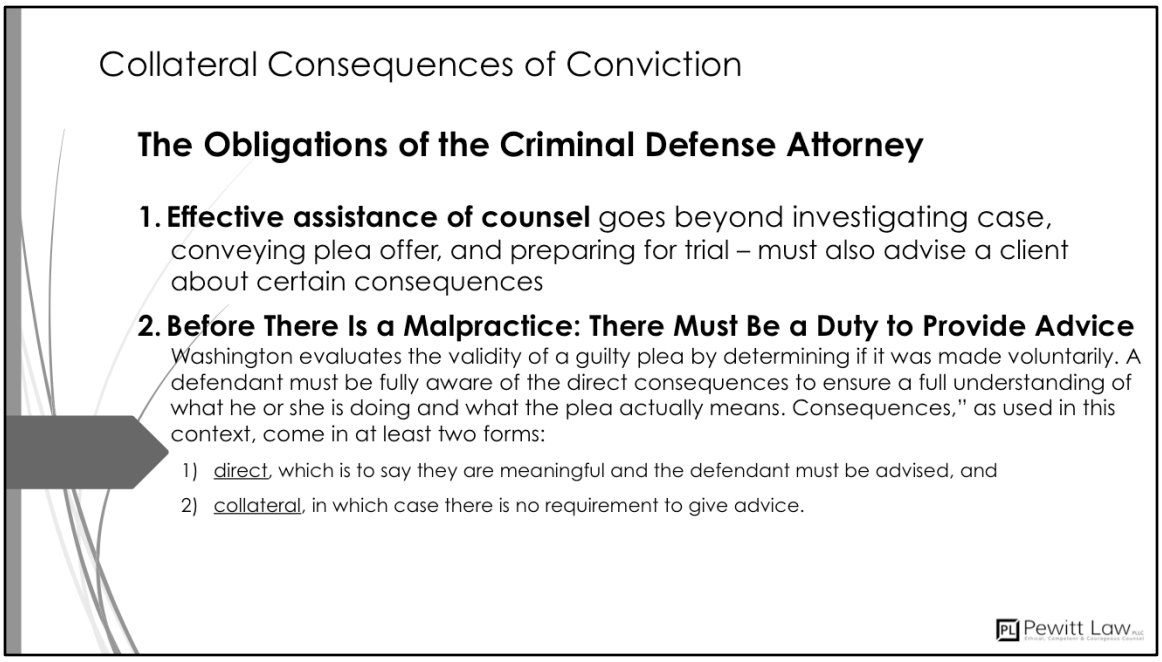
Pewitt Law PLLC
Ethical, Competent & Courageous Counsel

Ethics: Collateral Consequences of Conviction
Canada & Beyond

Sheri Pewitt founded Pewitt Law, PLLC after working as a Snohomish County public defender for several years. She has handled hundreds of cases through all phases of the criminal process, from arraignments to motions and trials. She has significant experience defending DUIs,criminal traffic, domestic violence, felony and misdemeanor matters. She has a reputation as a strong courtroom presence who vigorously advocates for her clients using her significant courtroom experience and legal training. She has been a featured speaker for the Washington Association of Criminal Defense Lawyers and her winning strategy for an Ambien sleep-driving trial is published in Washington Criminal Defense Magazine. Pewitt is the Co-Chair of the WACDL Legislative Committee and has been selected by Super Lawyers as a 2016 Rising Star. When she's not advocating for her clients, she serves as a pro tempore judge in Edmonds Municipal Court and enjoys sailing and spending time with her daughters, Peyton and Sawyer.

Collateral Consequences of Conviction

The Real Ball and Chain from Being a Convicted Person

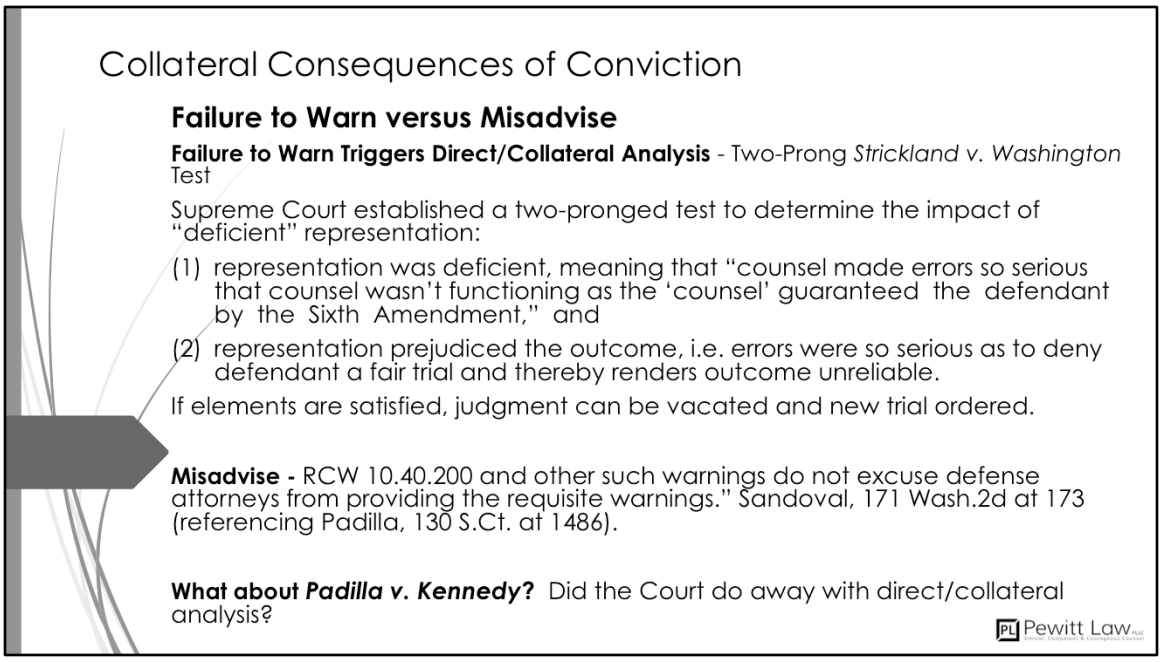


Defense attorneys have an ethical and constitutional obligation to provide effective assistance of counsel to their clients. This goes beyond investigating a case, conveying a plea offer, and preparing for trial. An attorney also has the constitutional obligation to advise a client about certain consequences of a conviction that go beyond the pronounced sentence.

The Supreme Court has emphasized that it has "never applied a distinction between direct and collateral consequences to define the scope of constitutionally 'reasonable professional assistance'" under the Sixth Amendment. The defendant must be made aware of certain "severe" consequences that are collateral, yet nevertheless "certain" to result from the conviction.

Before There Is a Malpractice: There Must Be a Duty to Provide Advice

Washington evaluates the validity of a guilty plea by determining if it was made voluntarily. A defendant must be "fully aware of the direct consequences, including the actual value of any commitments made to him by the court, prosecutor or his own counsel" to ensure a full understanding of what he or she is doing and what the plea actually means. "Consequences," as used in this context, come in at least two forms: (1) direct, which is to say they are meaningful and the defendant must be advised, and (2) collateral, in which case there is no requirement to give advice.

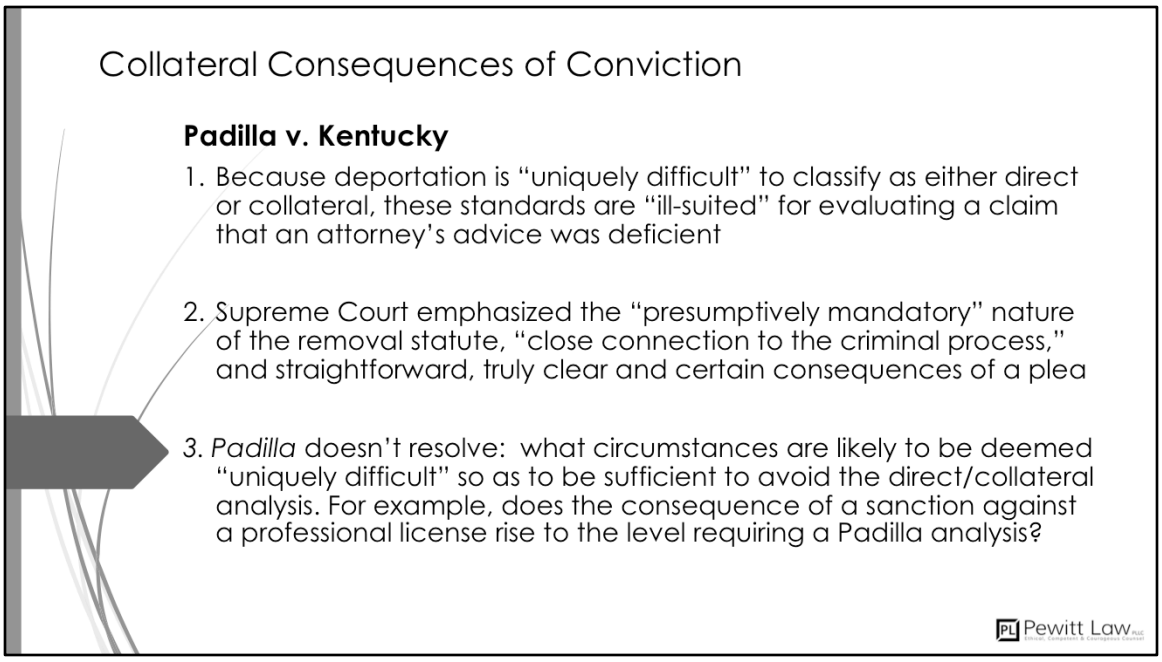


Failure to Warn versus Misadvise – *legal analysis of each*

Direct and Collateral Analysis

The direct/collateral analysis applies to cases involving the failure to warn as distinguished from a claim that the guilty plea came about because of the defendant being misadvised. The latter situation calls for a different analysis. In *Strickland v. Washington*, the Supreme Court established a two-pronged test to determine the impact of "deficient" representation: (1) that the representation was deficient, meaning that "counsel made errors so serious that counsel wasn't functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment," and (2) that the representation prejudiced the outcome, which is to say the errors were so serious as to deny the defendant a fair trial and thereby render the outcome unreliable. If these elements are satisfied, the judgment can be vacated and a new trial ordered.

Misadvise - RCW 10.40.200 and other such warnings do not excuse defense attorneys from providing the requisite warnings." Sandoval, 171 Wash.2d at 173 (referencing Padilla, 130 S.Ct. at 1486).



Padilla v. Kentucky

Early in 2010 the U.S. Supreme Court weighed in, finding that in a case involving deportation there was no need to evaluate the consequence as being either direct or collateral. Instead, in Padilla v. Kentucky, the Court concluded that because deportation is "uniquely difficult" to classify as either direct or collateral, these standards are "ill-suited" for evaluating a claim that an attorney's advice was deficient, at least for purposes of determining if post-conviction relief is available. In the opinion for the Court, Justice Stevens gave great emphasis to the "presumptively mandatory" nature of the removal statute, "the close connection to the criminal process," and the straightforward, truly clear and certain consequences of a plea leading to the conclusion that Padilla was entitled to a hearing to determine if the advice he had received prejudiced his decision to plead guilty. In addition, the Court indicated that, for purposes of evaluating a claim where "but for" the faulty advice the defendant wouldn't have accepted the plea, a court should take into account the desire of a defendant to look beyond the criminal consequences because of a value judgment by the defendant. In Padilla the Court took note of the value a defendant might give to remaining in the United States when weighed against having a criminal record.

Collateral Consequences of Conviction

Does a Sanction Against a Professional License Trigger Application of *Padilla* Rules?

Padilla seems to suggest that the determination concerning deportation involves four elements:

1. Law relative to consequences must be succinct and clear.
2. Must be a presumption that the consequence is mandatory.
3. Consequences must have close connection to criminal process.
4. D must be unable to divorce the consequence from the criminal process because of a value judgment of defendant.

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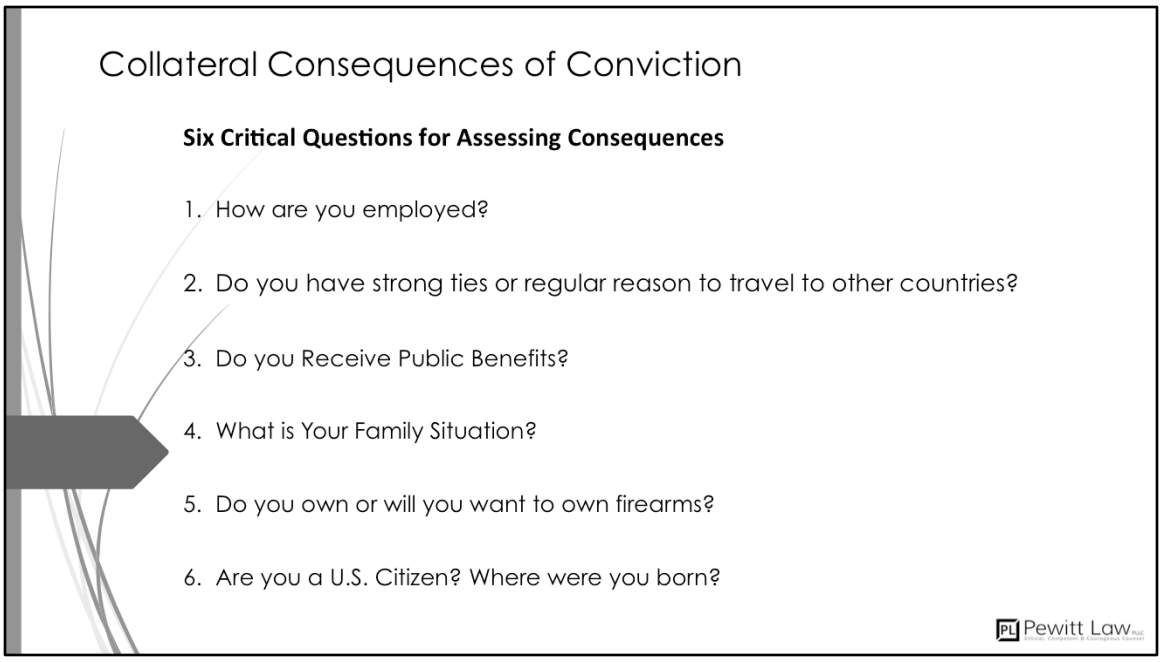


Six Critical Questions for Assessing Consequences

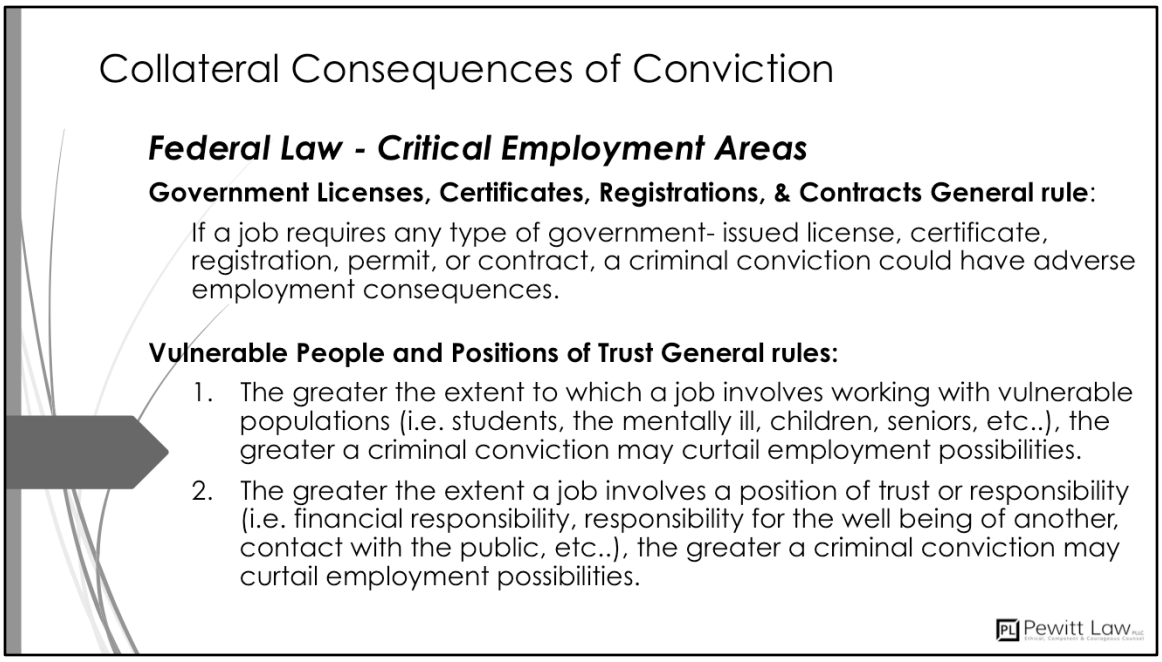
Some of the consequences —such as the loss of a public benefit—can have an immediate impact on accused persons and their families. Other consequences, however, may be impossible to identify as issues before a criminal case reaches disposition. For instance, a person charged with a crime may not be aware that he or she will one day aspire to enter a profession for which being convicted of that crime is disqualifying. Six questions can help individuals and their attorneys identify the consequences most likely to impact their decision-making process as a case moves toward disposition.[4] This publication is loosely organized around these questions, which are designed to be asked of people accused of criminal offenses:

How are you employed?

In many professions, certain charges or convictions can result in losing a license or certificate necessary to work. Asking this question can help identify whether an individual works in a field likely to track and care about criminal activity. Students can be asked about their fields of study and their plans after finishing school.

Do you have strong ties or regular reason to travel to other countries?

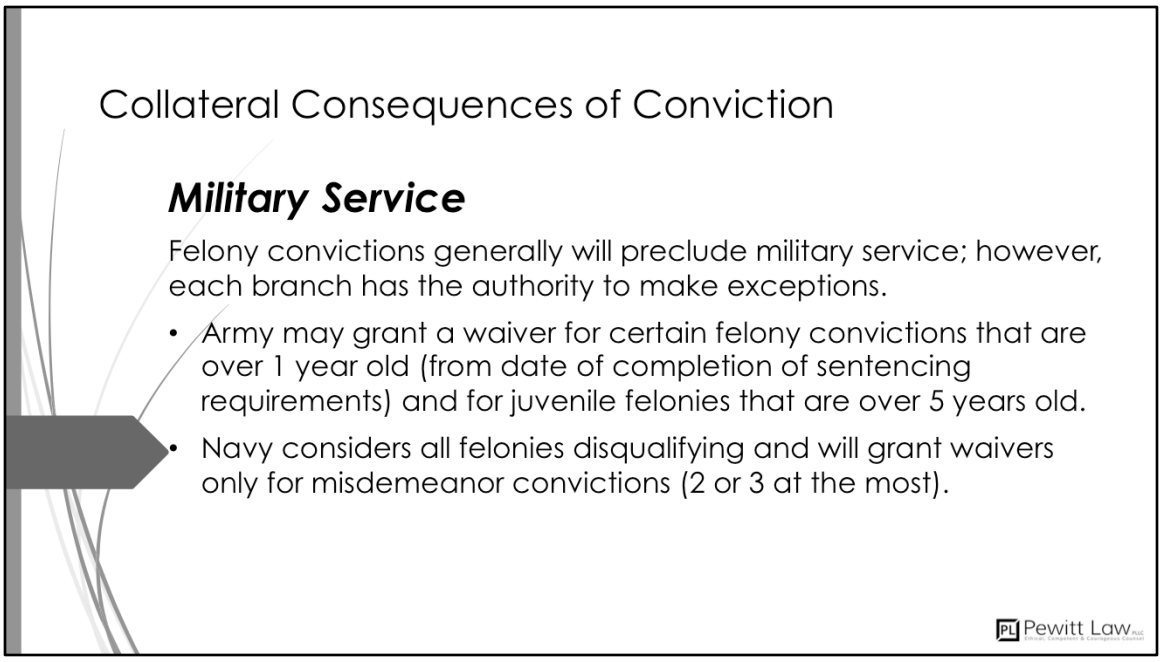
In addition to possible family ties in other countries, any professions require



Employment – Federal Law

Almost every job with the federal government will require the applicant to submit to a background check.129 The extent and depth of this background check is typically proportionate to the importance and sensitivity of the position.

Due to the wide array of federal departments, agencies, and bureaus, a complete list of the federal jobs and the degree to which they screen an applicant's criminal record is beyond the scope of this manual. However, a discussion on military service follows, given the large number of people from diverse backgrounds who consider military service as a career option.



Military Service
Felony convictions generally will preclude military service; however, each branch has the authority to make exceptions. For example, the Army may grant a waiver for certain felony convictions that are over 1 year old (from date of completion of sentencing requirements) and for juvenile felonies that are over 5 years old. The Navy, however, considers all felonies disqualifying and will grant waivers only for misdemeanor convictions (2 or 3 at the most).

Under federal law, a person with a felony conviction may not enlist in the United States Armed Services.130 In "meritorious cases," however, exceptions can be authorized.131

The Department of Defense ("DoD") has issued similar instructions regarding the qualification standards for enlistees.132 These standards require that enlistees be of "good moral character."133 This is intended to disqualify from service "individuals under any form of judicial restraint," such as bond or a term of imprisonment,134 and "those with significant criminal records."135 Like federal law, the DoD standards allow for a person convicted of a felony to

Collateral Consequences of Conviction

State Employment

Criminal convictions can result in ineligibility for a variety jobs and occupational licenses in Washington.

Although the Restoration of Employment Rights Act, RCW 9.96A, prohibits government entities from denying employment or occupational licenses to persons **solely** based on their felony convictions, there are numerous exceptions to this general rule. RCW 9.96A.020.

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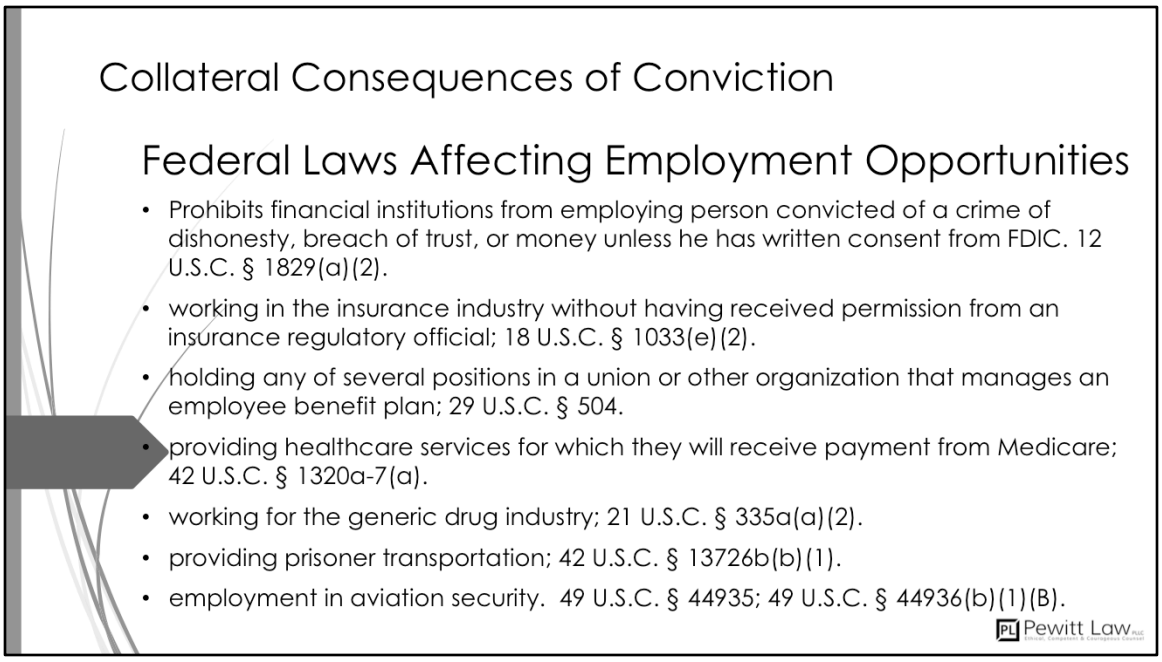
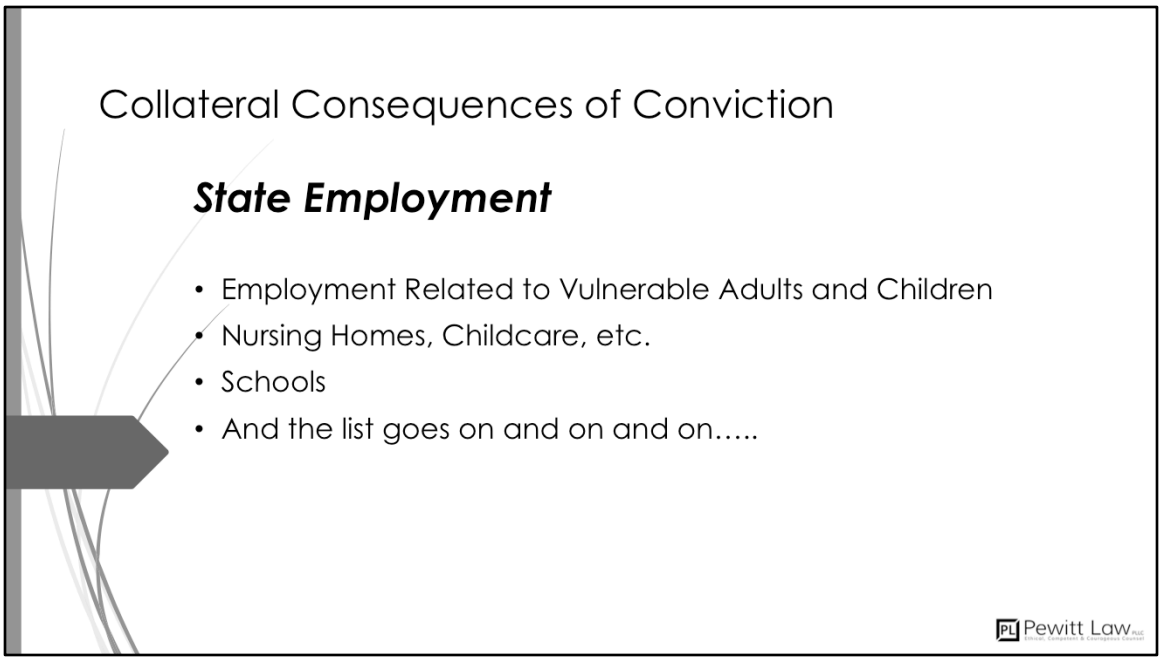


<u>Federal Laws Affecting Employment Opportunities</u>: Federal law prohibits **financial institutions** from employing a person who has been convicted of a crime of dishonesty, breach of trust, or money unless he or she has received written consent from the Federal Deposit Insurance Corporation (FDIC). 12 U.S.C. § 1829(a)(2). For purposes of this law, pre-trial diversion or similar programs are considered to be convictions. *Id.*

Federal law also bars certain classes of felons from the following jobs:

working in the insurance industry without having received permission from an insurance regulatory official; 18 U.S.C. § 1033(e)(2).
holding any of several positions in a union or other organization that manages an employee benefit plan; 29 U.S.C. § 504.
providing healthcare services for which they will receive payment from Medicare; 42 U.S.C. § 1320a-7(a).
working for the generic drug industry; 21 U.S.C. § 335a(a)(2).
providing prisoner transportation; 42 U.S.C. § 13726b(b)(1).
employment in aviation security. 49 U.S.C. § 44935; 49 U.S.C. § 44936(b)(1)

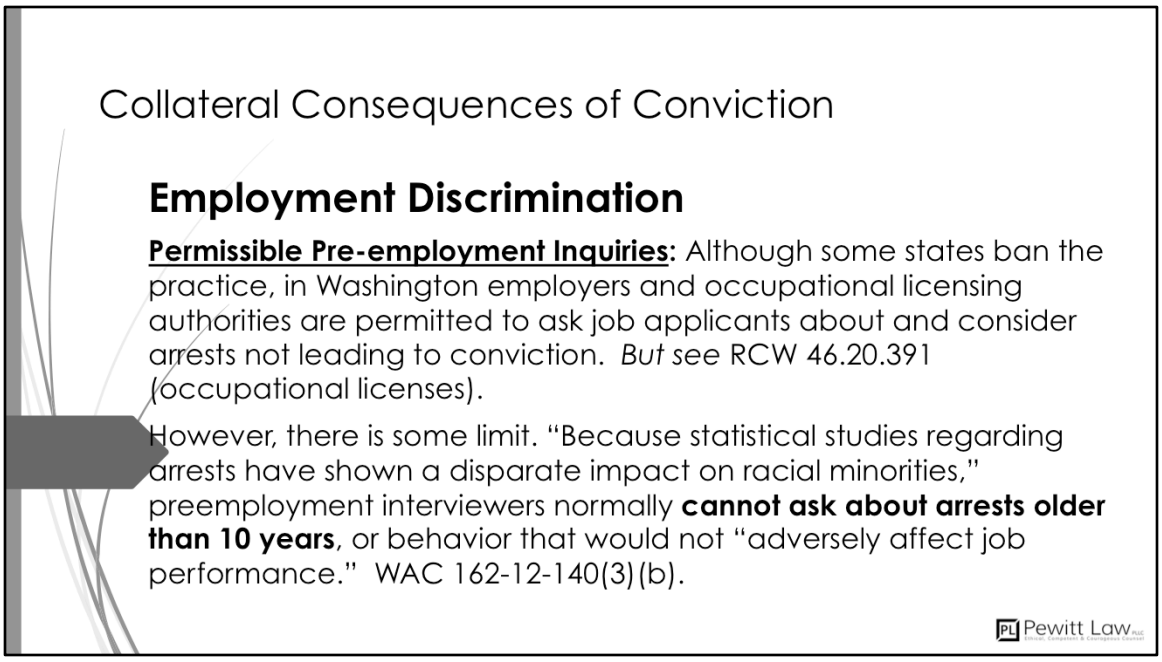


Employment Related to Vulnerable Adults and Children: Criminal background checks are required for persons who are employed by, contract with or are licensed by the Department of Social and Health Services ("DSHS") to provide services to children or vulnerable adults. RCW 43.43.832

The check will be made through a background clearance registry, and successful applicants will receive a clearance card good for three years absent changed circumstances. Card holders must report any new arrests, charges, and other negative actions within twenty-four hours of their occurrence. RCW 43.215.215.

School districts and their contractors who have employees who will have regular unsupervised access to children are also required to do criminal background checks on their employees. RCW 28A.400.303.

Nursing Homes, Childcare, etc..: "Crime[s] against children or other persons" will prohibit persons from working in **nursing homes, adult family homes, boarding homes, and childcare facilities**. RCW 43.43.830(7);

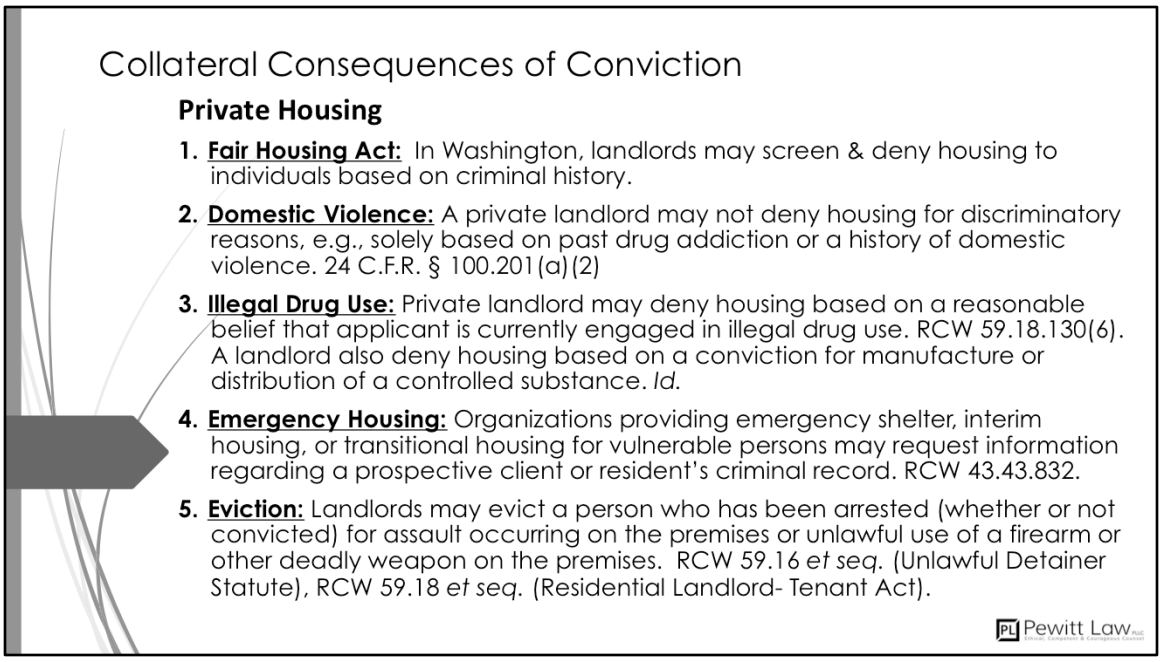


Employment Discrimination:

Permissible Pre-employment Inquiries: Although some states ban the practice, in Washington employers and occupational licensing authorities are permitted to ask job applicants about and consider arrests not leading to conviction. *But see* RCW 46.20.391 (occupational licenses).
However, there is some limit. "Because statistical studies regarding arrests have shown a disparate impact on racial minorities," preemployment interviewers normally **cannot ask about arrests older than 10 years**, or behavior that would not "adversely affect job performance." WAC 162-12-140(3)(b).

Inquiries must include whether the charges are still pending, have been dismissed or led to conviction. Certain organizations, such as law enforcement, state agencies and organizations that have direct responsibility for children or vulnerable adults are exempt from these restrictions. *Id.*

Similarly, interviewers normally cannot ask about **convictions less than ten**



Fair Housing Act: In Washington, landlords are permitted to screen and deny housing to individuals based on criminal history. The Fair Housing Act provides numerous anti-discrimination protections, such as prohibiting the owner of a dwelling from discriminating against a potential buyer or renter on the basis of race, color, national origin, sex, handicap, familial status, or religion. However, the Act specifically does not prohibit any discrimination against a person who has been convicted of the illegal manufacture or distribution of controlled substances. In general, there is little to stop a private landlord for denying a person tenancy based on his or her criminal past. The United States Fair Housing Act does not include criminal history as a protected class. 42 U.S.C. § 3604.

Domestic Violence: A private landlord is not permitted to deny housing for discriminatory reasons, e.g., solely based on past drug addiction or a history of domestic violence. 24 C.F.R. § 100.201(a)(2); *See Alvera v. C.B.M. Group et al.,* No. CV 01-857-PA, Consent Decree (D. Or. 2001)(denying housing to victims of domestic violence without inquiring as to whether applicant was a victim or perpetrator has disparate impact on women and as such constitutes unlawful sex discrimination), 42 U.S.C.§ 3604 *et seq.* (prohibiting discrimination based on sex).

Collateral Consequences of Conviction

Public Benefits Programs

- **Public Housing**
- **Food Stamps and Public Assistance**
- **Federal Student Loan Eligibility**
- **Social Security**
- **Veterans Benefits**
- ***Loss of Other Federal Benefits Due to Conviction***

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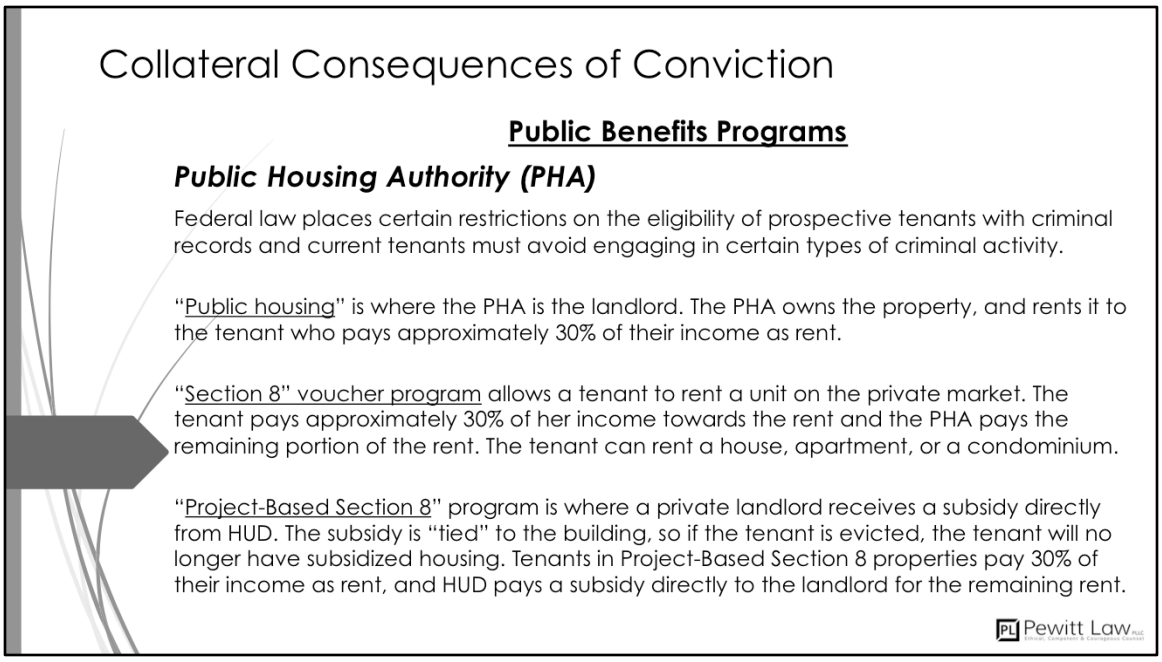
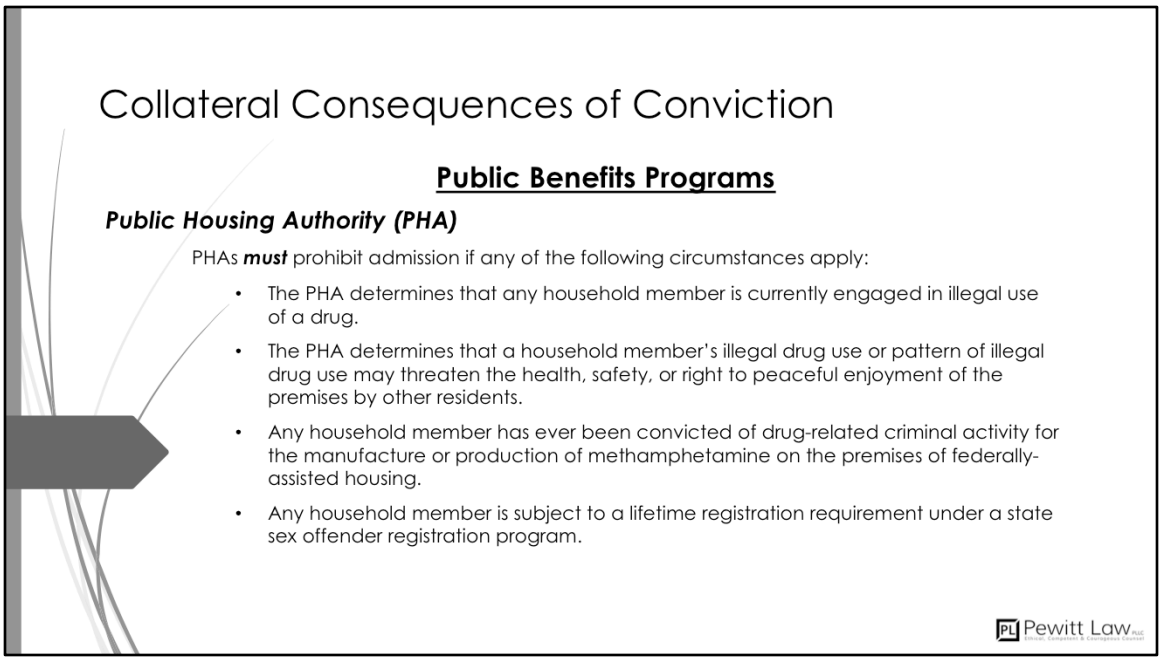


The federal Department of Housing and Urban Development ("HUD") works with local public housing authorities ("PHAs") and private landlords to provide subsidized housing to families in need. Federal law places certain restrictions on the eligibility of prospective tenants with criminal records and current tenants must avoid engaging in certain types of criminal activity. However, the PHAs and landlords have the right to impose additional restrictions on the eligibility of people with criminal histories.

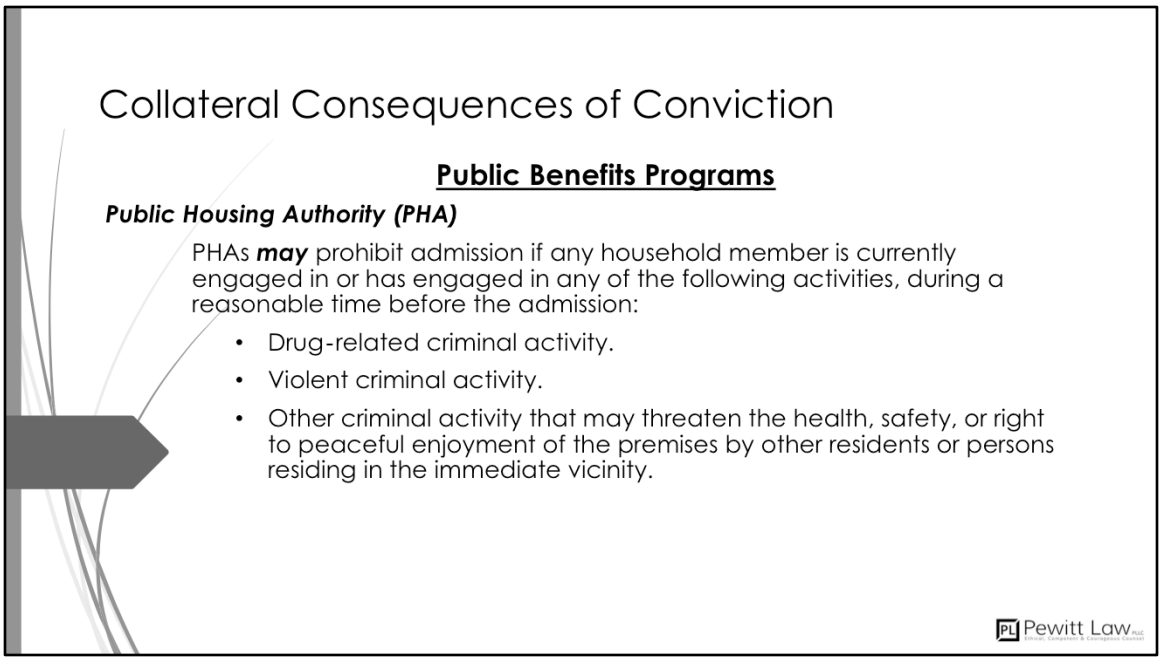
There are many different types of federal housing programs. The three largest programs are public housing, the Section 8 voucher program, and Project-Based Section 8 properties. There are different types of HUD-funded housing programs that are generally administered through local Public Housing Authorities ("PHAs") like the Seattle Housing Authority. These programs include, among others, public housing projects, Section 8 voucher programs and multi-family housing programs (a.k.a. project-based assistance.)

"Public housing" is where the PHA is the landlord. The PHA owns the property, and rents it to the tenant who pays approximately 30% of their income as rent. The "Section 8" voucher program is offered by various PHAs. A Section 8



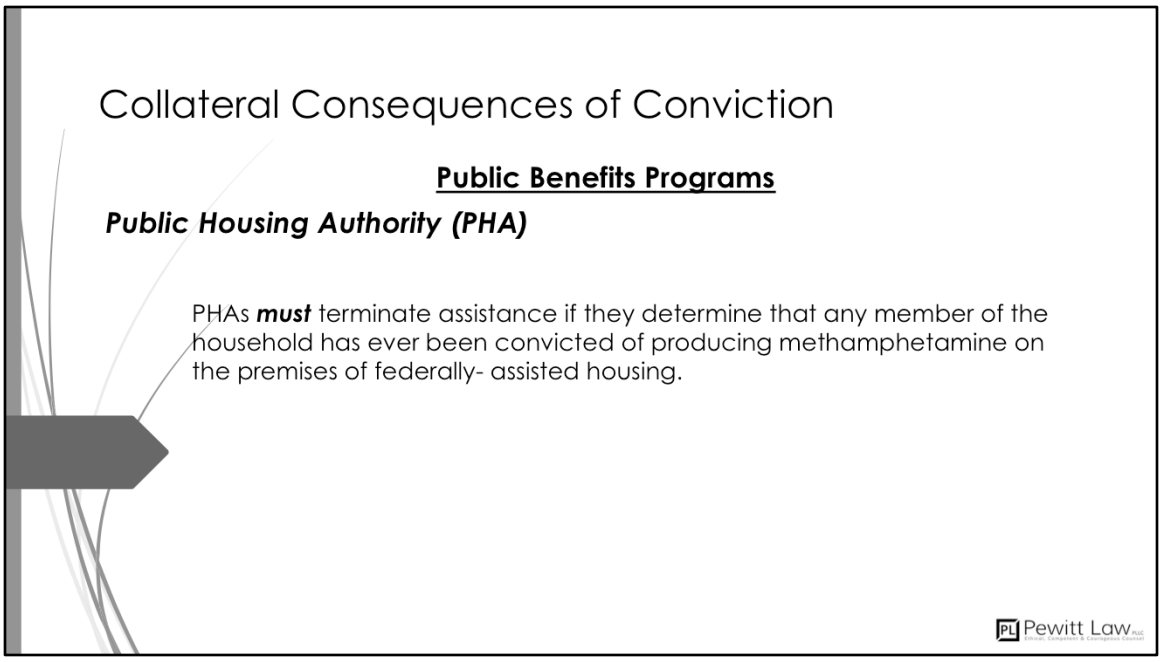
Mandatory Lifetime Bans on Admission:
Households which include a **registered sex offender.** 42 U.S.C. § 13663; *see also* 66 Fed. Reg. 28,776 (May 24, 2001).
Households which include a person convicted of the **manufacture or production of methamphetamines on the premises of a federally assisted housing program.** 42 U.S.C. § 1437n(f).

Other Mandatory Bans on Admission:
3 year ban from the date of eviction against any household which includes an individual who was **evicted from federal assisted housing for drug related activity**, unless the housing provider determines that the evicted household member has successfully completed a supervised drug rehabilitation program approved by the PHA or the circumstances leading to the eviction no longer exist (for example, the criminal household member has died or is imprisoned). 42 U.S.C. § 13661(a).
Households which include a member who the housing provider has a **reasonable belief is currently engaged in illegal use of a controlled substance** or whose **pattern of illegal drug use** may threaten the health, safety or right to peaceful enjoyment of the premises by other residents. 42

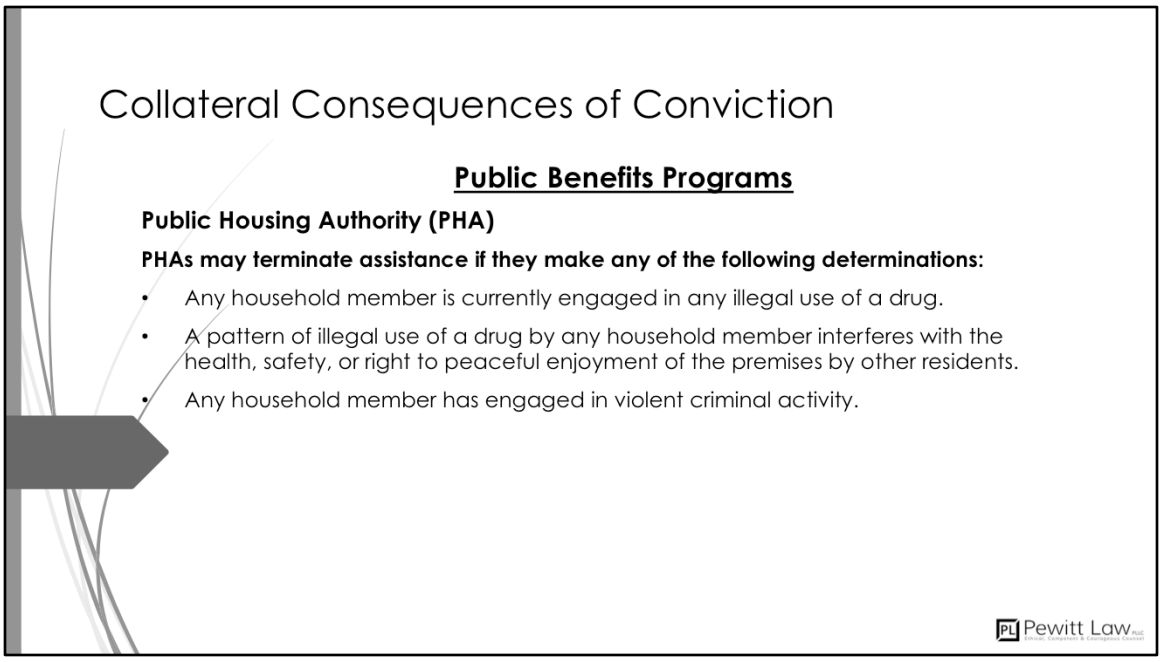


Permissible Exclusion: A HUD housing provider is permitted to exclude any household which includes a member currently engaging in, or has engaged in during a reasonable time before the admissions decision, in **violent criminal activity or other criminal activity that would threaten the health, safety, or right to peaceful enjoyment of the premises by other residents or staff.** The regulations define "violent criminal activity" as "any criminal activity that has as one of its elements the use, attempted use, or threatened use of physical force substantial enough to cause, or be reasonably likely to cause, serious bodily injury or property damage." 24 C.F.R. § 5.100 (2007); see also 42 U.S.C. § 13661(c).

HUD guidance policy suggests that "five years may be reasonable for serious offenses" and PHAs and owners may want to differentiate what a reasonable time period is for different types of criminal activity. *See* Screening and Eviction for Drug Abuse and Other Criminal Activity; Final Rule, 66 Fed. Reg. 28,776, 28,779 (May 24, 2001).

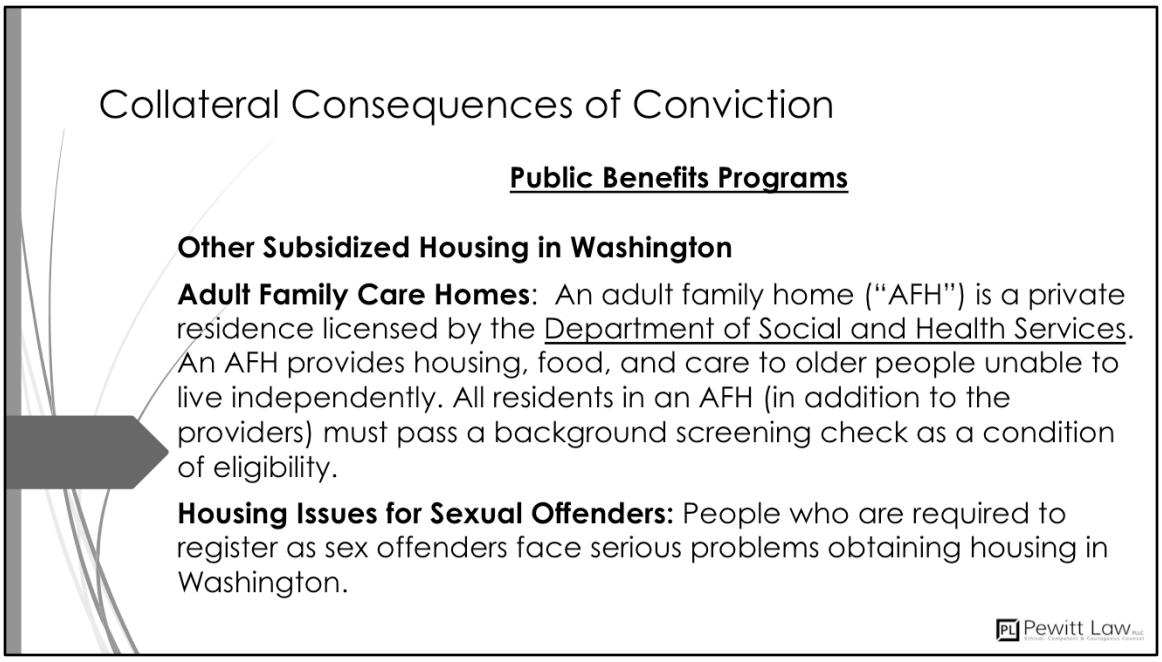


Mandatory Eviction from Federally Funded Housing Programs: Manufacture or production of methamphetamines in any HUD funded housing program, with the exception of project-based multi-family housing, will result in **mandatory eviction. See**
Screening and Eviction for Drug Abuse and Other Criminal Activity; Final Rule, 66 Fed. Reg. 28,776 (May 24,2001) Reasonable cause to believe there is current drug use or reasonable cause to believe that illegal drug use or pattern of illegal drug use may interfere with the health, safety, or right to peaceful enjoyment of the premises by other residents also will result in a mandatory eviction from federally funded public housing. *Id.* Households which include a member who engages in a pattern of alcohol abuse that interferes with other tenants' rights also must be evicted by federally funded housing programs.



Discretionary Eviction from Federally Funded Housing Programs: Drug related criminal activity "on or off" the premises of a public housing project is grounds for eviction from the public housing complex and allows PHAs authority to evict family members for the drug related activity of other household members or guests. *U.S. Dept.' of Housing and Urban Development v. Rucker*, 122 S.Ct. 1230, 152 L.Ed.2d 258 (2002); *see also* QWHRA § 512, P.L. 105-276 (1998); 66 Fed. Reg. 28,776 (May 24, 2001). There may be an "innocent tenant" defense under Washington law or some municipal codes**.** RCW 59.18.130(6). **Drug related criminal activity "on or near" the premises** of other HUD funded projects is grounds for eviction. QWHRA §§ 576(d), 577 and 579; *see also* 66 Fed. Reg. 28,776 (May 24, 2001).

Public housing providers may evict persons for other **criminal activity which threatens the health, safety or right to peaceful enjoyment of the premises** by other residents, persons residing in the immediate vicinity or on-site property management staff. The housing provider has broad discretion to consider all relevant circumstances. A federally funded housing provider may also evict tenants who are **fleeing felons or probation/parole violators.**

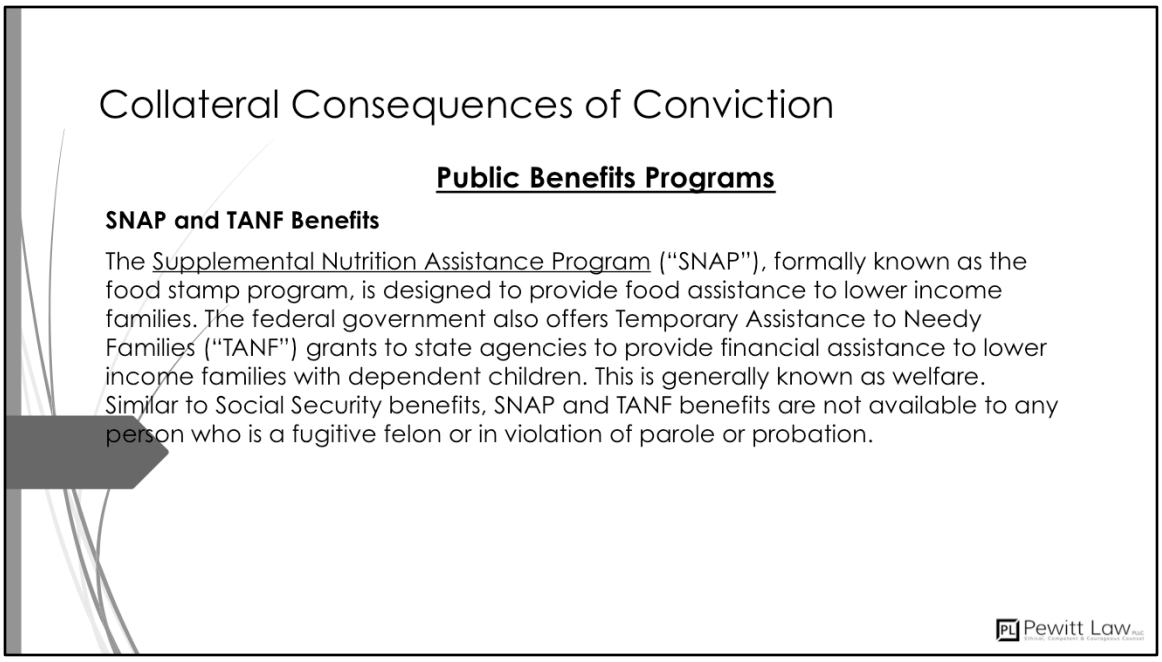


Other Subsidized Housing in WASHINGTON

In addition to the housing discussed above, the largest other subsidized housing program is the Low Income Housing Tax Credit program. There are no statutes or regulations regarding evictions for criminal activity from this type of housing. The lease language will dictate whether the criminal activity is a violation of the lease.

Adult Family Care Homes: An adult family home ("AFH") is a private residence licensed by the Department of Social and Health Services. An AFH provides housing, food, and care to older people unable to live independently. All residents in an AFH (in addition to the providers) must pass a background screening check as a condition of eligibility.

Housing Issues for Sexual Offenders: People who are required to register as sex offenders face serious problems obtaining housing in Washington.

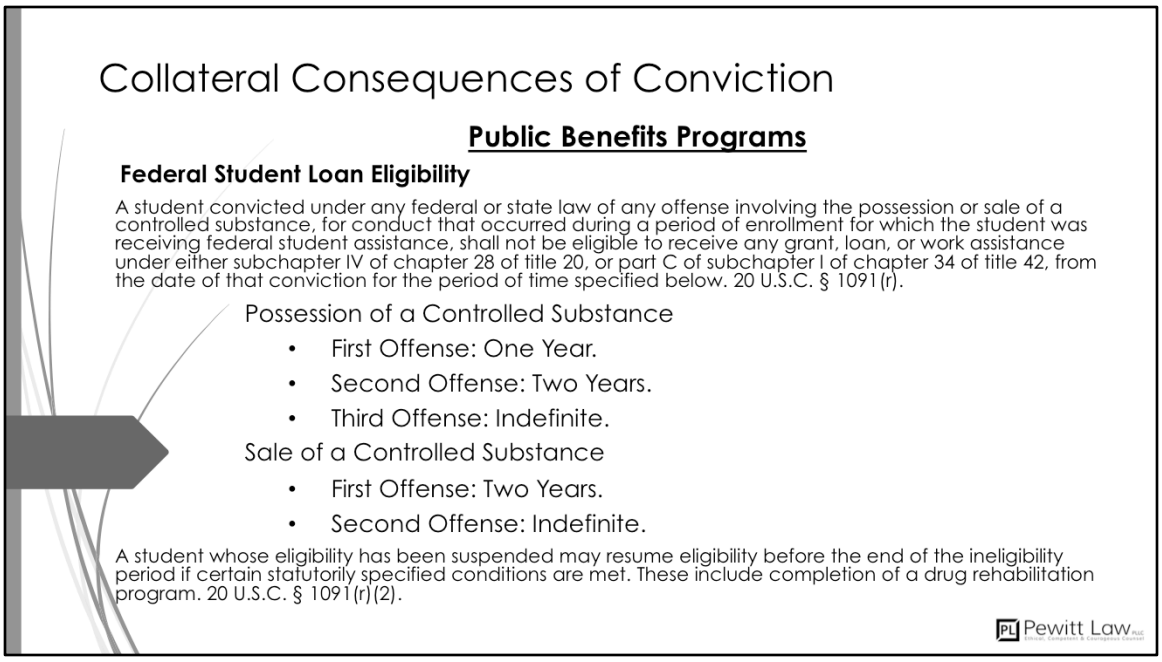


SNAP and TANF Benefits

The Supplemental Nutrition Assistance Program ("SNAP"), formally known as the food stamp program, is designed to provide food assistance to lower income families. The federal government also offers Temporary Assistance to Needy Families ("TANF") grants to state agencies to provide financial assistance to lower income families with dependent children. This is generally known as welfare. Similar to Social Security benefits, SNAP and TANF benefits are not available to any person who is a fugitive felon or in violation of parole or probation.

SNAP, TANF, and Drug Convictions in WASHINGTON
In 1996, Congress passed the welfare reform act creating Temporary Assistance for Needy Families ("TANF"), and imposing a lifetime ban on receiving cash assistance and food stamps to persons convicted of a state or federal felony drug offense. *See* Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193.

21 U.S.C. §862a



Notification of Conviction: If a student of a public school is convicted of a felony, or found delinquent of an offense that would be a felony if committed by an adult, the court must notify the appropriate district school superintendent within two days.

Expulsion from Public School: Public schools have the power to expel any student who has been found guilty of a felony or found to be delinquent of an act that would be a felony if committed by an adult.

Extracurricular Activities: School boards may use their discretion to limit the participation in interscholastic extracurricular activities of any student who has been convicted of a felony or found delinquent of an offense that would be a felony if committed by an adult.

Removal from University Student Government: All state universities are required to maintain procedures providing for the suspension or removal from student government of any student government officer convicted of a felony.

Expulsion from Public University: A student of a state university in

Collateral Consequences of conviction

Public Benefits Programs

Social Security

Old-age and survivors insurance benefit payments will not, subject to various exceptions, be paid for any month in which a person is subject to any legal status listed below:

- Confined in a jail, prison, or other penal institution for conviction of a criminal offense.
- Confined by court order in an institution at public expense in connection with a verdict of guilty by reason of insanity, a finding of incompetence to stand trial, or a similar verdict or finding.
- Confined by court order in an institution immediately following completion of confinement for a criminal offense, an element of which is sexual activity, and pursuant to a finding that the individual is a sexually dangerous person (sexual predator) or a similar finding.
- Fleeing to avoid prosecution or custody for a felony.
- Violating a condition of probation or parole imposed under federal or state law.

For additional information, see 42 U.S.C. § 402(x).

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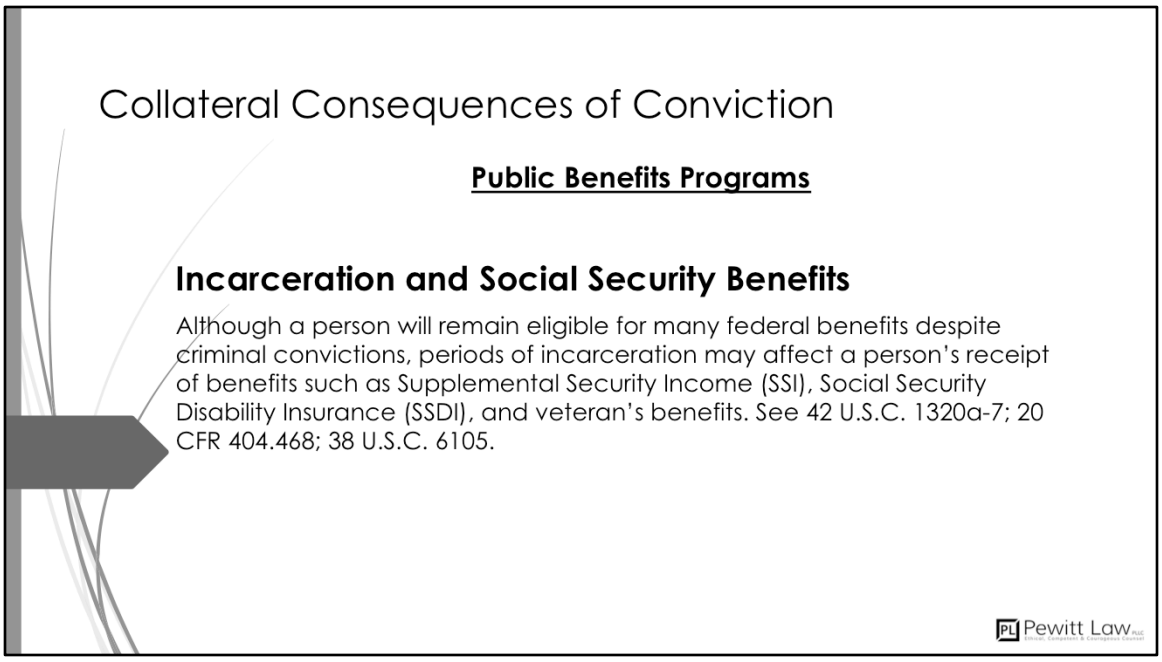
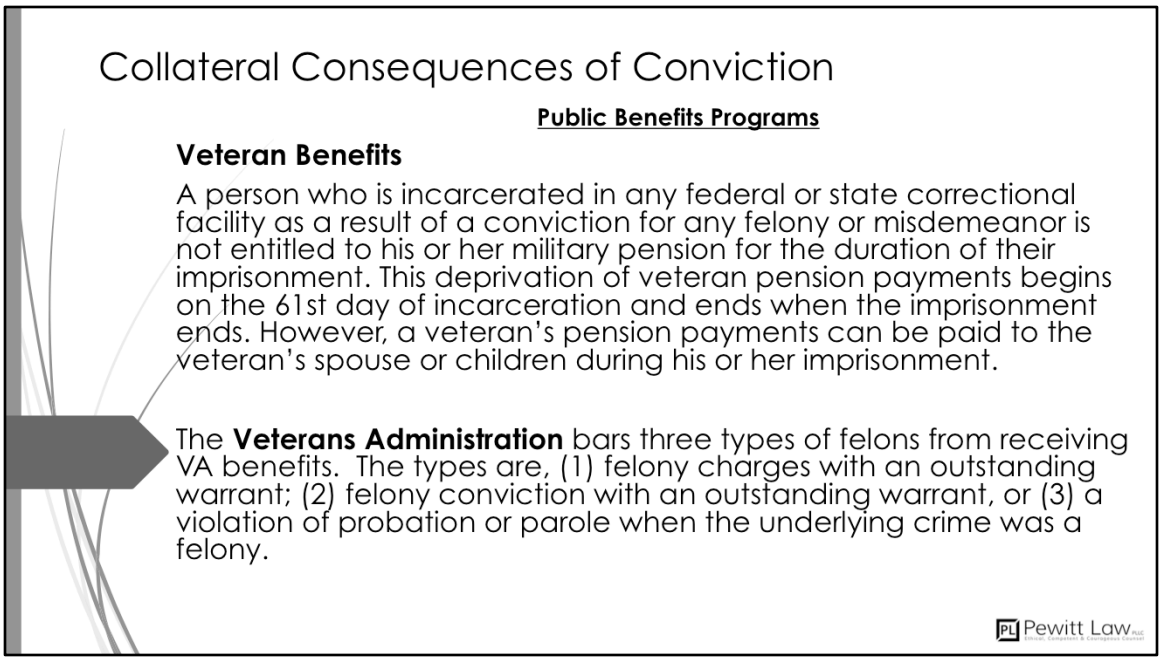


Incarceration and Social Security Benefits
Although a person will remain eligible for many federal benefits despite criminal convictions, periods of incarceration may affect a person's receipt of benefits such as Supplemental Security Income (SSI), Social Security Disability Insurance (SSDI), and veteran's benefits. See 42 U.S.C. 1320a-7; 20 CFR 404.468; 38 U.S.C. 6105.

Old Age, Survivor's Insurance, and Disability Insurance Benefits: A person is not eligible to receive monthly Social Security payments related to old age, survivor's, or disability insurance benefits if he or she:
Is confined in any jail, prison, or other correctional institution for a full calendar month or more following a conviction for a crime; 42 USC 402(x)(1)(B)(i). SSDI payments will continue until a person is convicted and has spent 30 days in jail or prison. 20 CFR 404.468. If an SSI recipient is incarcerated for more than 12 consecutive months, benefits will be terminated entirely and the person will have to reapply. 42 U.S.C. 1320a-7. SSDI recipients may remain on the rolls no matter how long a period of incarceration; however, they will need to request reinstatement of cash benefits prior to or upon release. 20 CFR 404.468. See also



Veteran Benefits

See Federal Benefits for Veterans and Dependents, vii, published by the Department of Veterans Affairs (2008), *available at* http://www1.va.gov/opa/vadocs/current_benefits.asp.

Collateral Consequences of Conviction

Public Benefits Programs

Loss of Other Federal Benefits Due to Conviction

A federal benefit is the issuance of any:

- Grant
- Contract
- Loan
- Professional license
- Commercial license

provided by an agency of the United States or by funds appropriated by the United States.

It does not include retirement, welfare, Social Security, health, disability, veterans benefits, public housing, or other similar benefits.

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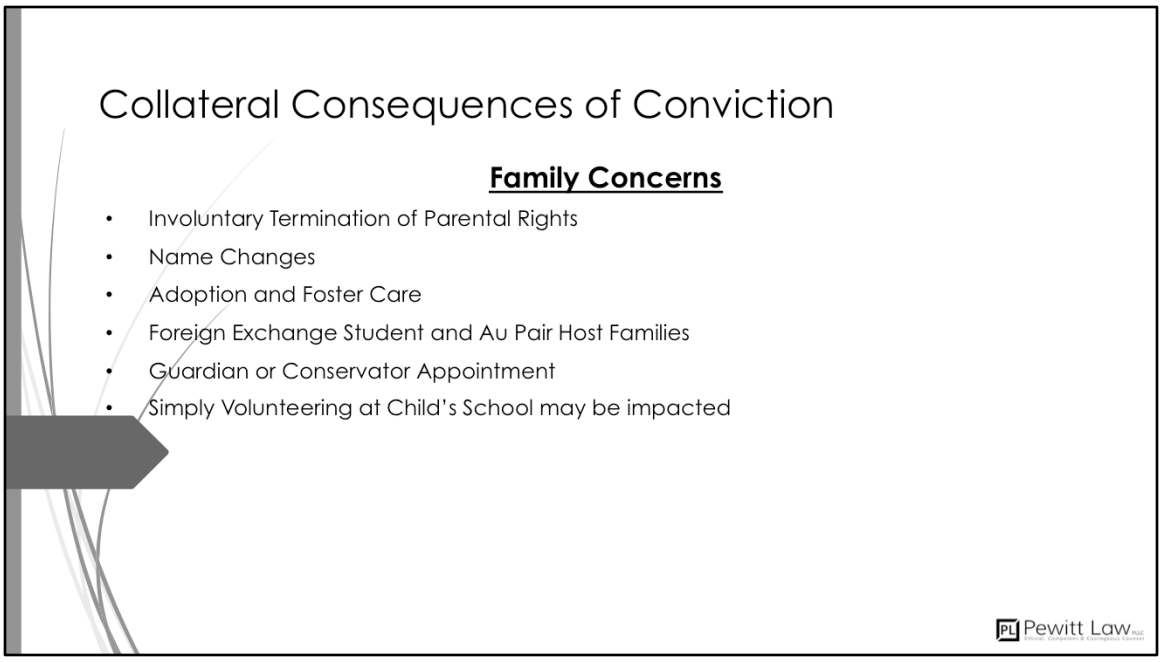


Collateral Proceedings: Parents who are involved in criminal proceedings may also be involved in collateral proceedings with the Department of Social and Health Services ("DSHS"), i.e., dependency and/or termination of parental rights proceedings, in family law proceedings or in child support enforcement proceedings. Defense attorneys should be aware of the following:

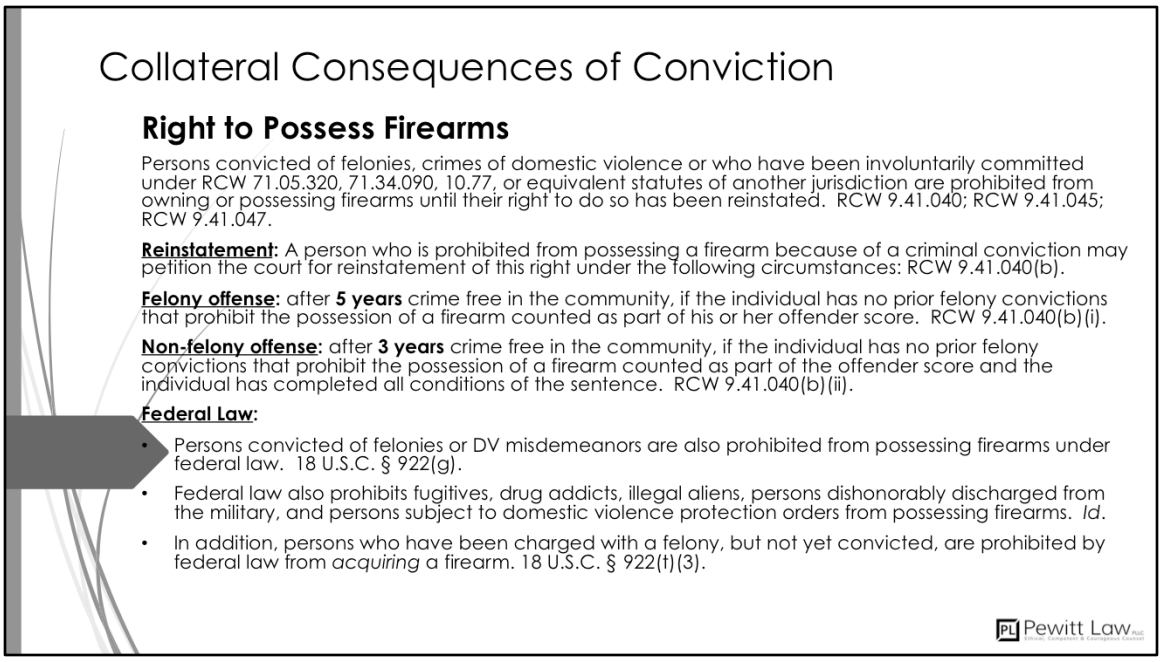
Clients may be making both in and out of court statements in the context of these civil collateral proceedings.

Evidence may be obtained from these collateral proceedings which might affect the criminal case.

Criminal history, conviction and non-conviction, may be admissible in dependency proceedings insofar as it is relevant to parental fitness. WAC 246-924-445(5)(j).

Certain felony convictions are considered "aggravated circumstances" and may result in the "fast-track" termination of parental rights. RCW 13.34.132.

Child support obligations continue to accrue when a person is incarcerated, unless a modification is requested. RCW 72.09.111(1).



Right to Possess Firearms

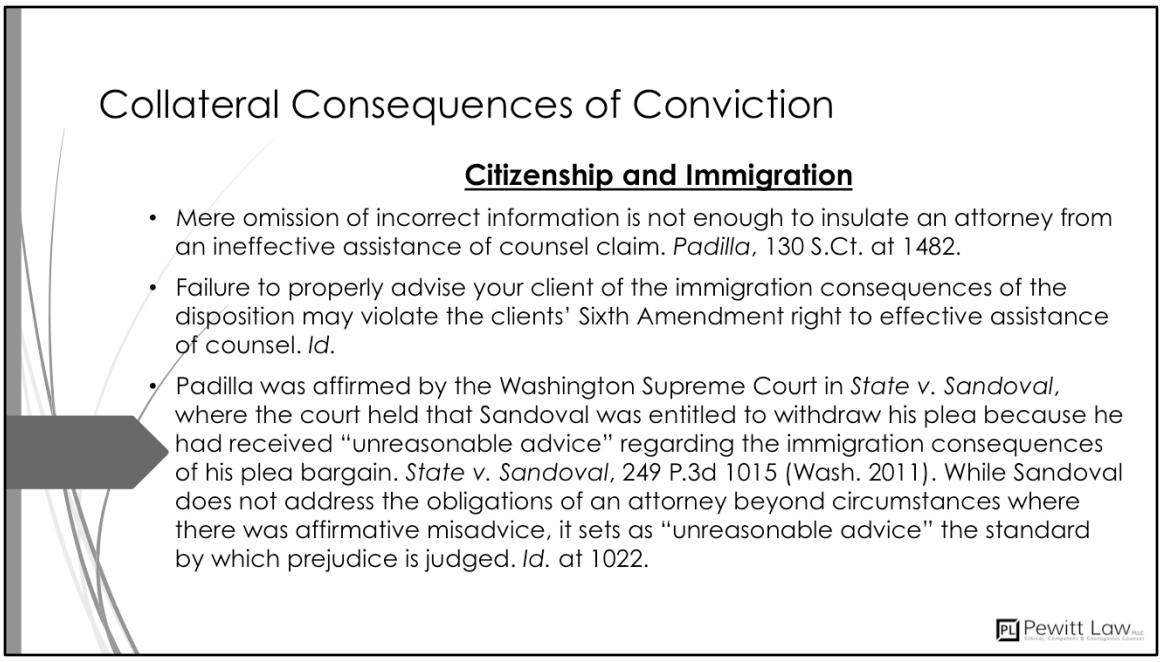
Persons convicted of felonies, crimes of domestic violence or who have been involuntarily committed under RCW 71.05.320, 71.34.090, 10.77, or equivalent statutes of another jurisdiction are prohibited from owning or possessing firearms until their right to do so has been reinstated. RCW 9.41.040; RCW 9.41.045; RCW 9.41.047.

Reinstatement: A person who is prohibited from possessing a firearm because of a criminal conviction may petition the court for reinstatement of this right under the following circumstances: RCW 9.41.040(b).

Felony offense: after **5 years** crime free in the community, if the individual has no prior felony convictions that prohibit the possession of a firearm counted as part of his or her offender score. RCW 9.41.040(b)(i).

Non-felony offense: after **3 years** crime free in the community, if the individual has no prior felony convictions that prohibit the possession of a firearm counted as part of the offender score and the individual has completed all conditions of the sentence. RCW 9.41.040(b)(ii).

Federal Law: Persons convicted of felonies or DV misdemeanors are also prohibited from possessing firearms under federal law. 18 U.S.C. § 922(g). Federal law also prohibits fugitives, drug addicts, illegal aliens, persons



Immigration Issues

Perhaps the most severe non-confinement consequences of criminal convictions are those faced by **non-citizen defendants**. Removal (deportation) and inadmissibility are triggered by criminal dispositions. In 2010, the United States Supreme Court rule in *Padilla v. Kentucky,* 599 U.S. 356 (2010) that an attorney representing a non-citizen client has an affirmative duty to inform the client of the immigration consequences of a guilty plea. *Padilla v. Kentucky,* 559 U.S. 356, 130 S.Ct. 1473, 176 L.Ed.2d 284 (2010).

The mere omission of incorrect information is not enough to insulate an attorney from an ineffective assistance of counsel claim. *Padilla*, 130 S.Ct. at 1482.

Failure to properly advise your client of the immigration consequences of the disposition may violate the clients' Sixth Amendment right to effective assistance of counsel. *Id.*

Padilla was affirmed by the Washington Supreme Court in *State v. Sandoval*,

Collateral Consequences of Conviction

Other Civil Rights and Privileges

- Driver's License *
- University Attendance *
- Voting & Jury Service *
- Election Participation as Candidate or Official
- Property Forfeiture
- Genetic and HIV Testing
- Passport and Travel *

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Collateral Consequences of Conviction

Other Civil Rights and Privileges

University Attendance

Where a public university finds that an applicant, contractor, employee of a contractor, volunteer or visitor has been convicted of a sex crime as specified in the statute or a violent offense, the institution may deny employment, deny contractor's permit, prohibit volunteering, or prohibit the person from visiting the institution.

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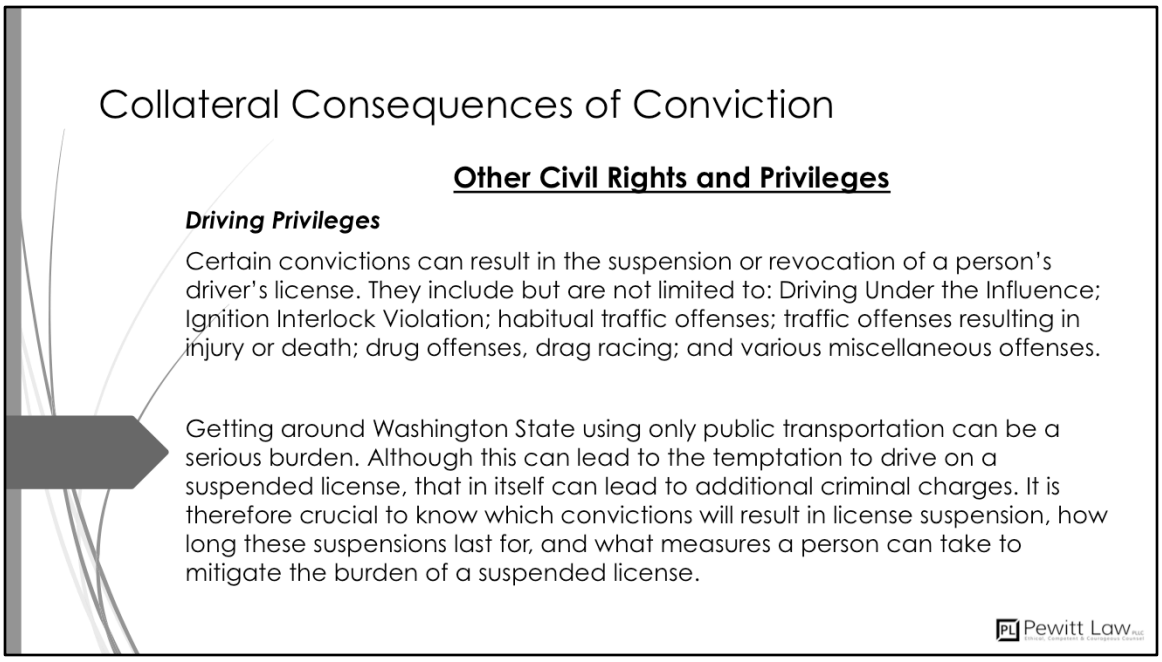


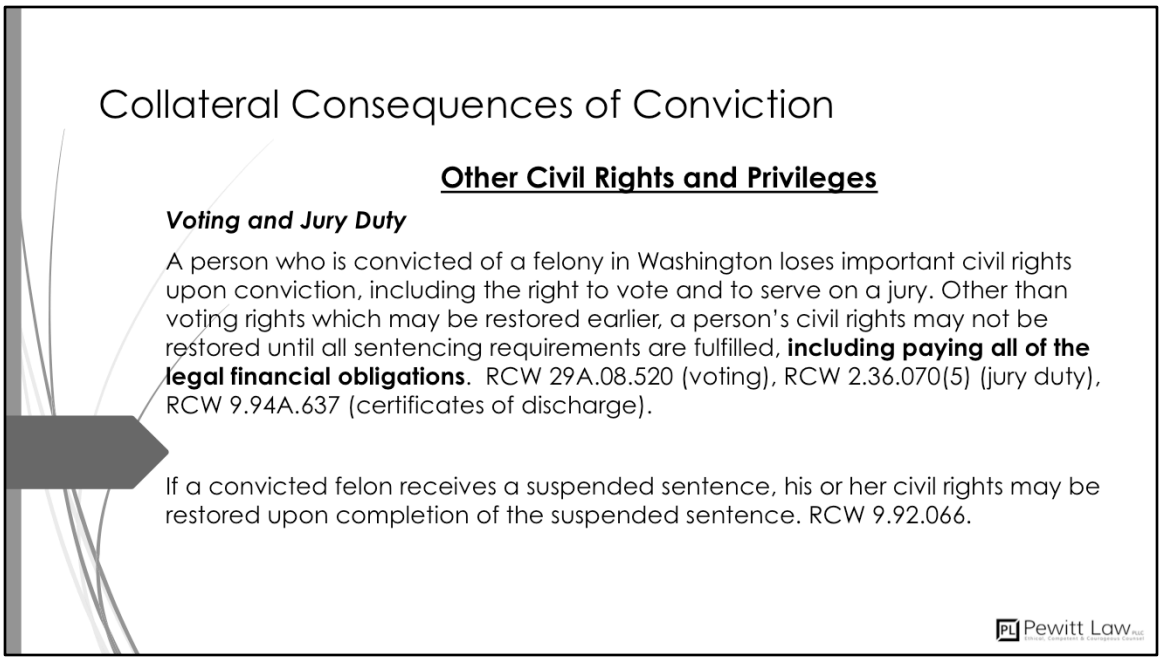
Driving Privileges

Certain convictions can result in the suspension or revocation of a person's driver's license. They include but are not limited to: Driving Under the Influence; Ignition Interlock Violation; habitual traffic offenses; traffic offenses resulting in injury or death; drug offenses, drag racing; and various miscellaneous offenses. In Washington, this is a particularly serious collateral consequence. Getting around Washington State using only public transportation can be a serious burden. Although this can lead to the temptation to drive on a suspended license, that in itself can lead to additional criminal charges. It is therefore crucial to know which convictions will result in license suspension, how long these suspensions last for, and what measures a person can take to mitigate the burden of a suspended license.

Convictions for the following offenses require suspension, revocation or disqualification of driving privileges for various statutorily mandated periods of time:

DUI RCW 46.61.502

Unattended Child in Running Vehicle (2nd and subsequent offenses) RCW 46.61.685.



Voting and Jury Duty

A person who is convicted of a felony in Washington loses important civil rights upon conviction, including the right to vote and to serve on a jury. Other than voting rights which may be restored earlier, a person's civil rights may not be restored until all sentencing requirements are fulfilled, **including paying all of the legal financial obligations**. RCW 29A.08.520 (voting), RCW 2.36.070(5) (jury duty), RCW 9.94A.637 (certificates of discharge). If a convicted felon receives a suspended sentence, his or her civil rights may be restored upon completion of the suspended sentence. RCW 9.92.066.

Otherwise, a **certificate of discharge** or a pardon is required in order to restore a convicted felon's right to vote or serve on a jury. Since a certificate of discharge is conditioned upon payment of all legal financial obligations, if a convicted felon fails to pay them off, he or she may permanently lose the right to vote or serve on a jury. RCW 9.94A.637; *See* RCW 9.94A.885 (governor's clemency and pardon board), RCW 9.95.260 (indeterminate sentence review board).

Collateral Consequences of Conviction

Other Civil Rights and Privileges

Passport and Travel

A person is ineligible for a passport if he or she has been convicted of a federal or state felony drug offense and used a passport or crossed an international border in committing the offense. This prohibition also applies to federal and state misdemeanor drug offenses. The period of ineligibility applies as long as the person is either imprisoned or on parole or supervised release following the conviction.

Different countries may deny visas or admission to any person with certain criminal convictions. This varies depending on the country and the offense. A person with a criminal history should contact the embassy or the consulate of the foreign country in question before traveling.

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Beyond Canada
The True Consequences of a Criminal Conviction and the Lawyer's Duty

From the moment of arrest, people are in danger of losing the right to travel freely, hard-earned jobs, stable housing, basic public benefits, and even their right to live in this country. Recently, this landscape has changed drastically for the worse. The steady accumulation of collateral sanctions has combined with the exponential increase in the availability of criminal history data to create a "perfect storm."

Recognizing this landscape, we must redefine "reentry" as a process that begins at arrest and continues through community reintegration. This shift in the paradigm of reentry and collateral consequences highlights the substantial role that criminal defense attorneys can play in the process and expands the focus beyond incarceration, so that it encompasses the consequences of criminalization faced by individuals from the moment they come in contact with the criminal justice system.

Collateral Consequences of Guilty Pleas: Prosecutor and Defense Duties

Prosecutor: How much should the prosecutor consider consequences that are "peculiar to the individual and generally result from actions taken by agencies"[2] not within the court or their control? While it is expected that the defense counsel will investigate and advise a defendant regarding the consequences of criminal convictions, practically and ethically, the prosecutor should also consider the effects of collateral consequences during the prosecution of a criminal case. The ethical prosecutor appreciates the importance of objectivity and fairness in prosecution. A wise and ethical prosecutor wants a defendant to have the most effective assistance of counsel during all stages of the criminal litigation. This not only protects convictions from subsequent litigation, but more importantly it furthers the interests of justice. Additionally, a just and fair prosecutor will consider the collateral consequences that may apply in a particular case and take them into account when considering a disposition.

Defense and prosecution should work together to ensure collateral consequences of convictions are considered when evaluating a resolution.

IMPROVED CRIMINAL DISPOSITIONS

1. Experience has taught that defenders can be successful at leveraging more favorable bail, plea, and sentencing results – or even outright dismissals – when they are able to educate prosecutors and judges on the draconian consequences for the clients and

their families.

2. In my experience, prosecutors and judges respond best to consequences that affect their basic sense of fairness – consequences that are absurd, disproportionate, or affect innocent family members.

How can prosecutors help prevent unjust collateral consequences that follow a criminal conviction?

Pre-conviction:

1. *Dispositions That Avoid Incarceration and a Criminal Record.* Prosecutors should be made aware of possible collateral consequences that may apply and factor them into disposition considerations. Offenders, especially first-time offenders, who commit minor or non-violent offenses and therefore risk losing their professional licenses or employment, should be afforded an opportunity of a more favorable disposition.
2. *Immigration Consequences.* Prosecutors should receive training on the possible immigration consequences of criminal convictions. In *Padilla v. Kentucky*, the United States Supreme Court held that a defense attorney is required to provide competent legal advice to a non- citizen defendant regarding the immigration consequences of a guilty plea. A defendant who pled guilty without such advice may raise a claim of ineffective assistance of counsel and may be entitled to have his or her conviction vacated.6 Prosecutors should consider offering a disposition that will not affect the defendant's immigration status where there is no indication that an immigrant defendant poses a danger to the community.
3. *Alternatives to Incarceration Programs.* Prosecutors should support programs designed to divert addicted non-violent misdemeanor and felony drug offenders into treatment and rehabilitation plans. Effective drug diversion programs are critical in minimizing public safety risks, maximizing the likelihood of success of those in treatment, and reducing repeat offenses. They also accommodate individuals with special needs, including, offenders with mental health issues, adolescents and young adults.

Post-conviction:

1. ***Re-entry Programs.*** It is well documented that the majority of offenders who are re-arrested for crimes are unemployed at the time of their re-arrest. Eighty-nine percent of recidivists who violate the terms of their parole or probation are unemployed at re-arrest. The absence of gainful employment is the most apparent cause of recidivism. One of the most common collateral consequences and a significant barrier to obtaining sustainable employment is the discretionary denial of employment or professional licenses based solely on prior convictions.8 We have all read about ex-offenders who have been thwarted in their efforts to start a new life because of their past. For example, there is the

> formerly incarcerated offender who received barbering training but was unable to obtain a license in his trade be- cause of his prior conviction or the graduate student unable to obtain a professional license because of a regrettable youthful mistake. For these ex-offenders, after they complete their sentences, they will continue to suffer the consequences of their convictions. As part of a crime reduction strategy, prosecutors should support programs that enable offenders to successfully re-enter society. A successful re-entry program ultimately improves public safety and reduces recidivism. The primary duty as prosecutors is to ensure justice and protect the public from crime. In keeping with that mission, prosecutors must also consider the collateral consequences of the convictions we obtain to ensure that justice is achieved.

Defense: Do you have a legal duty to advise the client as to all the consequences that might result from the plea? In particular, are you obligated to give advice concerning the possibility that your client's professional license will be the subject of sanctions by accepting the plea? And if you fail to provide adequate guidance, can you be held liable for malpractice? It turns out that these are tricky questions.

Before There Is a Malpractice: There Must Be a Duty to Provide Advice

Washington evaluates the validity of a guilty plea by determining if it was made voluntarily. A defendant must be "fully aware of the direct consequences, including the actual value of any commitments made to him by the court, prosecutor or his own counsel" to ensure a full understanding of what he or she is doing and what the plea actually means. "Consequences," as used in this context, come in at least two forms: (1) direct, which is to say they are meaningful and the defendant must be advised, and (2) collateral, in which case there is no requirement to give advice.

How do we determine which type of consequence is involved in a particular matter? If the consequence is one that "has a definite, immediate and largely automatic effect on the defendant's punishment," it is said to be direct and the failure to warn can support a motion for a hearing to determine if the plea should be vacated on the grounds that the defendant was thereby prejudiced. A collateral consequence is one that has "a result peculiar to the individual and generally results from the actions taken by agencies the court does not control." The obligation to advise/warn about a direct consequence is the same whether or not a defendant is represented by counsel, which is to say that the court is obliged to give warning.

Failure to Warn versus Misadvise – *legal analysis of each*

Direct and Collateral Analysis

The direct/collateral analysis applies to cases involving the failure to warn as distinguished from a claim that the guilty plea came about because of the defendant being misadvised. The latter

situation calls for a different analysis. In *Strickland v. Washington*, the Supreme Court established a two-pronged test to determine the impact of "deficient" representation: (1) that the representation was deficient, meaning that "counsel made errors so serious that counsel wasn't functioning as the 'counsel' guar- anteed the defendant by the Sixth Amendment," and (2) that the representation prejudiced the outcome, which is to say the errors were so serious as to deny the defendant a fair trial and thereby render the outcome unreliable. If these elements are satisfied, the judgment can be vacated and a new trial ordered.

Padilla v. Kentucky

Early in 2010 the U.S. Supreme Court weighed in, finding that in a case involving deportation there was no need to evaluate the consequence as being either direct or collateral. Instead, in Padilla v. Kentucky, the Court concluded that because deportation is "uniquely difficult" to classify as either direct or collateral, these standards are "ill-suited" for evaluating a claim that an attorney's advice was deficient, at least for purposes of determining if post-conviction relief is available. In the opinion for the Court, Justice Stevens gave great emphasis to the "presumptively mandatory" nature of the removal statute, "the close connection to the criminal process," and the straightforward, truly clear and certain consequences of a plea leading to the conclusion that Padilla was entitled to a hearing to determine if the advice he had received prejudiced his decision to plead guilty. In addition, the Court indicated that, for purposes of evaluating a claim where "but for" the faulty advice the defendant wouldn't have accepted the plea, a court should take into account the desire of a defendant to look beyond the criminal consequences because of a value judgment by the defendant. In Padilla the Court took note of the value a defendant might give to remaining in the United States when weighed against having a criminal record.

In sum, for matters involving a guilty plea, Padilla appears to create a first-tier standard for the evaluation of a claim for post-judgment relief based on constitutionally deficient legal advice. Where the consequence is found to be presumptively mandatory and closely connected to the criminal process, it can be said to be "uniquely difficult" to classify it as either direct or collateral, thereby rendering those standards "ill suited" for the task and entitling a defendant to a hearing to determine if deficient advice prejudiced the taking of a guilty plea.

What Padilla doesn't resolve is what other circumstances, if any, are likely to be deemed "uniquely difficult" so as to be sufficient to avoid the direct/collateral analysis. For example, does the consequence of a sanction against a professional license rise to the level requiring a Padilla analysis? And if so, why?

Does a Sanction Against a Professional License Trigger the Application of the Padilla Rules?

Padilla seems to suggest that the determination concerning deportation involves four elements:

1. The law relative to the consequences must be succinct and clear.
2. There must be a presumption that the consequence is mandatory.

3. The consequences must have a close connection to the criminal process.
4. The defendant must be unable to divorce the consequence from the criminal process because of a value judgment of the defendant.

Six Critical Questions for Assessing Consequences

Some of the consequences —such as the loss of a public benefit—can have an immediate impact on accused persons and their families. Other consequences, however, may be impossible to identify as issues before a criminal case reaches disposition. For instance, a person charged with a crime may not be aware that he or she will one day aspire to enter a profession for which being convicted of that crime is disqualifying.

Six questions can help individuals and their attorneys identify the consequences most likely to impact their decision-making process as a case moves toward disposition.[4] This publication is loosely organized around these questions, which are designed to be asked of people accused of criminal offenses:

1. **How are you employed?**

   In many professions, certain charges or convictions can result in losing a license or certificate necessary to work. Asking this question can help identify whether an individual works in a field likely to track and care about criminal activity. Students can be asked about their fields of study and their plans after finishing school.

2. **Do you have strong ties or regular reason to travel to other countries?**

   In addition to possible family ties in other countries, any professions require the ability to travel internationally. Explore how travel restrictions might impact the accused.

3. **Do you receive any public benefits?**

   Eligibility for many public benefits can be lost upon conviction for certain crimes. Asking this question can identify whether individuals are at risk of losing critical support, either for themselves or for their families.

4. **What is your family situation?**

   Some types of convictions can impair an individual's ability to be a part of his or her family, especially when children are involved. Asking about family can identify whether family relationships are a concern.

5. **Do you own, or will you want to own, any firearms?**

   Any felony conviction or a misdemeanor conviction involving domestic violence can leave an individual permanently unable to possess a firearm. Asking this question can both determine whether firearm ownership is a concern and warn against future charges for unlawful possession of a weapon.

6. **Are you a United States citizen? /Where were you born?**

   Non-citizens charged with crimes are often at risk of either being deported or being deemed inadmissible (thus prohibiting future entry into the United States). Asking these questions can determine whether immigration status is a necessary concern. Asking

about place of birth is a good starting point to determine citizenship because some clients may not be sure of citizenship or immigration status.

Practice Tips

Generally, attorneys should talk with their clients about any possible consequences which might have an especially heavy impact in the life of the client. Attorneys should have the client identify the goals of the representation, including the avoidance of unwanted consequences. Attorneys should also be aware of the special concerns of clients with respect to unwanted consequences before they negotiate with the prosecutor and make sure that the prosecutor is aware of the consequences to be avoided. This may impact the kind of offer the prosecutor will make or may help the prosecutor to see the importance of amending the charge before a plea of guilty is entered by the client. If the client is expected to suffer an unwanted consequence as the result of the resolution of a case, the client should be warned to expect the consequence and, if possible, the attorney should try to identify steps which might lessen the impact of the consequence.

Improved Dispositions - Using Collateral Consequences in Practice

- Juan R. was charged with a drug crime, and the prosecutor refused any plea below a misdemeanor. Juan, however, was disabled and lived in public housing, and a misdemeanor would result in his eviction. The defense attorney used this knowledge to convince the prosecutor to offer a non-criminal disposition, and Juan kept his home.

- Joanne F. had worked hard to get a steady job as a security guard. In a domestic incident with her boyfriend, she was charged with Assault and Harassment. The initial plea offer would have resulted in the loss of her security guard license and her job. The defense attorney used this knowledge to convince the DA to offer an adjournment in contemplation of dismissal. Joanne kept her job.

- This summer, Max S. was 18 years old and charged with possession of a marijuana cigarette. The prosecutor would only offer a plea to a marijuana violation, defined by New York law as a non-criminal offense. Max, however, was enrolled in college and was receiving student loans. Under draconian federal law, even a non-criminal plea to a drug offense would render Max ineligible for student loans and thus unable to attend college. Using her knowledge of this sanction, the defense attorney persuaded the DA to offer an adjournment in contemplation of dismissal. Max remains in college pursuing his degree.

RISK MANAGEMENT

1. Knowledge of collateral consequences is a key risk management tool for defenders. Subsidized housing, family issues, public employment or licenses – these are all situations where the client is likely to have an ancillary civil or administrative proceeding pending at the same time as the criminal case.

2. Clients will often testify or give written statements as part of these ancillary

proceedings (they are penalized for invoking their right to remain silent) about the underlying facts, with or without their defense attorney.

3. Defense attorneys have to be familiar with the collateral consequences so that they can anticipate these situations.

DISCOVERY

1. As a result of being prepared for these ancillary proceedings, defense attorneys can use them for additional discovery not available in the criminal case.

2. Eviction cases, employment licensing proceedings, DMV hearings, school suspension hearings – these are all venues where an administrative or lower court judge is likely to have subpoena power.

CLIENT BENEFITS

1. Look beyond your client: the collateral damage of being arrested often falls most heavily on family members and children, and your client will often consider that more important.

2. Particularly with misdemeanor charges, many clients would rationally choose even a short term of incarceration to avoid these harsh "collateral" consequences.

3. Help your client think about these long-term hidden effects of a plea before he accepts it.

An in depth look at the breadth and depth of collateral consequences

Why Criminal Records Matter

1. Widespread Availability of Criminal History
2. Limited Sealing and Expungement of Criminal Records
3. Juvenile Court Records

Employment

1. Critical Employment Areas
2. Guilty and No Contest Pleas
3. The Effect of Out-of-State and Federal Convictions
4. The Effect of Internal Regulations and Policies
5. The Effect of Federal Law
6. Governmental Discrimination Based on Criminal Record...
7. Private Discrimination Based on Criminal Record

Public Benefits Programs

1. Public Housing
2. Food Stamps and Public Assistance
3. Welfare to Work, State Supplementation
4. Federal Student Loan Eligibility
5. Worker's Compensation Benefits
6. Unemployment Benefits
7. Social Security
8. Veterans Benefits
9. Loss of Other Federal Benefits Due to a Drug Conviction...

Family Concerns

1. Involuntary Termination of Parental Rights
2. Name Changes
3. Adoption and Foster Care
4. Foreign Exchange Student and Au Pair Host Families
5. Guardian or Conservator Appointment
6. Firearms
7. Restrictions under Washington Law
8. Restrictions under Federal Law, 18 U.S.C. § 922(g)

Citizenship and Immigration

7. Inadmissibility
8. Deportability
9. Categories of Offenses
10. Aggravated Felony Convictions
11. Crimes Involving Moral Turpitude
12. Controlled Substance Offenses

Other Civil Rights and Privileges

1. Driver's License
2. Driver's License Points System
3. Commercial Driver's License
4. University Attendance
5. Voting
6. Election Participation as Candidate or Official
7. Property Forfeiture
8. Genetic and HIV Testing
9. Jury Service
10. Passport
11. Volunteering

Greater Penalties upon Repeat Offenses

1. Persistent Felony Offender
2. The Federal Armed Career Criminal Act

Specific Consequences for Sexual Offenses

1. Employment
2. Residency and Registration Requirements
3. Travel Between States
4. Specific Consequences for Controlled Substance Offenses
5. Employment
6. Public Benefits Programs
7. Family Concerns
8. Firearms
9. Forfeiture
10. Citizenship and Immigration
11. Other Civil Rights and Privileges
12. Greater Penalties Upon Repeat Offenses

CASE LAW: ERRONEOUS ADVICE (OR FAILURE TO ADVISE) ON SENTENCING OR COLLATERAL CONSEQUENCES THAT LEADS TO PLEA

U.S. Court of Appeals Cases

2003: Moore v. Bryant, 348 F.3d 238 (7th Cir. 2003) (affirming 237 F. Supp. 2d 955 (C.D. Ill. 2002)). Counsel was ineffective in murder case for giving erroneous advice on sentencing to the defendant prior to entry of his guilty plea. The defendant was fifteen years old and charged as an adult with first degree murder. Although the defendant maintained his innocence, counsel recommended that the defendant enter a plea in order to receive a recommendation of a 20 year sentence, which the minimum was allowed. Counsel informed the defendant that if he plead guilty he would only be required to serve fifty percent of the 20 year sentence, but that if he went to trial he would be given a higher sentence and would be subject to the new state statute that would require that the defendant serve at least 85 percent of his sentence. Although the defendant was very reluctant he followed counsel's advice. Counsel's advice was wrong because the new statute did not become effective until after the defendant's trial and did not apply retroactively. Counsel's conduct was deficient because "[a] reasonably competent counsel will attempt to learn all of the facts of the case, make an estimate of a likely sentence, and communicate the results of that analysis before allowing his client to plead guilty." Here, counsel recognized that his understanding of the statute might be incorrect, but he did not review the statute or case law to research the issue. Prejudice was found because the defendant, while maintaining innocence throughout, plead guilty solely because of counsel's advice that he would only have to serve 10 years as opposed to 22 to 27 years if he went to trial and was found guilty. The state court's decision was rejected under AEDPA for two reasons. First, the state court's reliance on the adequacy of the plea judge's colloquy was irrelevant to the underlying question of counsel's effectiveness and, thus, was an unreasonable application of Strickland. Second, the state court's finding

that the record did not show that the defendant relied on counsel's bad advice contradicted the testimony of the defendant and his counsel and, thus, was an unreasonable application of the facts to the law.

U.S. District Court Cases

2008: United States v. Choi, 581 F. Supp. 2d 1162 (N.D. Fla. 2008). Counsel ineffective in relying on the advice of an employee of the Bureau of Immigration and Customs Enforcement that the defendant would probably not be deported if he pled guilty. Counsel's conduct was deficient because, "under the facts of this case, relying on a government agent's advice rather than performing one's own legal research fell short of an objective level of reasonableness. The governing statutes made clear on their face that this conviction would result in [the defendant's] mandatory deportation, subject only to narrow exceptions that [the defendant] plainly could not meet."

Sasonov v. United States, 575 F. Supp. 2d 626 (D.N.J. 2008). Counsel in bribery of public official case ineffective for several reasons. First, counsel affirmatively misrepresented the immigration consequences of a guilty plea. Counsel's conduct was deficient because counsel informed the defendant that, as a resident alien with a green card, he would not be subject to deportation following his plea. Prejudice established because "it is likely that Petitioner would have taken his chances at trial because he faced only six to twelve months more than the sentence he received," due to his guilty plea.

Second, counsel failed to conduct discovery and, thus, failed to argue petitioner's minor role in the crimes and failed to establish that the value of the benefit received from the bribe was less than $10,000, which would have prevented a four-point enhancement of the offense level. Prejudice established because the court might otherwise have reduced the sentence to less than one year or at least allowed the defendant "to negotiate a more favorable plea agreement with the Government."

2007: U.S. v. Marcos-Quiroga, 478 F. Supp. 2d 1114 (N.D. Iowa 2007). Counsel ineffective in guilty plea to drug trafficking offense for erroneously advising the defendant he would not qualify for sentencing as a career offender. The court's ruling was entered based on a motion to withdraw the guilty plea and a pro se motion for appointment of new counsel prior to sentencing. Counsel's conduct was deficient because the defendant had prior convictions in Iowa for felony delivering cocaine and misdemeanor assault with intent to commit sexual abuse. "[T]here should have been no doubt . . . [that the] two prior convictions . . . would qualify him for career offender status. Thus, counsel certainly could have predicted with a fair degree of certainty that [he] would be sentenced as a career offender." Id. at 1135 (emphasis in original). Prejudice found because the defendant likely would not have plead guilty absent counsel's erroneous advice. Motion to withdraw guilty plea and for appointment of new counsel granted.

State Cases

2008: Polite v. State, 990 So. 2d 1242 (Fla. App. 2008). Counsel ineffective in robbery, carjacking, and violation of probation plea for incorrectly advising the defendant of the maximum sentence he could receive upon revocation of the community control/probation when the plea entailed a sentence of two years in prison followed by two years of community control with the possibility of conversion to

probation. Counsel advised the defendant that the maximum would be six years upon revocation, which was incorrect.

2007: Sial v. State, 862 N.E.2d 702 (Ind. App. 2007). Counsel ineffective in theft case for failing to advise the defendant that his guilty plea carried possible deportation consequences. Counsel's conduct was deficient and he admitted–"with admirable candor"–"that he dropped the proverbial ball." Id. at 707. The fact that the probation officer preparing the presentence investigation report may have advised the defendant of the deportation causes a month after the plea was irrelevant to what the defendant knew at the time of the plea. Prejudice found because the defendant, a native of Pakistan, had been in the U.S. for 20 years and had a wife and 13-year-old daughter, who was presumably born here and a U.S. citizen. Thus, sufficient circumstances existed to establish a reasonable probability that the defendant would not have plead guilty if he had been adequately advised.

2006: State v. Patel, 626 S.E.2d 121 (Ga. 2006). Counsel was ineffective in sexual battery plea of nolo contendre for making affirmative misrepresentations to the defendant with respect to the effect of the plea on the defendant's future participation as a physician in federal health care programs, such as Medicare and Medicaid. The defendant entered a plea only after specifically asking counsel about this issue. Without conducting "the basic research" necessary, counsel incorrectly advised the defendant that there would not be any long-term consequence when, in fact, the defendant was prohibited from participation in these programs for 10 years. Although there is no constitutional requirement to advise defendants of collateral consequences of a plea, counsel here made an affirmative misrepresentation in response to the defendant's specific inquiries. Prejudice found because the defendant would not have entered a plea of nolo contendre if he had been properly advised.

2005: Davis v. Murrell, 619 S.E.2d 662 (Ga. 2005). Counsel was ineffective in armed robbery plea case. The defendant was charged with six armed robberies and other offenses and plead guilty to one armed robbery in exchange for dismissing the other charges and a sentence of 20 years that was made concurrent to a sentence he was serving in Florida. Counsel's conduct was deficient because counsel affirmatively misinformed the defendant that he would be eligible for parole and sentence review when neither was true. Prejudice found.

2004: Cobb v. State, 895 So. 2d 1044 (Ala. Crim. App. 2004). Counsel ineffective in driving under the influence case for failing to adequately investigate and advise the defendant prior to his entry of a guilty plea. The defendant plead guilty under the assumption that he would be accepted into drug court and would receive no prison time. Because of a prior conviction of which counsel was unaware, the defendant was ineligible for drug court. Counsel admitted in his post-trial motions and conceded that his conduct was deficient. Prejudice found because the defendant consistently maintained innocence and would not have plead guilty if he had been adequately advised.

Hernandez v. Commissioner of Correction, 846 A.2d 889 (Conn. App. 2004). Counsel ineffective in murder nolo contendre plea case for erroneously advising the defendant concerning parole eligibility. During the first day of trial, the defendant withdraw his not guilty plea and entered a nolo plea in exchange for a 25 year sentence. He had been informed by counsel that he would be eligible for parole after serving half of the sentence, when the defendant was ineligible for parole under state law. Counsel's conduct was deficient and the defendant was prejudiced because he likely would not have

entered the plea absent counsel's misadvice because the defendant had a plausible self-defense argument and the court had already excluded the testimony of the only state's witness that could testify about the defendant's motive to commit murder.

Matton v. State, 872 So. 2d 308 (Fla. App. 2004). Counsel in sexual battery case was ineffective in probation revocation plea case for failing to advise the defendant that he was entitled to credit for his previously accrued "gain time" in prison and that, by entering plea agreement for 9 years credit, he was waiving his right to this gain time credit to which he was otherwise entitled. Counsel was also ineffective for failing to challenge the victim injury points included in the sentencing guidelines score sheet simply because they had been included in the initial sentencing and counsel believed she could not challenge them. Counsel's conduct was deficient because she could have made the challenge. Prejudice was found because the defendant was entitled to the gain time absent a knowing and intelligent waiver and the state could not include the victim injury points without proof of actual physical injury to the victim. Admission to probation violation withdrawn.

Rollins v. State, 591 S.E.2d 796 (Ga. 2004). Counsel was ineffective in drug plea for giving the defendant erroneous advise concerning the collateral consequences of pleading guilty, which resulted in the defendant pleading guilty. The defendant was a native of Barbados and a resident alien when she entered a first offender guilty plea to a drug charge based on trace amounts of cocaine discovered on a dollar bill in her purse. Although the defendant maintained innocence and the state's evidence was very weak, she entered a plea on the advice of counsel. Prior to entry of the plea, the defendant asked counsel if there would be any negative repercussions from the plea that would affect the defendant's desire to go to law school and become a lawyer and her INS status. Without conducting any research, counsel advised the defendant that there would be no repercussions. Counsel's conduct was deficient because basic research would have revealed that the defendant was subject to deportation upon a drug conviction. Basic research also would have revealed that it is standard practice for any state bar to require the applicant to provide information concerning prior convictions. Prejudice was found because both the defendant and counsel testified unequivocally that the defendant would not have entered a plea had she known of the adverse impact on either her intension to become a lawyer or her immigration status.

State v. Lamb, 804 N.E.2d 1027 (Ohio App. 2004). Counsel ineffective in sexual imposition plea for failing to object to the trial court's failure to inform the defendant, at the time of his guilty pleas, that he was subject to a mandatory five-year post-release control period, due to a prior felony sex offense and the determination that he was a sexually oriented offender. Prior to accepting a guilty plea, state law requires the trial court to inform the defendant of the maximum penalty involved. Post-release control is part of an offender's sentence. Thus, the trial court's failure to provide any explanation of the mandatory period of post-release control at the time of the plea was error. Without the proper instruction, the defendant here could not have fully understood the implications of the plea. Counsel's conduct was deficient and prejudicial in failing to object to the trial court's error.

The Legal Framework for Undoing the 'Work' of Ineffective Counsel – DUI Example

The penalties for subsequent DWI convictions continue to become harsher. The danger of enhanced collateral consequences for drivers convicted of DWI has grown. Many drivers have suffered prior

convictions after receiving sloppy advice to plead guilty in cases that should have been tried and for which the driver received no real benefit by pleading guilty. As the collateral consequences for DWI convictions increase, you may see an increase in the frequency of clients who approach you and ask that you try to undo the work of dump-truck lawyers who convinced them to get convicted. The legal framework for a post-conviction attack on a prior DWI plea based on the ineffective assistance of counsel for failure to advise about out of state collateral consequences is examined below.

Hypothetical Case Scenario

A driver is arrested for DUI in Washington. He refuses breath testing. Washington has a 7-year look-back period for DUI convictions. The evidence consists of the usual goulash of observations in a refusal case: an odor of alcohol, slurred speech, an admission by the driver of drinking three beers, and unremarkable field sobriety tests. A DUI trial lawyer would read the police report with optimism about winning the case.

The driver is licensed in Massachusetts. Unfamiliar with the area where he was arrested, the driver looks through the local phone book and finds a lawyer who advertises that he handles DUI cases (as well as most other types of legal work). The driver hires the lawyer to represent him. The prosecutor sends the driver's lawyer a copy of the driver's Massachusetts driving record which reveals four prior DUI convictions in Massachusetts. All four convictions are outside the 7-year look-back period for DUI convictions in Washington.

The driver arrives at his first court appearance. His lawyer advises him that he has negotiated a deal with the prosecutor: if the driver pleads guilty, the lawyer assures him that he will "get the minimums" for a DUI first offense, namely a 90-day loss of his right to drive in Washington. The driver asks his lawyer what Massachusetts will do to him if he takes the deal due to his four prior Massachusetts convictions. His lawyer erroneously tells him that Massachusetts will reciprocate by revoking his license for the same 90 days that Washington will if he takes the deal.

Unbeknownst to the driver (and his lawyer), Massachusetts does not have a look-back period and counts any prior DUI convictions, no matter how old, for the purposes of license revocations. Massachusetts has a lifetime license revocation for a fifth DUI conviction. The driver pleads guilty based on his lawyer's representations about the 90-day license loss. A month later, he receives a notice from the Massachusetts Registry of Motor Vehicles. It informs him that his right to drive has been revoked for the rest of his lifetime without any right to appeal or any right to ever get a hardship license. He will never legally drive again.

The driver asks you to try and undo all this. The following is an overview of the current Supreme Court legal framework to collaterally attack the horrible consequence described in the scenario. I have also included some positive decisions from state courts and federal circuit courts of appeals that have favorably resolved collateral attacks on convictions spawned by the erroneous advice of lawyers regarding collateral consequences.

The Test of Strickland and Hill

In *Strickland v. Washington*, the U.S. Supreme Court articulated a two-part test that a defendant must meet in order to obtain post-conviction relief based upon a claim of ineffective assistance of counsel.

First, the defendant must prove that his counsel's performance fell below an objective standard of reasonableness. Second, if the reviewing court finds that the defendant can prove that counsel's performance was constitutionally ineffective, then the defendant must prove that counsel's deficient performance resulted in prejudice. This second prong of the Strickland test requires a showing that there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different.

In Hill v. Lockhart, the Supreme Court applied Strickland to convictions resulting from a guilty plea as opposed to a trial. The Hill Court reformulated Strickland's second prong, the "prejudice" prong, to require a showing by the defendant "that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial."[5]When read together, these two decisions mean that in order for the reviewing court to vacate a prior conviction it must find that: (1) defense counsel's performance fell below that of an ordinary fallible attorney; and (2) there is a reasonable probability that, but for his attorney's error(s), the defendant would not have pleaded guilty and would have insisted on going to trial.

Application of Strickland and Hill to Claims Arising From Erroneous Advice

In our hypothetical case, the lawyer gave an affirmative misrepresentation regarding the collateral consequences of a conviction when asked by a defendant intelligent enough to inquire about it. Other cases may involve situations where counsel simply fails to advise the defendant at all regarding collateral consequences, which will present a steeper hill to climb for post-conviction counsel. However, the steep hill is not an insurmountable climb. In People v. Pozo,6 the Colorado Supreme Court ruled that the failure of José Pozo's attorney to learn even the basic collateral immigration consequences of a plea when the defendant is an alien is similar to failure of the attorney to research the crime with which the defendant is charged.

Cases involving affirmative misrepresentations provide the most fertile ground for collateral attack, however, because they present a better opportunity to prove both prongs of the Strickland/Hill test. Many appellate courts have distinguished a lawyer's failure to inform a defendant about collateral consequences from a lawyer's affirmative misrepresentations to a defendant who is considering the ramifications of a plea offer. In United States v. Coutu, the U.S. Court of Appeals for the Second Circuit vacated Ivania Coutu's conviction based on counsel's erroneous advice regarding collateral consequences. The Second Circuit distinguished Coutu's case from instances where lawyers simply failed to inform a client of collateral consequences. The Fourth Circuit reached a similar result in Strader v. Garrison.

The Eleventh Circuit has ruled that the appropriate remedy for affirmative misrepresentations that lead a defendant to enter a guilty plea is to vacate the conviction.

"When the misadvice of the lawyer is so gross as to constitute a denial of the constitutional right to the effective assistance of counsel, leading the defendant to enter an improvident plea, striking the sentence and permitting a withdrawal of the plea seems only a necessary consequence of the deprivation of the right to counsel."

Holmes v. United States

There are also numerous state cases favorable to a defendant trying to vacate a conviction based on trial counsel's affirmative misrepresentations. For example, Florida appellate courts have vacated convictions based on ineffective misrepresentations of counsel.

Moreover, the Georgia Supreme Court has ruled in two important cases on the issue of ineffective assistance claims based on erroneous advice regarding collateral consequences of criminal convictions. In *State v. Patel*, the court reversed Narendra Patel's convictions because the lawyer gave erroneous answers to the defendant's specific questions regarding collateral effects of conviction upon Patel's license to practice medicine. In Rollins v. State, the court ruled that the plea by Michle Rollins had to be vacated and the conviction reversed based on affirmative misrepresentations by counsel regarding collateral consequences which affected the decision to plead guilty.

In *Aldus v. State*, the Maine Supreme Judicial Court affirmed the lower court's decision to vacate the conviction. Aldus involved an alien charged with a felony assault. The prosecutor told defendant's lawyer that the INS was looking for defendant. Defendant asked her attorney what it meant, but the attorney did not research the effects of a negotiated plea upon her immigration status. If the attorney had researched the issue, he would have learned that the conviction made the defendant presumptively deportable. The Maine court ruled that counsel's performance was ineffective because he "did not make it his business to discover what impact his negotiated sentence would have" upon the defendant's immigration status.

The Oregon Appeals Court has ruled that "there is a qualitative distinction between passive non-disclosure and active misrepresentation." In *Long v. State*, the defendant asked his lawyer specific questions regarding the possibility of subsequent expungement of a conviction. When the lawyer erroneously assured him that he could expunge the conviction, Scott Long decided to plead guilty. The court stated that while Long's lawyer was under no obligation to tell the defendant whether his conviction could be expunged, "having undertaken to provide advice on expungeability in response to his client's expressed concerns, counsel was obliged to do so accurately and completely." The court ruled that the lawyer's performance breached standards of professional skill and judgment and was constitutionally ineffective.