COLLATERAL SANCTIONS IN PRACTICE IN OHIO

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In 2002 Hamilton County Common Pleas Court judges imposed 5,212 felony sentences on defendants. In 4,861 of those felonies the defendants entered a guilty or no-contest plea. That means defendants accepted a plea bargain or chose to throw themselves on the mercy of the court and plead guilty or no contest ninety-three percent of the time.[2] Consistent with the cogent observations of the ABA Task Force on "Collateral Sanctions," these defendants often did not appreciate the hidden consequences of their felony convictions. It is doubtful that they realized that by pleading guilty or no contest to a felony they automatically forfeited their right to vote, to serve on a jury, or to hold public office, let alone the effect of their plea on employment opportunities or government benefits. The collateral consequences may be more severe than the judge-imposed sanctions for a felony conviction and amount to a secret sentence for an unsuspecting defendant.[3]

WHAT ARE COLLATERAL CONSEQUENCES?

The term "collateral consequences," defined in the ABA Standards, are those consequences that result from a felony conviction by operation of law at the time of conviction and also those consequences that result because of a later event or discretionary decision.[4]

In Ohio random collateral consequences for a felony conviction lurk throughout the Revised Code. The Ohio Constitution authorizes the General Assembly "to exclude from the privilege of voting, or of being eligible to office, any person convicted of a felony."[5] The General Assembly has provided that any person convicted of any state or federal felony offense "forfeits" the right to vote, to serve as a juror, and to hold an office of "honor, trust, or profit."[6] A convicted felon's voting rights are restored after release from prison on parole or post-release control, or if the judge imposes a sentence of community control, formerly known in Ohio as probation. Otherwise, R.C. 2967.16(C) states that a convicted felon is not restored to those rights and privileges forfeited by operation of law until the adult parole authority grants final release or the defendant completes the term of community control. Despite the language of 2967.16(C), however, confusion as to the loss of certain rights exists from dictum in *State v. Golston*.[7] In *Golston*, the Ohio Supreme Court observed that the right to serve as a juror or to hold certain offices is not restored when the defendant is released from state supervision. To add to the confusion, currently a case is pending in federal court on behalf of convicted felons who are allegedly being denied their right to vote after their release from prison due to incorrect information provided by some county boards of election.[8]

Other specific examples contained in the Revised Code that come within the definition of a collateral sanction in the ABA Standards include:

(1) Even where the Ohio constitution guarantees the fundamental right to bear arms, a defendant convicted of an offense of violence (defined in R.C. 2901.01(A)(9)), drug trafficking, or drug possession cannot possess a firearm until the disability is removed by application to the common pleas court.[9]

(2) A defendant or delinquent child, if convicted or adjudicated of certain sex offenses, is deemed by operation of law, to be a "sexually oriented offender" or "child victim oriented offender" and, unless exempt, must register annually with the sheriff for ten years. If the defendant is determined by the trial court at a

separate civil hearing to be a "sexual predator" or "child victim predator" because of conviction of a sexually oriented offense, the defendant or delinquent child must register every ninety days until death unless the court determines that the defendant or child is no longer a sexual predator or child victim predator.[10]

(3) A guilty or no-contest plea to certain drug offenses subjects the defendant to discretionary revocation or disqualification for any professional license, and the sentencing court must notify the appropriate licensing board or agency of the conviction if the defendant has a professional license.[11]

(4) Under HUD's one-strike, zero-tolerance policy, conviction for "drug related criminal activity," on or off public housing premises, is grounds for eviction. Furthermore, although a very attenuated collateral consequence, where a child has been adjudicated delinquent for possession of drugs, the parent HUD leaseholder may be evicted from public housing.[12]

(5) The Immigration and Naturalization Act provides that any alien who is convicted of a felony is deportable.[13] In R.C. 2943.031(D), the General Assembly considers the immigration consequences from an alien's felony conviction to be so severe that it requires judges, before accepting a guilty or no-contest plea, to personally address the defendant and, in the specific words of the statute, warn of the prospect of deportation, exclusion from the United States, or denial of naturalization.[14]

The Task Force has gathered a more comprehensive list.

THE ROLE OF CRIM. R. 11(C)

A defendant who enters a voluntary guilty plea while represented by competent counsel waives the right to appeal all nonjurisdictional defects in the proceedings.[15]

Before the trial court can accept a guilty or no-contest plea, the defendant must knowingly, intelligently and voluntarily waive the constitutional and statutory rights listed in Crim.R. 11(C)(2)(c). Crim.R. 11(C)(2)(c) requires the judge to personally address the defendant and meaningfully inform him of those constitutional rights he is waiving, which include the privilege against compulsory self-incrimination, the right to a jury trial, and the right to confront accusers, plus the right of compulsory process of witnesses.[16] When dealing with the nonconstitutional warnings of Crim.R.11(C)(2)(c)—maximum penalty, ineligibility for probation or community control, effect of the guilty or no contest plea, and that the defendant may be immediately sentenced —the trial court need only "substantially comply" with the rule.[17] The Ohio Supreme Court has defined "substantial compliance" to mean, "under the totality of the circumstances the defendant subjectively understands the implications of his plea and the rights he is waiving."[18]

With the lone exception of immigration-consequences an Ohio trial court is presently under no duty to warn defendants of collateral consequences before accepting their plea. The fact that collateral consequences can have a more severe impact on the defendant's future than the sentence itself, is reason enough for this disclosure. Logically the collateral consequences should share equal status with the nonconstitutional rights enumerated in Crim.R. 11(C)(2)(c) even if they are not part of the court's sentence or enumerated in the judgment of conviction.

The Ohio General Assembly has recognized the importance of the immigration consequences of a felony conviction for non-citizens in R.C. 2943.031. In addition to the warnings required by Crim.R. 11(C)(2)(c), R.C. 2943.0321 states, "[P]rior to accepting a plea of guilty or no contest to an indictment * * * charging a felony * * * *the court shall address the defendant personally*, provide the following advisement to the defendant that shall be entered in the record of the court, *and determine that the defendant understands the advisement*[19].

'If you are not a citizen of the United States you are hereby advised that conviction of the offense to which you are pleading guilty (or no contest, when applicable) may have the consequences of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States.'"[20]

In R.C. 2943.031(D) the General Assembly established a substantive right. The statute provides that the court "shall set aside the judgment and permit the defendant to withdraw a plea" if the court fails to provide the statutory advisement. However, like other nonconstitutional warnings, substantial compliance by the trial court, rather than literal compliance with the advisement of the immigration consequences of pleading guilty or no contest, determines if the defendant knowingly, intelligently, and voluntarily entered the plea.[21]

INEFFECTIVE ASSISTANCE OF COUNSEL

If the General Assembly authorizes the Legislative Service Commission to identify all collateral consequences and sanctions and collect them in one section in the Revised Code or in an approved publication as provided in ABA Standard 19-2.1, counsel will have the means to inform the accused of those rights actually or potentially forfeited by a guilty or no-contest plea. The Supreme Court of Ohio also may do the same by rule. [22]

Competent practice involves more than evaluating the evidence and discussing the direct consequences of the plea with the defendant. It assumes that counsel should discuss with the accused any relevant collateral consequences in advance of the plea. The benefits of this discussion are two-fold: (1) although knowledge of the collateral consequences is unlikely to change the accused's decision to plead guilty or no contest, the information improves the accused's appreciation of the legal effect of the felony conviction, and thus it allows counsel to provide a higher quality of assistance to the client; and (2) this information, may give counsel a bargaining chip to avoid revocation of probation for a separate offense, or to avoid or shorten the length of a prison term when, for example, deportation will allow the court to avoid the cost to the taxpayers of imprisonment, or when the defendant's disgrace by disqualification from public office is adequate punishment. Therefore, counsel's role is absolutely essential to implementing the ABA Standards if the defendant is to knowingly, intelligently, and voluntarily enter a guilty or no contest plea. Still, it is unlikely that a defendant will refuse to plead guilty or no contest because they will lose their right to vote, serve on a jury, or hold public office. But a knowing and intelligent waiver assumes the defendant has an awareness of those consequences.

The ABA Standards for Criminal Justice state that "[t]o the extent possible, defense counsel should determine and advise the defendant, sufficiently in advance of the entry of any plea, as to the possible collateral consequences that might ensue from entry of the contemplated plea."[23] The mere fact that counsel hasn't informed a defendant of the collateral consequences or has violated the Code of Professional Responsibility doesn't by itself mean that there has been denial of the effective assistance of counsel.[24] To demonstrate ineffective assistance of trial counsel, a defendant's burden is to show (1) that his trial attorney's representation fell below an objective standard of reasonableness, and (2) that counsel's deficient performance prejudiced him. [25] In *Lockhart v. Fretwell*,[26] the United States Supreme Court held that a showing of prejudice does not depend solely on whether the outcome of the trial would have been different but for counsel's error, but whether "counsel's performance renders the result of the trial unreliable or the proceeding fundamentally unfair," **citing *Strickland v. Washington*, 466 U.S. at 687, 104 S.Ct. 2052**. The same two-prong test applies to ineffective assistance of counsel claims resulting from guilty pleas.[27]

Federal courts uniformly hold, that, without a statutory mandate, the defendant's ignorance of the collateral consequences, alone, does not render a guilty plea involuntary.[28] State courts, however, may impose higher standards than federal courts as to whether different representation amounts to ineffective assistance of counsel. Several courts have held that where counsel has failed to advise a non-citizen defendant of the deportation consequences of a guilty plea, the defendant was denied the effective assistance of counsel.[29]

Absent a statutory remedy for failure to inform a defendant of collateral consequences, such as the remedy provided in R.C. 2943.031(D), it is doubtful that an Ohio appellate court will hold that failure to advise the accused from the published list of collateral consequences alone establishes a claim of ineffective assistance of counsel. As a nonconstitutional requirement substantial compliance with statutory warnings determines if the defendant knowingly, intelligently, and voluntarily entered the plea.[30] To satisfy the second prong of *Strickland*, the defendant must demonstrate the plea would not have been entered had counsel's advice been correct or the warning provided.[31]

The second remedy available to a defendant who has not been informed of collateral sanctions is provided in Crim.R. 32.1. The judge or reviewing court may set aside the judgment of conviction after sentence to correct a "manifest injustice." The sentencing judge's decision to deny a motion to vacate a plea can only be reversed for abuse of discretion, which amounts to a ruling that is unreasonable, arbitrary or unconscionable. Because the standard for review is so deferential, seldom is a judge's decision denying a Crim.R. 32.1 motion reversed on appeal.[32] Lengthy delays between the occurrence of the offense and the filing of the motion to vacate the plea are a definite factor, particularly when witnesses or evidence are no longer available.[33]

Because so few guilty or no-contest pleas will be vacated after sentence has been imposed, the judge who accepts the plea is the vital participant who can assure that defense counsel has performed these responsibilities to the defendant. By an appropriate colloquy in open court with the defendant and counsel the judge should be able to determine that the defendant appreciates the collateral consequences outside the sentence.

OBSTACLES TO THE ACCEPTANCE OF ABA STANDARDS

Despite the laudable objective of removing surprise sanctions that hinder the defendant's reentry into the community, I anticipate that the ABA Standards will meet resistance by some.

(1) The public and victim advocacy groups undoubtedly will see the ABA Standards as a needless exercise that coddles criminals rather than protects victim's rights.

(2) From the perspective of trial judges, the General Assembly has progressively imposed legislative mandates on them that limit actual trial time. Felony sentencing under Am.Sub.S.B.2, R.C. Chapter 2929, for example, requires the judge to apply complex statutory guidelines and sentencing factors for selecting the sentence from the range of penalties. To comply, judges use worksheets and in some instances must articulate those findings giving their reasons on the record.[34] In the metropolitan counties each trial judge sentences between three to ten defendants each morning as jurors stand-by in the jury room for sometimes up to several hours. In the view of trial judges, any procedure that reduces trial time is not an efficient use of judicial resources.

(3) Opposition is also possible from some members of the criminal defense bar. Most felony cases are represented by public defenders. They have heavy caseloads and their clients sometimes reward their efforts with civil suits against them for negligent representation.[35] They may view the ABA Standards as another device for their clients to second-guess, blame, or even sue them.

(4) Finally, prosecutors will inevitably view the standards as just another ground for defendants to appeal their conviction, seek post-conviction relief, or move to withdraw their guilty or no-contest plea after sentence under Crim.R. 32.1.

Although each perspective is worthy of consideration, I respectfully disagree that these expressions of concern are valid reasons for not implementing the ABA Standards. Granted, we must take seriously the cost of crime and the harm to victims. But despite the grand jury's return of an indictment the accused still has the right to refuse to plead guilty or no-contest, however wise or unwise, and to require the state to prove his or her guilt beyond a reasonable doubt. The consequences that result from a guilty or no-contest plea may materially alter the defendant's life forever or long after the judicially imposed sanctions and disabilities expire. In the interest

of fairness, our judicial system should aim to safeguard and respect the choice that the accused must make.

As a society that thrives on information, we search for new ways to access more information that allows us to make good choices. Should the courts countenance a system of surprise in which the accused forfeits access to information that may alter a life's choice? A judge's acceptance of a guilty plea involves more than a short cut to the sentence.

TRIAL COURT'S DUTY

Trial judges also generally resist change. Familiarity with the usual litany for accepting guilty and no-contest pleas provides a comfort zone for judges. Through repetition procedures become second nature and bolster the judge's confidence. But from my knowledge of judges, if the issue is correctly presented, their concern for fairness will trump comfort. Experience has taught trial judges that a meaningful conversation with the defendant is important to fairness even when the defendant, by a plea of guilty, acknowledges commission of the crime alleged in the indictment. In those situations, when remorse of the moment prompts the defendant to enter a guilty plea, the care that the judge exercises to insure that the defendant appreciates the effect of the conviction may prevent the defendant's resentment and defiance after he or she is locked up in prison. Why must aliens be warned of the collateral consequences of immigration implications before they plead guilty or no-contest to a felony, but no warnings of the other collateral consequences, defined in ABA Standard 19-1.1 that relate to employment opportunities and their reentry into the community are required to be given to citizens?

Surely, implementation of the ABA Standards will not overwhelm trial judges. When I became a judge in 1972, there were no formal requirements for accepting guilty or no contest pleas. Judges obediently learned to accept and comply with the colloquy required by Crim.R. 11(C). They learned to include the immigration consequences of R.C. 2943.031 in their colloquy with non-citizens. They have recently learned to analyze and articulate on the record the sentencing factors and reasons required for felony sentencing by R.C. Chapter 2929.

If collateral sanctions are collected and published in a single resource as recommended by ABA Standard 19-2.1, the judge can comply with the ABA Standards by adding only four questions to the Crim.R. 11 (C) and "post-release control" colloquy with the defendant:

> (1) Have you read the "Collateral Sanctions" pamphlet and reviewed the collateral consequences listed?
>
> (2) Have you discussed them with your attorney and do you understand that you may be subject to the collateral consequences in that pamphlet?
>
> (3) Counsel, will you please summarize your discussion with your client of the collateral consequences?

(4) (Mr. ____ / Ms. ____) is that a correct summary that your counsel has just given?

Judges are aware that their duty is to assure that the accused knowingly and understandingly waives his or her rights before entering a guilty or no contest plea. Whether accepting a plea or stating the proper sentencing factors, the responsibility for doing it correctly is the judge's alone—not the prosecutor's or defense counsel's—and any error is the judge's fault. It is essential, as well as feasible, that the judge who accepts the plea supervises the prosecutor and defense counsel to assure that they competently perform their duties and insures that the defendant's guilty or no-contest plea is understandingly entered.

The importance of the judge to the ABA Standards is succinctly illustrated by Dean Roscoe Pound's statement,

Justice is an alloy of men and mechanisms in which men count more than machinery. Assume the clearest rules, the most enlightened procedures, the most sophisticated court techniques; the key factor is still the judge. In the long run, there is no guarantee of justice except the personality of the judge. The reason the judge

makes or breaks the system of justice is that rules are not self-declaring or self-applying. Even in a government of laws, men [and women] make the decisions.[36]

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[2] See *Ohio Courts Summary 2002*, Ohio Supreme Court.

[3] See Chin & Holmes, Effective Assistance of Counsel and the Consequences of Guilty Pleas (2002), 87 Cornell L. Rev. 697, 700.

[4] See *ABA Standard* 19-1.1, ABA Standards for Criminal Justice, Collateral Sanctions and Discretionary Disqualification of Convicted Persons (3 Ed. 2003) and Black Letter With Comment (2004).

[5] Section 4, Article V, Ohio Constitution.

[6] R.C. 2961.01.

[7] 71 Ohio St.3d 224, 227, 1994-Ohio-109, 643 N.E.2d 109.

[8] See, *C.U.R.E.—Ohio and Racial Fairness Project v. Blackwell et al.*, filed in August 2004 in the United States District Court for the Southern District of Ohio.

[9] See R.C. 2923.13 and R.C. 2923.14; see, also, *Klein v. Leis*, 99 Ohio St.3d 537, 2003-Ohio-4779, 795 N.E.2d 633, ¶7.

[10] R.C. 2950.06(B), R.C. 2950.07(B).

[11] See R.C. 2925.38.

[12] See Section 1437d(1)(6), Title 42, U.S.Code; see, also, Section 966.4(f)(12) and 966.4(l)(2)(ii)(A), Title 24, C.F.R.; *Cincinnati Metropolitan Housing Authority v. Browning*, 1st Dist. No. C-010055, 2002-Ohio-190.

[13] See Section 1227(a)(2)(A), Title 8 U.S.Code.

[14] See *State v. Yanez*, 150 Ohio App.3d 510, 2002-Ohio-7076, 782 N.E.2d 146, at ¶7-8, for history of R.C. 2943.031.

[15] See *Ross v. Court* (1972), 30 Ohio St.2d 323, 324, 285 N.E.2d 25; see, also, *Crockett v. Haskins* (C. A.6, 1966), 372 F.2d 475, 476.

[16] See *State v. Ballard* (1981), 66 Ohio St.2d 473, 479-480, 423 N.E.2d 115, citing *Boykin v. Alabama* (1969), 395 U.S. 238, 243, 89 S.Ct. 1709; see, also, *State v. DeArmond* (1995), 108 Ohio App.3d 239, 242-243, 670 N.E.2d 531.

[17] *Ballard, Id.*, 66 Ohio St.2d at 475, 423 N.E.2d 115.

[18] *State v. Nero* (1990), 56 Ohio St.3d 106, 108, 564 N.E.2d 474.

[19] R.C. 2943.0321 (Emphasis added).

[20] (Emphasis added.)

[21] See *State v. Yanez*, at ¶7.

[22] The Modern Courts Amendment, Section 5(B), Article IV, Ohio Constitution.

[23] ABA Standards for Criminal Justice: Pleas of Guilty (1999), Section 14-3.2(f); see, also, *Immigration & Naturalization Serv. v. St. Cyr.* (2001), 533 U.S. 289, 323, 121 S.Ct. 2271, fn. 50;

Strickland v. Washington (1984), 466 U.S. 668, 104 S.Ct. 2052; *State v. Yanez,* at ¶41.

[24] See *Strickland v. Washington*, 466 U.S. at 2066, 104 S.Ct. 2052.

[25] See id. at 694, 104 S.Ct. 2052; see, also, *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373, paragraph three of the syllabus, certiorari denied (1990), 497 U.S. 1011, 110 S.Ct. 3258; *State v. Powell* (1993), 90 Ohio App.3d 260, 629 N.E.2d 13.

[26] (1993), 506 U.S. 364, 369, 113 S.Ct. 838.

[27] See *Hill v. Lockhart* (1985), 474 U.S. 52, 58, 106 S.Ct. 366.

[28] See *United States v. Santelises* (C.A.2, 1975), 509 F.2d 703, 704; see, also, *United States v. Gavilan* (C.A.5, 1985), 761 F.2d 226, 228; *United States v. Campbell* (C.A.11, 1985), 778 F.2d 764, 768; see, generally, Chin & Holmes, Effective Assistance of Counsel and the Consequences of Guilty Pleas, 87 Cornell L.Rev. 697; *State v. Yanez,* at ¶8.

[29] *United States v. Campbell*, 778 F.2d at 769; see, also, *State v. Arvanitis* (1986), 36 Ohio App.3d 213, 215, 522 N.E.2d 1089.

[30] *State v. Yanez*, at ¶35.

[31] See *State v. Xie* (1992), 62 Ohio St.3d 521, 524-525, 584 N.E.2d 715.

[32] See *State v. Xie*.

[33] See id.

[34] See R.C. 2929.14 and R.C. 2929.19.

[35] See *Thorp v. Strigari*, 155 Ohio App.3d 145, 2003-Ohio-5954, 800 N.E.2d 392.

[36] Found in Rosenberg, The Qualities of Justice—Are They Strainable? In Winters, Selected Readings: Judicial Selection and Tenure. Readings on Recruitment and Selection of Judges, 1987, 11.