

To: New Jersey Law Revision Commission
From: Alex Fineberg
Date: September 6, 2011
Re: Collateral consequences of a conviction

MEMORANDUM

At the April meeting, the Commission reviewed the outcome of *In re D.H.*, 204 *N.J.* 7 (2010), a case which struggles to harmonize the statute delimiting the effect of an order of expungement, *N.J.S.* 2C:52-27, with the statute mandating the forfeiture of public office upon a conviction for certain crimes, *N.J.S.* 2C:51-2.

D.H., a detective at the Monmouth County Prosecutor's Office, performed an unauthorized criminal background check using a restricted law enforcement database—an offense involving or touching on her public office. She later petitioned for an expungement. *D.H.*, 204 *N.J.* at 9-10. In relevant part, *N.J.S.* 2C:51-2d. provides:
any person convicted of an offense involving or touching on his public office, position or employment shall forever be disqualified from holding any office or position of honor, trust, or profit under this State or any of its administrative or political subdivisions.

Had D.H. been convicted of a *crime* touching on her office (rather than a disorderly persons offense, *see N.J.S.* 2C:1-4), the conviction would not have been eligible for expungement. *N.J.S.* 2C:52-2b. However, D.H. was merely convicted of a disorderly persons offense pursuant to a plea agreement. *D.H.*, 204 *N.J.* at 11.

Relying on a 2006 Appellate Division decision, both the trial court and Appellate Division held that the permanent bar to holding public office was, as a collateral consequence of D.H.'s conviction, effectively erased by an order expunging that conviction. *D.H.*, 204 *N.J.* at 13. *See In re Forfeiture of Public Office of Nunez*, 384 *N.J.Super.* 345, 349 (App. Div. 2006). They reasoned that an expungement operates to make “the arrest, conviction and any proceedings related thereto . . . deemed not to have occurred”—“[u]nless otherwise provided by law”. *N.J.S.* 2C:52-27.

However, overturning both *Nunez* and lower courts' decisions, the *D.H.* court held that the phrase, “Unless otherwise provided by law”, encapsulates all other statutes, including the language of *N.J.S.* 2C:51-2d. *D.H.*, 204 *N.J.* at 24. In other words, an applicable public employee, even if entitled to certain advantages of expungement (e.g., being able to deny the existence of a conviction to private employers), shall, as “otherwise provided by law,” never again hold public office.

Justice Long, in dissent, read the phrase, “Unless otherwise provided by law”, as referring only to exceptions stated within the same chapter of Title 2C, including, for instance, the mandatory disclosure of expunged records to a parole board, *N.J.S.* 2C:52-22, or to a judge in conjunction with setting bail or sentencing, *N.J.S.* 2C:52-21. *D.H.* 204 *N.J.* at 29.

At the Commission's direction, Staff has further researched both the *D.H.* decision's effect on the statutory scheme concerning forfeiture of public office and, more broadly, all collateral sanctions imposed by New Jersey statutes and regulations. The provision of the forfeiture statute imposing a permanent bar on public employment, perhaps the most severe of collateral consequences in its duration and scope, is frequently cited. See, e.g., Margaret Colgate Love, *Relief from the Collateral Consequences of a Criminal Conviction: A State-by-State Resource Guide*, Appendix "New Jersey" (2006). Pursuant to the holding in *D.H.*, a judicial expungement will not grant relief from the permanence of *N.J.S. 2C:51-2d. D.H.*, 204 *N.J.* at 24. Only an executive pardon would suffice—a power which presumably cannot be limited by statute. *N.J. Const.* art. V, § 2. See also *Brezizecki v. Gregorio*, 246 *N.J. Super.* 634, 642-43 (Law Div. 1990) (*N.J.S. 2A:167-5*, which prohibits the use of executive clemency to allow an impeached public official to again hold public office, merely tracks the restrictions in the New Jersey Constitution, which forbids a grant of pardon for impeachment or treason; there are no other legislative restrictions on the governor's pardon power). However, unlike expungement, executive pardons are entirely discretionary and also rare. See Love, Appendix "New Jersey".

As to the State's other collateral consequences of conviction, Staff will undertake a thorough review of the New Jersey statutes and administrative code in order to identify and inform the Commission of their existence. A comprehensive study will allow the Commission to evaluate whether the current statutory scheme allows sufficient opportunities for relief upon a convict's rehabilitation. Moreover, the work of compiling and organizing the data will itself be significant, allowing for the prospect of notice to defendants and their attorneys who are contemplating a guilty plea. The U.S. Supreme Court has ruled that a defendant must be apprised of at least one such collateral consequence to ensure effective assistance of counsel: a defendant's clear eligibility for deportation attendant a drug conviction under 8 *U.S.C.* § 1227(a)(2)(B)(i). *Padilla v. Kentucky*, 130 *S. Ct.* 1473, 1483 (2010).

Staff's work will be aided by the Criminal Justice Section of the American Bar Association. Pursuant to an act of Congress, the National Institute of Justice was directed to compile a list of the collateral consequences of criminal convictions in all states, territories, and in the District of Columbia. Court Security Improvement Act of 2007, Pub. L. No. 110-177, 110th Cong. § 510 (2008). Ultimately, a grant was awarded to the ABA to perform the study. Thus far, the ABA has recorded 1,051 New Jersey statutes or regulations pertaining to the collateral consequences imposed upon various convictions.¹

Other states, too, have seen fit to investigate whether adequate means of relief exist from a conviction's collateral consequences. Governor Jeb Bush of Florida directed all state agencies to report on any disqualifications or restrictions relating to post-conviction employment. Fl. Exec. Order No. 06-89 (Apr. 25, 2006)². North Carolina recently enacted portions of the Uniform Collateral Consequences of Conviction Act.

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¹ <http://isrweb.isr.temple.edu/projects/accproject/pages/GetStateRecords.cfm?State=NJ>

² <http://edocs.dlis.state.fl.us/fldocs/governor/orders/2006/06-89-exoftf.pdf>

N.C. S.L. 2011-265 (2011) (“An act to establish a certificate of relief that will assist individuals convicted of less serious crimes in dealing with collateral sanctions and disqualifications that result from a criminal conviction and a procedure for issuing that certificate”). Voluntary studies have also been performed by governmental and private entities in Maryland, Ohio, Michigan, New York, and the District of Columbia, illuminating hundreds of collateral sanctions in each jurisdiction. Unif. Collateral Consequences of Conviction Act, Prefatory Note (amended 2010).