



Commission on Effective Criminal Sanctions
October 13, 2006 Hearing on Certificates of Rehabilitation
New York Supreme Court
Ceremonial Courtroom
Brooklyn, NY

Note: Because of the number of witnesses on the panels for the October 13 hearing, moderators used an interactive Q & A format. Each panel was asked a series of questions, and the floor was later opened for questions from the Commissioners and audience members. The following notes are not intended to be a verbatim transcript, but rather a general record of the testimony given.

Panel I: Moderated by Debbie Mukamal

Q: Chief Judge Kaye has been instrumental in increasing awareness of the collateral or hidden consequences of criminal convictions through hosting colloquiums and creating a website where judges can learn more about collateral consequences. What steps can the judiciary take to ensure that judges are specifically informed about collateral consequences? What role should trial judges play in informing offenders about collateral consequences that may apply in their case?

Robert G. M. Keating

Judge Kay convened two meetings at the Judicial Institute with law school clinical programs to address this issue. The “4 C” website developed from the meetings. One part of the website contains a judicial discussion board where judges can talk to one another about collateral consequences.

Courts also do training programs for judges. Court rules require that defendants be notified about immigration consequences, but there is otherwise no requirement to inform defendants about specific consequences related to their offense. While judges generally feel an obligation to advise defendants about collateral consequences at the plea stage, but beyond immigration, there is also a concern that the validity of pleas might be questioned if they were required to address specific collateral consequences and missed any. There is a problem with the state of knowledge: judges do not know all the collateral consequences that may apply.

Q: As a defender, what has been your experience in having judges address collateral consequences during sentencing?

Barry Kamins

N.Y. law requires judges to advise defendants about the availability of certificates of relief from disabilities to relieve collateral consequences; but I have not had one judge do this during sentencing.

Q: Some judges have objected to being made responsible for informing criminal defendants about collateral consequences on grounds that it would increase an already crushing workload. How practical is it for judges to address collateral consequences during sentencing?

Martin P. Murphy

Advising defendants about collateral consequences and the availability of certificates is more practical at the Supreme Court level, because judges have a lighter caseload even though the cases are more serious. In Criminal Court, this additional task may be more problematic because the caseload is so heavy and dispositions happen very quickly. The system is not designed to inform defendants of the many specific collateral consequences. There are too many. The system can better respond to a request by the defense attorney for relief from a specific consequence.

Marty Horn and I tried to implement a prearraignment video in Manhattan Criminal Court. The video could be played several times a day to the defendants while they are waiting to be arraigned. It could cover many topics about the criminal justice process as well as address the issue of collateral consequences. The defendants could be encouraged to talk to their attorney prior to any disposition. However, the idea was never implemented. It's still a good idea.

Q: What if any role should probation play in the certificate process? What steps have you taken to improve the certificate program?

Martin F. Horn

First, I want to clarify the role of certificates. Certificates of Good Conduct (“CGC”) demonstrate rehabilitation whereas Certificate of Relief from Disabilities (“CRD”) are intended only to further rehabilitation, not demonstrate it.

The Department of Probation created a box on the order of probation form that allows judges to grant a certificate at sentencing. It also now requires probation officers to evaluate an offender’s eligibility for a certificate and make a recommendation in this regard to the court in the presentence report. However, there is a loophole in the practice: People sentenced to less than 90 days can waive a pre-sentence report, and thus the judge will not receive a recommendation regarding the CRD.

Q: Why do you think the application numbers are low for certificates in New York?

Martin P. Murphy

The number of CRDs is low, because people are not focused on certificates. It is incumbent on the defense bar to use this tool.

Martin Horn (comment)

CRDs are not intended to show employers that a person is rehabilitated, whereas the CGC is “a sort of pardon.” Employers do not follow Article 23A because it contains vague language, and besides it is not enforced. [Article 23A, N.Y. Correct. Law §§ 750-755, requires licensing authorities and employers to consider on a case-by-case basis whether the conviction is “directly related” to the specific license or employment sought, or if the issuance of the license or employment would create an “unreasonable risk to the property or safety” of specific individuals or the general public.]

Q. How do prosecutors feel about certificates?

Lance Ogiste

I don't think most DAs would recommend that one be granted at sentencing.

Q: What responsibility do you think defense attorneys should have for informing their clients about collateral consequences?

Barry Kamins

The defense bar has “dropped the ball.” Defenders tend to focus on front-end questions of guilt or innocence, but they also have a responsibility to focus on reentry and increase awareness of collateral consequences. The City Bar is developing a Collateral Consequences Project to provide pro bono legal services in this area.

Robert G.M. Keating (comment)

Only 10% of CRDs issued are granted at sentencing; thus the defense bar is not seeking them during client representation. Certificates are not the total answer here, because offenders also need additional services (i.e. drug treatment, education, etc.) to reintegrate into society.

Q: Statistics show that roughly 25, 000 people are discharged annually from state correctional facilities and that only about 300 people complete the process of applying for certificates of rehabilitation from the State Board of Parole. If the certificates are really useful in helping secure employment and other opportunities, how would you explain this low number of applicants?

Chauncey Parker

First, we need to understand that the focus is to reduce crime, which underscores the larger goal of working on recidivism strategies. The Governor's office has focused on:

1. Reducing the number of people on parole
2. Providing resources to develop local reentry taskforces and providing 2 million dollars for social service providers.

There are 25,000 people leaving prison each year in New York, of whom 8,000 are first time felony offenders eligible for CRDs. But only about 300 CRDs are issued. The application is available on the website, and service providers and parole officers also inform offenders about the program, and there is a 95% approval rate for certificates of both kinds by the parole board. So why are the numbers of applications still so low? Maybe people are getting jobs without a certificate, and thus don't think they need them.

Q: What does the parole board consider in deciding whether to grant a CGC?

Chauncey Parker

The main thing the parole board looks for is stability from applicants to show that they are law-abiding citizens.

Certificates are not a "magic key to law-abiding lives." The more important thing is to educate employers and encourage them to hire people with criminal records.

Comment from Martin Horn: The probation office investigation for a certificate of good conduct is exhaustive, more intensive even than for a pre-sentence report.

Q: What factors do you generally consider when deciding whether to issue a certificate of relief from disabilities?

Martin P. Murphy

When considering whether to issue a CRD, I consider the safety of the community (i.e. nature of conviction and relief being sought).

Q: You are all employers in the public sector. Would you hire someone with a criminal record?

Martin Horn

Having a record probably would not help in hiring probation officers.

Lance Ogiste

People with certificates are still discriminated against. Trust is important, and it is hurdle for offenders to get over. Ultimately, they have to prove that they are trustworthy.

Robert G.M. Keating

Having a CGC is much more impressive, because a more detailed investigation is done. The average employer is going to consider other factors, such as qualifications.

Barry Kamins

Regardless of certificates, you must consider the nature of the conviction and the job responsibility. I would not hire someone convicted of larceny to work in a bank. Inaccurate criminal histories are also a big problem.

Audience Questions and Comments:

Q (from Commission co-chair Stephen Saltzburg) : What message is sent to offenders about upholding the rule of law when Judges are not abiding by the court rule requiring them to inform defendants about collateral consequences?

A: Keating: Judges are not consciously disregarding the rule; it is rather a problem with a lack of knowledge.

A: Murphy: Most judges are not aware of this rule. However, since it does not effect the validity of the plea disposition, it just doesn't get done.

Q (from Commissioner Joe Hynes): To what extent are the problems with the certificate program derived from the fact that the system is plea-driven?

General agreement from panel that the system reinforces a reluctance to inform defendants about all collateral consequences.

Q: (from Commission John VandeKamp): What would you recommend for a model certificate program?

A: Parker: Certificate should be readily accessible but also meaningful. Cannot give to all or it loses meaning (“What’s the value of a certificate that everybody gets?”). There is a need to make the case for the effectiveness of certificates – study whether people with certificates have a lower recidivism rate. This has not been done.

Q: Would you all support a program that allow the waiting period for CGCs to be reduced if a person successfully completes a program, like ComAlert offered by DA Hynes?

A: Horn: I would support giving prosecutors the authority to reduce the waiting period for CGCs. If the prosecutor recommends it, then it should be considered. Most states require a cumbersome pardon process, and they need a more efficient and reliable process to relieve specific collateral consequences.

Panel II: moderated by J. McGregor Smyth

Q: Please explain the difference between CRDs and CGCs for people who may not be familiar with the New York certificate program.

Anita Marton

The two certificates have the same legal effect, and the only difference is how a person applies for one, which is based upon the number of convictions and the type of sentence imposed. There is no standardized procedure – and forms can vary depending upon which office supplies them. There is no appeal, and no access by the applicant to the report that probation prepares.

Q: What improvements could be made to the application process?

Anita Marton

The on-line applications are not accepted by every agency. Each agency has their own version of the application, and wants applicants to use their version. Potential applicants can be required to fill in as many as four different forms. Also, some probation officers are reluctant to accept additional information that applicants may want to submit relating to the certificate investigation. Also attorneys and applicants don't have access to the probation reports in order to dispute errors, and they do not know what information will be given to the judge about the case. A new law requires judges to turn over the investigative report to applicants.

If the certificate must be issued by the Parole Board, the process is much too long. It is important that the relief available from the CRD be available during the crucial first months after a defendant returns from prison. That is when housing and employment is especially important to avoid recidivism.

There is a lack of awareness regarding the scope of relief offered by certificates: many people believe it is limited to employment, whereas in fact the scope is much broader.

Q: How did you find out about certificates of relief from disabilities? Were you able to apply for one on your own, or did it require seeking legal assistance? What would you improve about the process?

Michelle Harrison

I was released for 4 years before finding out about certificates. The Legal Action Center assisted me in applying, and there is no way I could have completed the process alone. It took almost one year from the time of application to receive the certificate. I applied for a certificate of good conduct, although I was eligible for both, because the relief it provided sounded better. One recommendation is that people should be informed about collateral consequences and certificates even before they leave prison, because they generally do not realize the barriers they will face.

Q: Mr. Richards you are able to speak from the perspective of a person who was involved with the criminal justice system and successfully turned your life around. What factors contributed most to your ability to do this? Did you consider applying for a certificate?

Stanley Richards

I took advantage of school programs in prison, and believed in myself in order to succeed after prison. I considered obtaining a certificate for licensing purposes, but my waiting period would have been 9 years (I had 4 years of parole and then a 5 year waiting period), but I did not need a license to do social work. By the time I was eligible I didn't need one.

Q: Your organization, the Fortune Society, is staffed primarily by former prisoners, and it assists former prisoners and at-risk youth break the cycle of crime and incarceration through a broad range of services. Does your organization encourage your clients to apply for certificates of rehabilitations in order to assist with reentry?

Stanley Richards

Fortune Society encourages clients to apply for certificates; however, there is a disconnection between what people want to do and the role of the certificates. People don't see the benefit, and don't apply. The two certificates should be legally distinct, and practically certificates should show real rehabilitation while in the community.

Q: What are some of the challenges faced in upstate New York regarding the certificate program?

Alan Rosenthal

The application process needs to be standardized throughout the state of New York. In upstate, judges are stricter in granting certificates. Also, the issue of whether certificates should create a presumption of rehabilitation or promote reintegration needs to be resolved. Perhaps the program could be a two-tier, multi-purpose process.

Q: Is it realistic to expect busy defense lawyers to worry about collateral civil consequences when their clients just want to stay out of jail? Is it realistic to ask judges to concern themselves with collateral consequences when they are sentencing dozens of people each day?

Alan Rosenthal

The criminal justice system requires that we address collateral consequences, regardless of the burden it imposes upon the courts. If defendants are fully informed about collateral consequences, then the system may change because there will be fewer guilty pleas. This would also require defenders to learn more about their clients in order to access what collateral consequences will be most relevant for them.

As opposed to considering certificates, perhaps we should be considering rolling back the statutory bars imposed by convictions. Certificates are only a band-aid on the real problem.

Q: The Center for Employment Opportunities provides immediate, paid, short-term employment for men and women returning from prison to New York City and others under community supervision. Are CRDs and CGCs useful to your clients? If not, why?

Marta Nelson

Certificates are of no practical help in a reentry strategy affecting CEO's clients, who are seeking immediate assistance and job placement within three months of returning from prison. Most of our clients have multiple felony convictions, and thus would be subject to the long waiting period for a CGC.

What employers are looking more for when a person is recently out of prison is a job history, and evidence that a person will come to work as opposed to whether they are "rehabilitated." When a person is further away from release a certificate can be a sign to employers hiring above the entry level that a person has conducted himself or herself well in society, which may be a consideration in filling these jobs.

One suggestion for improving the system would be to reevaluate the industry-wide bans on hiring people with convictions imposed by state and federal law. For example, a FDIC regulation has the effect that if you have a conviction you can not work in the kitchen located in a bank or in the financial services industry, a big industry for New York City. Also, employers are concerned with negligent hiring.

Q: What is your experience in encouraging employers to hire a person with a criminal record? Is it helpful to an applicant if he or she has a certificate?

Mike Rosenthal

There are 3 types of employers: Yes (those willing to hire people with convictions), No (those definitely opposed) & Maybe (those who may consider it). Most employers are in the middle. Non-profits like CEO that provide case-management and staffing assistance for people with criminal records have broad appeal for small businesses that don't have human resources departments.

A certificate would be on the bottom of the list of considerations for employers. They are first concerned about whether the person will come to work on time.

Q: What are your suggestions on how the certificate program in New York could be improved?

Anita Marton

CRDs are confusing, because they only apply to public employment and licensing. There is also confusion about what the CGC means. Employers don't know what people had to do to get it in order to know its importance. The solution may be in sealing some records and letting employers rely on work history. Lifting statutory bars gives more freedom to employers to decide who they want to hire, as opposed to barring those decisions.

Stanley Richards

After a person receives a CGC, they should become eligible for sealing the criminal record.

Michelle Harrison

Employers should be informed about the application process in order to understand what the applicant achieved. It would add value to the certificate.

Alan Rosenthal

Certificates should be a gateway to expungement and/or sealing. New York currently has very limited sealing statutes, though arrests not leading to convictions are automatically sealed.

There is a need for uniformity in the certificate application process throughout the state of New York.

Immigration is also a major issue, and defenders should carefully consult with immigration attorneys about how certificates could provide relief in this area. A certificate will not help where an "aggravated felony" is involved, but may be relevant where deportation is discretionary.

Anita Marton

The broader application of certificates should be emphasized. Recently, I was at a meeting where judges were surprised to learn that certificates restore voting rights to people on parole. Certificates also can remove barriers to public housing that apply even to misdemeanants in New York. A lot of offenders are concerned with restoring their voting rights, and other areas other outside of employment. When constructing a model statute, certificates should be given broad effect to relieve multiple disabilities.

There should be three stages of relief: First, there should be basic relief from blanket legal barriers available as early as sentencing, to give employers a choice; Second, there should be a testament to an offender's achievements, like a certificate of good conduct; Third, the record should be sealed. Certificates in this sense would be a gateway to expungement.

Audience Questions and Comments:

There should be discretion at the end of the certificate process to allow for sealing or expungement.

CRDs should be automatic at sentencing unless prosecution objects.

Panel III: moderated by Margaret Love

Q: Could you describe the role of pardon in Connecticut reentry scheme, and in particular the relief that will be offered by the new provisional pardon.

Gregory Everett

Pardons in Connecticut are issued by an administrative board and not by the governor. Perhaps as a result, pardon has always played a more central operational role in our state than in others, and it is a key part of the state's reentry strategy. We issue about 200 pardons a year, and they have the effect of "erasing" the conviction so that it no longer has to be reported and does not show up in a records check. But pardon requires a waiting period of 5 years after completion of sentence, and we wanted to have some way of providing relief from specific disabilities earlier. So last year we went to the legislature and asked for authority to grant "provisional pardons." These can be granted on a paper record without a hearing, to restore selected rights and relief selected disabilities, primarily for employment purposes. A provisional pardon does not erase the conviction the way full pardon does. Our authority only took effect on October 1 of this year, so we don't yet know how the program will be received.

Q: Could you describe the role of the trial judge in Arizona in connection with restoration of rights and expungement of conviction records?

John E. Davis

The courts in Arizona have traditionally had a central role in restoring rights and setting aside convictions, so these functions came with the territory. But it is hard to imagine a court being happy about taking them on as an original matter, given the burdens placed on courts. There is something of a disconnect between the quality of justice and the emphasis placed on the efficiency of the court. Judges are encouraged to expedite the cases from their calendars, which compromises the quality of the time given to each case.

In Arizona, the court can't issue certificates because it is not within the statutory authority of the courts. But they can restore rights and set aside convictions, though offenders still have to disclose their criminal records if asked.

Public Defenders don't have time to handle the back-end, but the University of Arizona law school clinical program will handle some of these cases.

Currently, only 10% come back for set asides in Arizona. He has had only one person come back to have his gun rights restored 10 years after his conviction. No federal offenders have requested this relief, though they are eligible for it.

Q: Traditionally, the Illinois parole board has not been considered an agency that had a responsibility for offender reentry. How did you go about changing the culture of the Illinois Prisoner Review Board in order to prepare for its new role in administering the certificate program? How do you see this role in relationship to the Board's role in recommending pardons to the governor?

Jorge Montes

It is important that parole authorities view their role not simply as a law enforcement one, but in a more holistic manner. The Board has begun to view its role in this fashion, particularly now that it is responsible for issuing certificates of relief from disability and good conduct. The legislation that authorizes the Board to issue certificates was enacted very recently, on the initiative of then-State Senator Barack Obama, and our Board was rather surprised to find itself in the position of administering this program. The Board also investigates pardon cases, and makes pardon recommendations to the governor – though the current governor has not granted any pardons for several years, and hundreds of cases are awaiting his action.

The N.Y. model that requires parole board members to have certain qualifications is a good one, because that knowledge and background in criminal justice is needed in order to create a new culture in the area of parole.

The Illinois Board previously viewed advocacy groups, like the Safer Foundation, as an enemy, but now we work with groups like Safer to assist with offender reentry. We hope that the certificate program will become a key part of the Board's reentry initiative.

Q: The Safer Foundation worked alongside other advocacy organizations in ensuring the passage of the Illinois certificate program. How did the advocacy community determine that certificates of rehabilitation were needed to assist people with criminal records?

Jodina Hicks

Five years ago, C.A.R.R.E.(Council of Advisors to Reduce Recidivism Through Employment) was established by the Safer Foundation and now has more than 90 organizations who come together to address reentry policy in Chicago. When the group was created, Illinois had not passed any legislation providing post-conviction relief. The group identified issues they saw as the top barriers to employment, and found 65 occupational barriers for people with criminal convictions.

Certificates are only the starting point. There has to be changes in hiring policies for public agencies and employer's bias toward persons with criminal records.

Safer also began the tracking process through grant funds to measure success rates for people with certificates as opposed to those without them. Safer wants to push for larger eligibility pool, but first they want to determine if the certificate is effective before supporting its expansion. (Safer completed a paper entitled "Certificates of Relief from Disabilities Implementation and Tracking" in September 2006, which is available on their website at www.saferfoundation.org.)

Audience Questions & Comments:

Q: The terminology "certificate of rehabilitation" send the message that someone is certified by the court to be rehabilitated, but most courts and/or agencies feel uncomfortable certifying such fact.

A: In Illinois, there has been big disagreement on what it means to be rehabilitation, and it is best to stay away from that terminology.