

for The Defense

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Collateral Consequences of Convictions

The Unseen Impact on Clients, Families and Barriers to Community Reentry

By Christopher Johns, Training Director

"And the Lord put a mark on Cain, so that no one who came upon him would kill him."

—Genesis 4:15

In his 1966 song, "Rainy Day Women #12 & 35," Bob Dylan notes that "they'll stone you and say it's the end. Then they'll stone you and then they'll come back again." The stones could just as well be a metaphor for the direct and collateral consequences of a conviction.

Direct consequences are those that have a definite, immediate and largely automatic effect upon the defendant's punishment. Collateral consequences, on the other hand, tend to be contingent upon action taken by an individual or individuals other than the sentencing court—such as another governmental agency or the defendant herself.

Always a Con

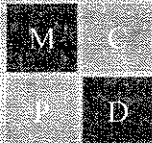
For many of our clients, their prison sentence is just the first stone in a slew of collateral consequences resulting from a felony conviction.

Some collateral consequences, for example, prevent our clients from receiving everything from government and commercial loans to housing.

The criminal justice system continues to inflict harm by tossing stones at a convicted felon long after he or she has left prison. And, for the client's family, the collateral consequences of a felony conviction are tantamount to a slow civil death sentence. One way or the other, it affects their entire lives.

Every Felony Conviction is a Life Sentence

It is so obvious that we often seem to forget that punishment is the legalized infliction of harm on our clients. And, for at least the last thirty years, the harm, the stoning, if you will, has generated numerous collateral consequences far beyond denial of the right to vote, or even the serious immigration consequences for clients who have come here legally or illegally.



*Delivering
America's Promise
of Justice for All*

for The Defense

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■ James J. Haas, Maricopa County Public Defender ■

In the recently published book, *Invisible Punishment: The Collateral Consequences of Mass Imprisonment*, edited by Marc Mauer and Meda Chesney-Lind, the editors note that social scientists have long recognized that all social policies have what might be termed intended and unintended, or collateral, consequences.

Even for the seasoned criminal defense lawyer, some of the invisible punishments that result from convictions may be obscure. The problem, of course, is that with government resources for indigent defense nearly always at minimal levels of funding, even in the best of economic times, public defenders, the justice system, and, most importantly, the public, have not focused on the vicious cycle of poverty, mental illness, inadequate housing, poor health care, and lack of educational opportunities that often fuel crime rates.

The Increasing Denial of Social Services

For example, how often does the system discuss the staggering number of parents who now have a permanent criminal record? In almost all circumstances, even a class 6 designated felony conviction will follow our clients for the remainder of their lives. It is a permanent record that may thwart ex-offenders—former clients—from obtaining or holding a job. Likewise, a criminal record may preclude an offender or his family from obtaining subsidized housing, or student

loans, and may cause the termination of parental rights.

The numbers are staggering. An estimated 66 percent of adult women in state prisons have minor children. Nearly one-quarter of those have had a baby within 12 months or will deliver during incarceration. Over 70 percent of women in local jails have young children, and nearly 72 percent of those on probation have children as well.

In 2000, nearly 6.5 million adults were under the supervision of either a state or federal correctional system. Finding how many people have a criminal record is impossible even with a “Google” search, but one estimate is that a sobering 59 million individuals have criminal history files either in state or federal systems. Some of these individuals may, in all likelihood, have records in multiple states. Still, there is not much doubt that millions of Americans have been processed through the criminal justice system.

How does the ex-offender, especially one who is a parent, re-enter the community? It is a difficult task.

The analogy that comes to mind to some in the criminal justice system is people with Hansen’s disease, or what sometimes is referred to as leprosy. Leprosy is a dreaded disease. It has been feared since antiquity. So-called lepers were forced to wear a “leper’s bell” so that people knew they were coming. Cities sometimes had a large bell that was beaten when lepers were spotted in the street. Lepers were required to keep themselves “ten cubits and a span” from others. The get-tough 80’s and 90’s have done for the ex-offender what antiquity’s legacy did for Hansen’s disease.

Temporary Assistance for Needy Families & Foods Stamps Are Denied

For example, federal law now requires a lifetime ban on Temporary Assistance for Needy Families (TANF) and food stamps for people

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with felony drug convictions after August 22, 1996—no matter how the individual may have rehabilitated herself.¹ A state may “opt out” of the ban, and a majority of states have. Arizona, however, has not opted out.² A bill modifying the ban has been introduced during this legislative session.

Housing

Similarly, recent amendments to the U.S. Housing Act have created substantial barriers to our clients receiving subsidized housing benefits.³ Most of us as practitioners know that our clients often have substantial housing needs—some are just plain homeless. The Housing Opportunity Program Extension Act of 1996, allows public housing agencies the authority to (42 USCA sec. 1437):

* Access criminal records of the applicant or current tenant

* Access records from drug treatment facilities where that information is *solely related to whether the applicant is currently engaging in the illegal use of a controlled substance.*

Consequently, public housing authorities, for example, Section 8 Tenant Based Housing Assistance Programs, may deny an applicant's admission to the housing project based on past drug use or a conviction.

Drug Convictions Prevent Clients from Receiving Student Aid

For most of us, education has been the key to reaching our dreams. Getting an education is part of the American Dream. Low-income families especially need education to improve the opportunities to support their families.

Unfortunately, as part of its 1998 reauthorization of Title V of the Higher

Education of Act of 1965, Congress barred people who have convictions for possession or sale of controlled substances from obtaining Pell grants or student loans for varying periods of time, depending upon the number of offenses. A third offense constitutes an indefinite bar. Prisoners lost their eligibility for financial aid in the 1992 reauthorization.⁵

In almost all circumstances, even a class 6 designated felony conviction will follow our clients for the remainder of their lives. It is a permanent record that may thwart ex-offenders—former clients—from obtaining or holding a job.

Go to Prison, Lose Your Child

A parent who goes to prison may have her parental rights severed. For example, a parent convicted of a felony which shows unfitness for future custody or who receives a sentence of sufficient length to deprive a child of a home for a number of years, provides a statutory ground for termination. See A.R.S. § 8-553(b).

The Adoption and Safe Families Act of 1997 accelerates parental rights termination and may prevent clients from ever becoming foster or adoptive parents.

Voting

The overwhelming majority of states impose restrictions on a felon's right to vote. Arizona's present statutory scheme for general disabilities and occupational disabilities is less punitive than in some states. A.R.S. § 13-904.

For example, in Arizona, a first-time offender's right to vote, hold a public office of trust, and serve as a juror is only temporarily suspended. Final completion of the client's sentence restores the above rights. Clients are not rendered incompetent as witnesses by reason of a prison sentence, or prevented from conveying property. Nor is a person

disqualified, as general matter, from employment—although proving that discrimination was based on a person's conviction may be another matter.

Firearms

In addition to the above, a client also forfeits the right to possess a gun or firearm. Under federal law, it is unlawful for any person who is under indictment for, or has been convicted in *any* court of, a crime punishable by imprisonment for a term exceeding one year, to sell or otherwise dispose of a firearm or ammunition. 18 U.S.C. § 922. Federal law also prohibits firearm possession by any person convicted of a felony or misdemeanor crime of domestic violence. 18 U.S.C. § 922 (g) (9). A person adjudicated delinquent under A.R.S. § 8-341 does *not* have the right to carry or possess a gun or firearm.

Unless an exception is made, federal law also prohibits an individual convicted of a felony to enlist in any branch of the armed forces. 10 U.S.C. § 504.

Important Collateral Consequences Under Arizona Law

The collateral consequences of a felony conviction for adults and a felony adjudication for juveniles are scattered throughout the Arizona Revised Statutes Annotated (A.R.S.). Most are found in Title 13 and 8.

A.R.S. § 13-904 provides that a felony conviction suspends the following civil rights:

- * To vote.
- * To hold public office.
- * To serve as a juror.
- * To possess a gun or firearm.

Further, if a client is imprisoned, other "civil rights" may be suspended which are "reasonably necessary" for the security of the

corrections institution where the person is imprisoned.

Restitution is, of course, mandatory. Moreover, A.R.S. § 13-807 precludes a defendant convicted of a crime from denying in any civil action the essential allegations of the criminal offense. Nor does a restitution order preclude a victim from bringing a civil action and proving damages in excess of court ordered restitution. See A.R.S. § 13-807.

HIV Testing

Other collateral consequences often flow from a particular crime of which the client is *charged* or convicted. An assault on a law enforcement officer involving biting, scratching, spitting, or transferring of bodily fluids, as well as in other situations, entitles the officer to obtain an order authorizing HIV testing of the person charged if there is probable cause to believe that the client committed the offense. Hence, a conviction is not required to trigger the seizure of the client's blood for testing. See A.R.S. § 13-1210(B).

Likewise an accused, including a minor, may be tested for HIV under A.R.S. § 13-1415, based upon the alleged commission of a sexual offense. A hearing is required in which the prosecutor must show "significant exposure." A.R.S. § 13-1415(B).

DNA Testing

Within 30 days of being convicted, whether the client is an adult or juvenile, the state may take a sufficient sample of blood for DNA testing as the result of the commission of *any* felony offense. A.R.S. § 13-610 (N) (5).

Duties to Give Notice of Conviction

It is a class 5 felony for a person convicted of a dangerous crime against children not to

provide notice of her conviction to a business institution or organization that "sponsors any activity in which adults supervise children." See A.R.S. § 13-3716.

Sex Offender Registration

Approximately sixteen offenses, from kidnapping of a child under eighteen years of age who is not your own, to sexual exploitation of a minor, require lifetime registration as a sex offender under A.R.S. § 13-3821. The statute applies to adults and juveniles—although the court retains discretion in the case of a juvenile. A.R.S. § 13-3821 (C). If, however, registration is imposed when the offender is a juvenile, the court may order termination of the term or it terminates automatically when the offender reaches twenty-five years of age. See A.R.S. § 13-3821(F), (G). Sex offender registration also imposes a duty to obtain annually an identification card or driver's license with "proof of address." Sex registration is for life unless it is for certain kidnapping offenses, in which case it terminates after ten years. See A.R.S. § 13-3821 (L).

Sex offenders are also subject to community notification laws provided in A.R.S. §§ 13-3825 and 3826. Community notification may include publication of the offender's name on an Internet sex offender web site. See § 13-3837.

Teaching and Nursing

If a person is certified to teach in Arizona, any felony conviction must be reported to the certifying board by the clerk of the court. See A.R.S. § 13-3990. Pursuant to A.R.S. § 13-32-1646 (B), an applicant for nursing assistant certification (NAC) is not eligible for certification if the applicant has any felony

convictions and has not received an absolute discharge.

A.R.S. § 41-1758.03 delineates the offenses that preclude a person from obtaining a "class one fingerprint clearance card." The offenses include, besides most sexual offenses, exploitation of minors and vulnerable adults, first-and second- degree murder, manslaughter, endangerment, assault, assault by vicious animal, and drive-by shooting. Conviction of most drug offenses also precludes obtaining a fingerprint clearance card. See A.R.S. § 41-1758.03 (C).⁸

Son of Sam

Federal law requires a lifetime ban on Temporary Assistance for Needy Families (TANF) and food stamps for people with felony drug convictions after August 22, 1996—no matter how the individual may have rehabilitated herself.

A contract by an accused for any form of media description of "a crime" is void unless it provides that monies received go to a commission. If the accused is convicted, the money goes to the crime victim if they timely apply to the commission. A.R.S. § 13-4201 (A) and (B).

Similarly, A.R.S. § 12-511 (A) (1) extends the statute of limitations for any civil action by a victim for one year "from the time the conviction becomes final."⁹

Driving

License suspension for misdemeanor and felony DUI is well known to criminal practitioners. Less well known is that certain offenses committed by clients under age eighteen, including criminal damage-graffiti offenses, car theft, and drug offenses result in loss of a driver's license. See A.R.S. § 28-3320. An extreme DUI or Aggravated DUI may result in a license suspension for three years. A.R.S. § 28-3320(A)(2); 28-1383(J)(1). Similarly, A.R.S. § 28-3320 lists all of the offenses for which a client in juvenile court may lose their driver's license.

What Do We Need To Tell Our Clients?

There is no single appellate case that requires criminal defense lawyers to explain all of the collateral consequences of a plea agreement. Appellate courts have been extremely reluctant to impose a duty to warn clients of the collateral effects of guilty pleas. The fundamental issue is whether the client entered into an agreement after proper advice and with an understanding of the important consequences that pertain to the voluntariness of the plea.

That doesn't mean there is not a duty to reasonably inform the client under the Rules of Professional Conduct, or as good practice, of all the conceivable collateral consequences. Every case and client is different. What may be important to one may be less important to another.

The important practice issue is to be active and not passive. Practitioners should ask their clients what is important to them, and take the initiative to learn about the collateral consequences that frequently occur in their jurisdiction (for example, immigration consequences are a frequent consequence in our state).

The American Bar Association (ABA) Standards for Criminal Justice, Pleas of Guilty, Third Edition (1999) says it this way:

Responsibilities of Defense Counsel—
Standard 14-3.2(f):

To the extent possible, defense counsel should determine and advise the [client], sufficiently in advance of the entry of any plea, as to the possible collateral consequences that might ensue from entry of the contemplated plea.

Likewise, the National Legal Aid and Defender Association notes in its *Performance Guidelines for Criminal Defense Representation* that "counsel should be fully aware of, and make

sure the client is fully aware of . . . [the] consequences of conviction such as deportation, and civil disabilities." See Guideline 6.2 (Contents of the Negotiations). The *Performance Guideline* comments emphasize that "all foreseeable potential consequences of a conviction by plea should be discussed with the client." *Id.*

Conclusion

Criminal defense attorneys have a duty to protect their clients' interests. Sometimes, a client may be more adversely affected by a criminal conviction's collateral consequences than by the obvious direct impact of incarceration or probation. To fulfill the duty to protect our clients' interests, the collateral consequences need to be identified, evaluated, explained, and, to the extent possible, avoided or mitigated. To assist counsel, the chart that follows outlines the most common collateral consequences.

Although our clients may successfully complete probation or do their time, a convicted felon pays a penalty long after he "pays his debt to society." It is time to re-examine many of the onerous, counterproductive sanctions of the 80's and 90's.

Collateral Consequences Chart

<p>Employment</p> <p>Arizona Law A felony conviction may bar clients from obtaining, keeping, or renewing a license for those who work with vulnerable populations including children, older people and the mentally ill. License restrictions or other statutory provisions may preclude holding certain offices.</p>	<p>Commission of any felony or misdemeanor involving moral turpitude</p> <p>Acupuncturists §32-3951(A)(1)</p> <p>Athletic Trainers §32-4153(6)</p> <p>Chiropractors §32-924(B)(6)</p> <p>Court Reporters §32-4024(A)(5)</p> <p>Dentists §32-1263(2)</p> <p>Homeopathic Physicians §32-2933(3) §32-2934</p> <p>Medical Doctors §32-1451 §32-1401(25)(d)</p> <p>Naturopathic Physicians §32-1551 §32-1501(22)(c)</p> <p>Nurses §32-1663 §32-1601(14)(b)</p> <p>Occupational Therapists §32-3401(9)(m) §32-3442</p> <p>Optometrists §32-1743(1)</p> <p>Osteopathic Physicians §32-1854(2) §32-1855</p> <p>Physical Therapists §32-2044(7)</p> <p>Physician Assistants §32-2501(18)(u) §32-2551</p> <p>Podiatrists §32-854.01(10)</p> <p>Psychologists §32-2061(A)(13)(l)</p> <p>Veterinarians §32-2232(10) §32-2233(A)(1)</p> <p>Conviction of any felony involving moral turpitude</p> <p>Appraiser §32-3631(A)(4)</p> <p>Conviction of any crime involving moral turpitude</p> <p>Radiological Technologists §32-2821</p> <p>Conviction of a felony</p> <p>Behavioral Health Professionals §32-3251(9)(a) §32-3281</p> <p>Collections Agent §32-1053(A)(4)</p> <p>Contractors §32-1154(A)(8)</p> <p>Pest Control §32-2321(B)(9)</p> <p>Pharmacists §32-1927(A)(2)</p> <p>Private Investigators §32-202457(A)(7)</p> <p>Private Post Secondary Education §32-3051(2)</p> <p>Respiratory Therapists §32-3552(A)(3)</p>	<p>Other</p> <p>Home Inspectors: §32-122.02(A)(7) requires an applicant for certification to have "an absolute discharge from sentence at least five years before the application if the person has been convicted of one or more felonies."</p> <p>Remediation specialists, Temporary certification (§32-131(A)(2)) and Permanent certification (§32-131(E)) both preclude applicants with a felony conviction of fraud, misrepresentation or theft by false pretenses or violation of securities laws within past 7 years.</p> <p>Cosmetologists: §32-572(A)(2) states that conviction of any crime is grounds for suspension, refusal to issue or renew license or as disciplinary action.</p> <p>Accountants: §32-741(A) provides that conviction of any felony [if civil rights have not been restored] or of any crime that has a reasonable relationship to the practice of accounting (including accounting or tax violations, dishonesty, fraud, misrepresentation, embezzlement, theft, forgery, perjury or breach of fiduciary duty)[regardless of whether civil rights have been restored].</p> <p>Funeral Directors/Embalmers: §32-1366(A)(1) and §32-1301(54)(a)-(b) states that committing a class 1 or 2 felony committing a felony or misdemeanor if the crime has a reasonable relationship to funeral directing or embalming, precludes this employment.</p> <p>Real estate: §32-2124(M) precludes obtaining a license if have a felony conviction and currently incarcerated, under community supervision, under supervision of parole or community supervision officer, or on probation. §32-2153(B)(2) precludes obtaining a license if have a conviction of a felony, or of any crime of forgery, theft, extortion, conspiracy to defraud, a crime of moral turpitude or any other like offense.</p> <p>Security guards: §32-2612 bars employment in this area if charged with or convicted of any felony (unless civil rights have been restored); conviction of any crime involving fraud, physical violence, illegal sexual conduct or the illegal use or possession of a deadly weapon; conviction of any crime (involving any section of title 13, chapter 34 or 34.1) or theft if in last 5 years; cannot be on probation, parole or community supervision for any crime or have any outstanding arrest warrants; §32-2636 committing an act of misconduct involving a weapon pursuant to §13-3102.</p> <p>Radiological technologists: §32-2821 precludes employment if convicted of a crime of moral turpitude (unless civil rights have been restored).</p>
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Collateral Consequences Chart

	Federal Law	Arizona Law
Employment (continued)	<p>Numerous limitations and prohibitions, including:</p> <p>Employment involving public trust and fraud. 7 USC § 85</p> <p>Drugs offenses preclude defense work, 10 USC § 2408(a) and Food and Drug Occupations, 21 CFR 1309.72</p> <p>Federal jobs in agencies like: IRS, FBI, Secret Service, U.S. Marshals, Customs, DEA, Transportation, Federal Enforcement Officers.</p> <p>Sentencing guidelines may impose additional occupational restrictions.</p> <p>Federal statutes provide that certain convictions may result in loss or ineligibility for a federal license (import, locomotive engineer, pilot, flight instructor).</p>	See Information on Previous Page
Firearms	<p>The Bureau of Alcohol, Tobacco and Firearms (ATF) was renamed the Bureau of Alcohol, Tobacco, Firearms and Explosives and transferred to the Department of Justice under the Homeland Security Act.</p> <p>It is unlawful for any person under indictment or who has been convicted in any court of a crime punishable for a term of more than one year to sell or otherwise dispose of any firearm or ammunition. 18 USC § 922</p> <p>Federal law also prohibits firearm possession by persons convicted in any court of a misdemeanor crime of domestic violence." 18 U.S.C. § 922 (g)(9)</p>	<p>A person convicted within or outside Arizona of any felony may not possess a deadly weapon (pistol, rifle or shotgun) if their right to possess a firearm has not been restored by court. ARS § 13-3101(6) (b), § 13-3102 (A) (4). After absolute discharge, if not a dangerous felony, gun rights may be restored by filing a Motion to Own or Possess Firearm. Notice is provided to state and federal prosecutors. A person convicted of a serious offense may not apply to carry a gun for ten years. ARS § 13-905(C).</p>
Immigration	<p>Immigrants may be deported when convicted of a crime defined as an "aggravated felony" 10 USC § 1101(a) (43). A person applying for lawful permanent residency status or citizenship may be placed in removal if the application or fingerprint check reveals a criminal history.</p>	<p>Federal Law Governs</p> <p>While not changing federal law, a petition to amend Rules 14.3 and 17.2, Ariz. R. Crim. P. is pending before the Arizona Supreme Court. If approved, it would require notice be given to defendants that a change of plea may affect immigration status or result in removal.</p>
Jury Service	<p>A person may not serve on a federal or petit jury if a charge is pending against or if the person has been convicted in a state or federal court of a crime punishable by imprisonment for more than one year and civil rights have not been restored. 28 USC § 1865(b) (5).</p>	<p>A felony conviction "suspends" the right to serve as juror. ARS § 13-904(A) (3). When a person completes all probation conditions, including fines and restitution, for a first or second felony conviction, or is absolutely discharged, rights to serve on a jury are automatically restored by the Clerk of the Court. A person convicted in U.S. District Court may apply to the Arizona Superior Court for restoration of state civil rights. ARS § 13-909.</p>

Collateral Consequences Chart

	Federal Law	Arizona Law
Federal Education	<p>A person convicted under Federal or state law for possession or sale of controlled substances is not eligible to receive any grant, loan or work assistance. 20 USC § 1091(r). In addition:</p> <p>For drug possession, 1st offense precludes for 1 year 2nd offense for 2 years 3rd offense indefinite</p> <p>For sale or trafficking, 1st offense precludes for 2 years Indefinitely for 2nd offense</p>	Federal Law Governs
Parental Rights	<p>State Law Governs Since 1978, the Indian Child Welfare Act provides special protection to Indian and the Indian tribes. If CPS removes a child, the child's parents and the tribe must receive additional protections.</p>	<p>Parental rights may be terminated on several grounds, considering the child's best interests including:</p> <ul style="list-style-type: none"> · Abandonment · Neglect and abuse · Chronic drug abuse · Parent convicted of a felony of nature which proves unfitness for future custody or such sentence length that child deprived of normal home for a period of years. See ARS § 8-553(B).
Public Office	<p>The U.S. Constitution does not specifically preclude felons from holding public office. U.S. Const. Art. 1, § 2, 3; art II § 1; art. VI.</p> <p>Various federal statutes, however, provide that a conviction may result in the loss of or ineligibility of holding any office in the United States. 18 USC § 2381. For example, treason.</p>	Not precluded if civil rights restored.
Welfare	<p>Temporary Assistance for Needy Families (TANF funds) under the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, imposes a lifetime ban on TANF and Food Stamps for people with felony drug convictions after August 22, 1996, unless their state affirmatively passes legislation to opt out of the ban. The ban includes any state program funded under the Social Security Act (if a felony for use, distribution, or possession of a controlled substance). Children of the affected client may still receive assistance. A federal drug conviction or one from another state count.</p>	While many states have opted out of the draconian provisions of the Personal Responsibility and Working Opportunity Act of 1996, Arizona has not. By not opting out, Federal restrictions apply.

Collateral Consequences Chart

	Federal Law	Arizona Law
Housing	In 1996, Congress passed the "one strike," (Housing Opportunity Program Extension Act of 1996) authorizing local public housing authorities to obtain the criminal conviction and drug abuse treatment facilities records of adult applicants for screening or eviction of public housing applicants or residents.	Federal law governs
Divorce	State law governs	Arizona is one of fourteen pure "no fault" marital dissolution states. No special provisions pertain to dissolutions. But in some states, e.g. Ohio, a spouse imprisoned allows a divorce to be granted.
Military Service	No person who is insane, intoxicated, or a deserter from an armed force, or who has been convicted of a felony, may be enlisted in any armed force. 10 USC § 504	Federal law governs
Voting	No Prohibition U.S. Const. art. I, sec. 2, cl. 1, art. I, sec. 4; art. II, sec. 1, cl. 2; amend. XVII. Qualifications for voting in federal elections are determined by state law.	Cannot vote while incarcerated. A resident of another state incarcerated here may be able to vote by absentee ballot in their home state if allowed. In Arizona, a first time offender's right to vote is automatically restored upon absolute discharge from incarceration or completion of community supervision or probation. If two or more felonies, must apply to court that sentenced the offender. If the sentence resulted in prison, there is a two year waiting period before a person can apply. Same rule applies to first time federal offenders. If a person is convicted of more than one felony in another state, no provision for restoring your Arizona right to vote.

Our clients face multiple barriers to a successful return to the community. The foregoing table is not meant to be exhaustive. Please contact Christopher Johns at johns@mail.maricopa.gov with corrections or for additions to future editions.

This table was created with the assistance of Rebecca Ruchalski, a law clerk for the Maricopa County Public Defender's Office.

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