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BY EMAIL TO: olpregs@usdoj.gov

Mr. Richard A. Hertling
Deputy Assistant Attorney General
Office of Legal Policy
4234 Robert F. Kennedy Building
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530

Re: OLP Docket No. 100
AG Report Concerning Use of Criminal Records for Employment Screening

Dear Mr. Hertling:

In evaluating the nation's policies concerning criminal background checks conducted for employment purposes, we believe that you have raised one of the most critical justice issues of our time. We commonly see criminal background checks hurt the employment prospects of low-income families under circumstances that seem unfair, as described below. Yet until now, the impact of disparate background-check practices has largely escaped the attention of policy makers and the public. So we appreciate your invitation to offer the following comments, particularly as to the factors numbered 5, 9, 10, 13, 14, and 15 in the Request for Comments published June 6, 2005 in 70 Fed. Reg. 32849.

Of course employers have many valid reasons for considering a person's criminal history in making employment decisions. But just as certainly, criminal history may be misunderstood and misused by employers in ways that unfairly hurt individuals and their families, particularly when the rules for maintenance of, access to, and use of criminal history information are so poorly understood and inconsistently applied by governments, intermediaries, and employers. Accordingly, our core comment is that clear substantive and procedural rules based on thorough study are necessary to ensure that all stakeholders' interests are fairly addressed, and to minimize the likelihood that a person's income can determine the extent to which criminal history is considered in employment decisions. After all, public confidence in our criminal justice system promotes respect for the law, and confidence is undermined whenever the public perceives money to influence the consequences that our criminal justice system assigns to criminal behavior. These consequences include the use of criminal background information in decisions concerning employment, credit, insurance coverage, housing access, and public benefits.

Texas RioGrande Legal Aid (TRLA, www.trla.org) is a non-profit corporation that provides free legal services to low-income families throughout southwest Texas, including Texas's entire border with Mexico. The Equal Justice Center (EJC, www.equaljusticecenter.org) is a non-profit corporation that focuses on criminal justice and employment issues affecting low-income families throughout the southwestern United States. The number of people complaining to us that criminal background checks have unfairly diminished their employment opportunities has steadily increased over the past several years, and now includes about 600 requests for help each year. Except in a handful of cases, our limited resources prevent us from providing extended services in response to these requests, but the volume of detailed requests that we have recorded over the years gives us a unique perspective on issues that merit your consideration.

While our comments below focus on the core problems that we have identified, we begin with a few flesh-and-blood examples from our intake logs to anecdotally demonstrate how people could have legitimate complaints about the fairness of current practices:

> 2002—Client wants to be assisted in getting her criminal record expunged. The charge on the record is preventing her from finding employment, making it hard to care for her 2 year old. Charge is preventing employment even though the case was dismissed because the DA had insufficient evidence. Criminal charge for Murder-Married. In Oct. 1989, ex-boyfriend broke into her house. Client went to San Antonio DA and they said they couldn't help her get a protective order. For one and a half years, ex had tried numerous times to kill Client with choking, weaponry, driving off the road, etc. Victim broke into client's house again in Oct. 1989 and Client threatened to shoot him and he attacked and Client shot him in the aorta and he died. Six months later a warrant was issued for her arrest. Case was dismissed for insufficient evidence, but since it is still on her file, public has access to it. So employers see that charge and automatically deny her.
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> 2003—Client would like to get an expungement of records. She is being turned down for job opportunities due to her records. Thirteen years ago, in 1990, she bounced a check for $15, and now has a record for theft of $15. Client was picked up and paid off the debt and then her probation was dismissed. Client has job interview on 04-30-03, and they will run a background check on her. Client is afraid that they will not give her employment again because of these records.
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> 2003—On or about 10/25/99 as Client was speeding down Loop 20, he was stopped by Sheriff's deputy who ran a check on him and mistakenly arrested him for a crime (theft) committed in San Antonio by a person with the same name who had jumped bail. When Client was stopped, he was informed that there was a warrant for his arrest, deputy read him his rights and was informed that more info re: arrest would be provided to him at the jail. Client went to court on 11/17/99 with his court-appointed attorney who took pictures of Client and the booking shot of the man who jumped bail and the case was dismissed. This wrongful arrest resulted in 9-hour detention in Webb Co. Jail. These felony charges keep coming up and he wants to apply for a federal job.
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> 2004—Client registered with Staff Search, a temporary employment agency, in 10/2003. He was given an assignment and then released. The agency said that they did a criminal background check and found out that client had 3 felonies and 11 or 12 misdemeanors. Client says that he has no criminal history and has never been arrested. He says that the worst he has is traffic tickets. He called the Bexar County police and they told him to call the Bexar County Courthouse and the Bexar County jail to find out what is on his record. Both verified that he has a clean background and gave him documents to prove it. He showed these to the temp agency. The temp agency said that the agency that they use for background checks found something different and they would not give him any employment assignments.

Our experience in helping people resolve problems like these indicates that the following four recurring issues merit the attention of policy makers:

1. Absence of Conviction

Currently throughout the nation, a person need *not* be proven guilty beyond a reasonable doubt before being punished for an alleged crime. This is because records of acquittals, dismissals, arrests, and other pre-trial proceedings are widely available and used to make employment decisions. Especially in the 90% of all criminal cases that are classified as misdemeanors, the adverse employment consequences that derive from the fact of arrest alone often carry a far greater and longer-lasting impact on the accused than any sentence that could be imposed by a judge upon a finding of guilt in a criminal case (upon proof of guilt beyond a reasonable doubt), or any damages that could be awarded in a civil case (upon proof by a preponderance of evidence). Thus, as to what can be the most serious and lasting impact upon the accused, no burden of proof at all need be met, our elaborate system of adversary justice is entirely bypassed, and a substantial power to punish is conferred upon arresting officers alone without any oversight. This is true as a practical matter regardless of whether a court would hold adverse employment consequences of an arrest record to be "punishment" in a constitutional sense.

In thousands of cases nationwide each year, criminal charges do not result in conviction. The main reasons are dismissal by the prosecution, extended prosecutorial delay, acquittal, and state procedures that enable prosecution to be deferred upon agreement that the charges will be dismissed after the accused completes an agreed course of action. In each such case, a person's ability to earn a livelihood may be destroyed even though no offense has been proved. Accordingly, rules are needed to set appropriate limits on when records of criminal charges that do not result in conviction may be available to or used by employers.

Most state laws allow people to seal or destroy most records of criminal charges that do not result in conviction. These laws rarely operate automatically, however, which means that only people with access to knowledge of their criminal records, and to the legal services necessary to seal or destroy those records, can avoid the employment consequences of those records. The poor often do not have access to the legal services necessary to correct their criminal records, and they are most likely to remain poor as those criminal records limit their employment opportunities. The fact that existing laws allow wealthier people to correct their criminal records while practically denying this opportunity to poorer people is an injustice that could be efficiently remedied in a number of ways. Particularly with today's technology, appropriate records could be automatically sealed or destroyed, or each agency maintaining criminal records could offer an ombudsman service to all individuals who challenge the agency's right to maintain a record.

Moreover, some state laws do not sufficiently address the employment consequences of pre-trial criminal records. For example, Texas has no speedy trial law, so only the federal speedy trial standard established in *Barker v. Wingo* applies (requiring courts to balance four factors—length of delay, reason for delay, efforts to avoid delay, and prejudice—in each individual case). Consequently, a prosecutor may leave a case pending for the entire limitations period in Texas, which is two years for misdemeanors and up to ten years for most felonies. An accused's only recourse during this time is to assert the federal speedy trial right and submit to the uncertain balancing test, or to simply endure the adverse employment consequences until the prosecutor decides to act. Some prosecutors do routinely issue letters stating that they do not intend to file formal charges after a certain time, but others are content to leave a complaint (which is an informal charging instrument that precedes an information or indictment) pending even when they are not interested in pursuing the case. After all, by doing nothing, prosecutors "win" by hurting the defendant's employment prospects during the limitations period. Accordingly, where delay caused by the prosecution extends for a year or some other fair standard, records of the arrest and other pre-trial proceedings should not be allowed to hurt a person's employment prospects.

In the end, these non-conviction records only exist because of government action, and if the government is unable or unwilling to prove its case after the passage of a fair amount of time, then the government itself should be responsible for minimizing the impact that it's unsuccessful efforts have upon the most vulnerable individuals in our society.

2. Inaccurate Records

Presumably no one wants inaccurate criminal records to be considered in employment decisions. But inaccuracies abound in the records that reach employers, usually because of mistaken identity or identity theft, which are both prevalent in communities where immigration documents are valued and where the number of common surnames is limited, *i.e.* in Latino communities. To minimize the indisputably unfair harm that results from inaccuracies, the following issues need to be addressed: (a) people need to have full and clear notice of when and how criminal records have been used to adversely affect their employment opportunities; (b) people need an easy way, i.e. a way that does not require legal representation, to challenge the accuracy of any criminal record that has adversely affected them; and (c) all public and private entities that publish records need to have policies and practices in place to ensure that any alleged inaccuracies in their records are promptly and completely addressed to minimize the harm that innocent people suffer from inaccurate records.

3. Uncounseled Misdemeanor Pleas

Even when the criminal record at issue is accurate and is a conviction, it may not be fair to allow the record to be considered for employment purposes when the record is the result of an uncounseled misdemeanor plea, particularly one that is several years old. Consider that before Texas implemented its Fair Defense Act beginning in 2002, counsel were simply never appointed for indigent misdemeanor defendants in many Texas counties regardless of the Supreme Court's direction in *Argersinger v. Hamlin*. *See* http://www.equaljusticecenter.org/Fair%20Defense%20Reference%20Report.pdf. Instead, indigent misdemeanor defendants were routinely jailed as pre-trial detainees. Only after the prosecutor believed that adequate time had been served in pre-trial detention would the prosecutor file formal charges and cause the defendant to be brought to court. Once there, a prosecutor would await the defendant, not the judge. The prosecutor would personally approach the unrepresented defendant in court to offer a deal: plead guilty in exchange for a sentence of "time served." Virtually everyone waived counsel and pleaded guilty in response to such offers. No one knew or explained the lasting employment consequences of such a plea. The indigent defendants reasonably believed that they could get their immediate problem behind them by doing as the prosecutor suggested, and that little reason remained to resist the charges.

Such suspect practices continue in Texas today, albeit to a lesser extent as the Fair Defense Act is implemented. They have resulted in our receipt of the following types of complaints:

> 2004—Client wants her record expunged of assault against a family member (misdemeanor). 12/23/1996: My husband had not been home for around 6 weeks. He would come and go. I went out looking for him because we were just evicted and it was two days until Christmas. He had stopped paying the rent. I was driving around looking for him and I saw his car at a convenience store. I stopped. There were two women in the car. I learned later that one of the girls in the car was his 17 year old girlfriend. I walked into the store and we started arguing. The store clerk asked us to take it outside. I walked outside, but he did not come outside. I was really upset because it was so close to Christmas and we had just been evicted. I got into the car with the two girls and told them

to get out or come with me because I was taking the car. The 17 year old girl was really upset because she did not know he was married. He pulled me out of the car. He was slapping me. I was struggling, so he started punching me. I pushed him away. The Killeen police arrived. The first police officer said he saw no bruises and asked me if I wanted to press charges. I said no. Supervisor showed up. Supervisor told him that they still were going to arrest Husband because state was pressing charges. They explained to him that they would have to take him to jail. His girlfriend got upset and told him that he better tell them that I had hit him or he was not allowed to come home. His girlfriend and he said that I had hit him, so the police took us both to jail. We were taken to jail in the SAME car. He was making threats to me the whole time. There was closed glass in between us and the front, so the police could not hear what was going on. He was telling me to watch my back, and that when he got out he was going to get me. I went to Bell County Jail. Bailed out within 6 hours. Asked for a Protective Order when I got out of jail, and emergency protective order was issued but expired after 31 days. Court date was set for February 1997. When I went to Court, I was told by court personnel (not the judge, but someone there at the court) that if I plead "no contest" or "guilty," then I would have to retain an attorney. All the defendants (approx. 30) were spoken to at the same time. Some court personnel was explaining about how things were going to go in the courtroom. They said that if we plead "no contest" or " not guilty" that we would have to retain an attorney. One of the other defendants asked how much an attorney would cost. The court person then said it was around $500 to retain an atty, but that we would have to look around ourselves. Everyone was definitely left with the impression that we would have to pay for counsel. I did not have money to pay an attorney, so I plead guilty. Sentence was a fine and time served in jail. I thought the matter was behind me but years later it has now come up on criminal background checks and my employer of four years, a school district, wants me to clear it or they will have to let me go.

2005—On 05/03/2005, Client was arrested for shoplifting, said she doesn't think she was advised of her rights. Client and her husband were shopping at a grocery store. Client's husband took a package of pacifiers off the store shelf and put the package in his grocery basket while Client was in a different aisle. Client and Husband later started arguing in a different part of the store. Client grabbed the package of pacifiers out of husband's basket and threw the package back in her husband's grocery basket. They split up again and met up at the checkout line. After they checked out, as Client was approaching the store exit, her Husband walked up behind her. As he did, either 3 store security or 3 plain clothes police officers approached Client and told her to stop. They presented Client with the empty pacifier package. She denied taking them. They instructed Client and Husband to empty their pockets and Client and her Husband complied. Husband pulled the pacifiers out of his pockets and told the officers that Client had nothing to do with the attempted theft. At no point did Client ask for a lawyer and she doesn't think that she was ever advised of her right to court appointed counsel. Client's Husband plead guilty at arraignment on 05/04/2005. Client plead not guilty and when she heard that her bond was $100, she became concerned because she couldn't afford the bond. Client then told the magistrate that she'd change her plea to guilty. The judge asked her if she was changing her plea, and she replied that she was. The judge then accepted her plea and sentenced Client to a $254 fine. Client has paid $30 towards the fine, but now claims actual innocence and would like to know how she can prove her actual innocence.

These types of cases commonly involve two family members or close friends, usually a husband and wife, and often an abusive husband. They always present the accused with a choice that is simple on the surface: resolve your legal problems simply and quickly, or undertake a lengthy and uncertain effort to assert your innocence. Without the advice of counsel, the risk of an unwise choice is compounded.

Of course, state and federal habeas challenges are theoretically available to people whose guilty pleas were not knowing or voluntary. But indigent convicted misdemeanor offenders have no access to the legal representation that is necessary to bring these challenges, so the challenges essentially exist in theory only. Moreover, the only practical reasons that a misdemeanor conviction resulting in a sentence of time served would ever be challenged after the fact are when the conviction is used to enhance a sentence on a subsequent criminal charge, or when the conviction is used to adversely affect employment.

While habeas is likely the appropriate route for enhancement cases, it is entirely too costly and time-consuming for employment cases. A low-cost bright-line alternative that would promote fairness in these cases might be that after a certain time without any criminal activity, say two years, records of a conviction that is based on an uncounseled plea in a misdemeanor must be sealed from employers unless the record indicates that the defendant entered the plea while aware of the potential for adverse employment consequences.

Of course in the future, criminal defense lawyers and judges must also do a better job of educating themselves about the employment consequences of criminal records, and of informing criminal defendants of these consequences as the defendants consider their options.

4. Relevance

Policy makers should consider whether some offenses are so remote from employer interests as to time or substance that they should not be available for consideration in employment decisions. A $15 bad check that was repaid 13 years ago arguably says little about a person's current trustworthiness. The fact that a man entered a Humane Society outdoor kennel after hours to retrieve his dog and was sentenced to an apology also says little about his trustworthiness. By enabling employers to access all criminal records regardless of relevance, governments may inhibit rehabilitation, promote any recidivism that is borne of unemployment, waste employers' time in investigating irrelevant matters, and deny society the labor of some perfectly competent and productive people.

Only judges or policy makers can draw the lines as to what offenses should be considered irrelevant. Our only point is that policy makers should attempt to draw a line, since the tendency of some records to mislead is much greater than their probative value, and adverse public policy consequences will result from the absence of a line. Of course, the burden of proving irrelevance could fairly be placed upon the person seeking to seal a criminal record, but a mechanism for doing so should exist, and it should be simple enough that substantial resources are not required to access it.

In conclusion, we emphasize the following comments:

- criminal background checks for employment, insurance, credit, housing, and public benefits are increasingly raising fairness concerns among low-income families, particularly as to the four issues described above;

- clearer substantive and procedural rules for access to and use of criminal background information are needed to balance the concerns of all stakeholders, and to ensure that fair procedures are available to all regardless of economic resources; and

- a significant federal role in producing substantive and procedural rules and in administering those rules is warranted because (a) criminal background information is available on an inter-state basis, (b) most employment affects inter-state commerce, (c) employees themselves ordinarily move in inter-state commerce; (d) employment decisions directly impact need for federal public benefits, and (e) centralized administration can promote efficiency and accuracy, which may in turn promote security.

We thank you kindly for beginning to focus upon these critical issues, we hope that you find our perspective of some benefit at this stage, and we look forward to answering any questions that you may have about our work or about specific proposals that may address the issues we have raised.

Sincerely,

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