

August 5, 2005

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: Employment Screening for Criminal Records (OLP Docket No. 100)
Attorney General's Recommendations to Congress

Dear Mr. Hertling:

Community Legal Services, Inc. ("CLS") of Philadelphia, Pennsylvania appreciates this opportunity to briefly comment on the Attorney General's initiative to evaluate the nation's policies related to criminal background checks conducted for employment purposes and to make recommendations for reform to Congress. (70 Fed.Reg. 32849, June 6, 2005).

Based on our extensive representation of ex-offenders in employment cases, CLS provides three overall recommendations for your consideration.

- (1) Laws disqualifying ex-offenders from employment should be narrowly tailored and should permit ex-offenders to show their rehabilitation.
- (2) Legal protections for ex-offenders against inappropriate employment rejections based on their criminal records should be better publicized, better enforced, and enhanced.
- (3) Criminal history record accuracy must be improved.

Background on Community Legal Services, Inc.

CLS provides free legal services to low income Philadelphians. We have developed expertise in the unique legal problems that ex-offenders face in the practice areas of employment, public benefits, child welfare, and public housing (see Attachment A, "Community Legal Services' Legal and Policy Advocacy Assisting Ex-Offenders"). With the Center for Law and Social Policy, CLS has written an influential publication on the civil consequences of having a criminal record, entitled Every Door

Closed: Barriers Facing Parents With Criminal Records. This report can be found at http://www.clasp.org/publications/every_door_closed.pdf.

The representation of ex-offenders is a prominent part of the work of CLS's Employment Unit. Although our Employment Unit has existed for more than 30 years, client demand for representation on criminal record issues has emerged only in the last decade. Now, criminal record problems constitute the plurality of our individual employment cases. In 2004, 287 of our 957 new employment files were requests for representation of ex-offenders with problems caused by their criminal records. CLS has developed many strategies to meet this client demand (see Attachment B, "Community Legal Services' Representation of Ex-Offenders in Employment Cases").

From representing many hundreds of ex-offenders with employment problems over the years, CLS has a wealth of experience from which to offer the observations and recommendations made below.

Recommendation #1: Laws disqualifying ex-offenders from employment should be narrowly tailored and should permit ex-offenders to show their rehabilitation.

The proliferation of federal and state statutes which prohibit the employment of ex-offenders in countless professions has been well documented. We encounter such laws on a daily basis in our practice, affecting our clients seeking in work in health care, child care, schools, banks, and many other fields.

Pennsylvania law offers one of the most extreme examples of these statutes. The Older Adults Protective Services Act, 35 P.S. § 10225.503(a) ("OAPSA"), prohibits the employment of many ex-offenders in long term care facilities such as nursing homes, assisted living facilities, and group homes for persons with mentally disabilities, and the placement of ex-offenders by home health care agencies. The criminal offenses which preclude employment range from homicide to library book theft, and there is no time limit on the disqualifications – that is, they are lifetime bans on employment in the facilities that are covered by the law.

CLS discovered that the life time disqualifications had been passed by our state legislature when our lobby suddenly began to fill with clients who were being told that they could no longer work in the field in which many of them had made a career. Some had worked in long term care facilities for decades. With private bar co-counsel, CLS challenged OAPSA under the Pennsylvania Constitution. We were ultimately successful. Nixon v. Commonwealth, 839 A.2d 277 (Pa. 2003). However, the statute has not yet been amended by the state legislature to correct its constitutional deficiencies.

CLS recognizes that some laws prohibiting the employment of ex-offenders are justifiable, particularly where the employees work with a vulnerable population. Indeed, CLS represents residents in the long term care facilities covered by OAPSA as well as workers in those organizations. However, prohibitory statutes are often overbroad, unnecessarily precluding the employment of good workers. From our work both to challenge OAPSA and to fashion an

appropriate alternative (as well as our work with similar statutes in other professional fields), we have identified the following principles for a fair, narrowly tailored law.

- (1) *Disqualifications should have time limits suitable to the offense, and lifetime disqualifications should be disfavored.* The more time that has passed since a criminal offense, the less likely that the ex-offender will recidivate. Moreover, lifetime disqualifications are particularly unfair for more minor offenses, especially misdemeanors.
- (2) *Statutes prohibiting the employment of ex-offenders should provide an exemption process for individualized consideration of whether a particular ex-offender would be a suitable employee.* To balance the arbitrariness of disqualifications of set durations, ex-offenders should be permitted to establish rehabilitation and other indicia of suitability for work before a hearing officer. Such determinations already are routinely made by occupational licensing bodies. Circumstances which might establish suitability for employment include: employment history; the underlying circumstances of the offense; successful substance abuse rehabilitation; and references from the community.
- (3) *Persons already working in a profession should not be precluded from employment when a statute prohibiting the employment of ex-offenders is enacted.* It is counterproductive to mandate the unemployment of incumbent workers who have been performing their jobs appropriately. In our experience, employers are very unhappy to be forced to terminate workers who have been doing a fine job because such a statute has been passed. And “grandfathering” of ex-offenders into only their current job also makes no sense. One of the tragedies of OAPSA was that persons who were permitted to continue employment in a covered facility but who unwittingly quit for a different job were prohibited from working in the new job, or indeed any other job in the field.

Recommendation #2: Legal protections for ex-offenders against inappropriate employment rejections based on their criminal records should be better publicized, better enforced, and enhanced.

Notwithstanding the laws discussed above, in most circumstances employers are not prohibited by law from hiring ex-offenders, nor are they required by law to conduct criminal background checks. But an ever increasing number of employers choose to conduct criminal record checks and to broadly reject job applicants with criminal records. Even ex-offenders seeking work in professions that are not heavily regulated for criminal record purposes often find that their record acts as an absolute bar to employment, because employers simply will not consider them. This is true not only for former prisoners who have recently re-entered their communities, but even for ex-offenders with old and minor records and for persons who were arrested but never convicted.

Although they are little known, some employment protections for ex-offenders do exist. Under federal law, the most commonly applicable employment protection is Title VII of the Civil Rights

Act of 1964, 42 U.S.C. § 2000e *et seq.* Decisional law and policy statements of the Equal Employment Opportunity Commission ("EEOC") have clearly established that employment discrimination against ex-offenders can have a racially disparate impact against African-Americans and Hispanics that violates Title VII.

The basic analysis of such a disparate impact claim is laid out in EEOC's "Policy Statement on the Issue of Conviction Records Under Title VII of the Civil Rights Act of 1964, as amended 42 U.S.C. §§ 2000e *et seq.* (1982)" (Feb. 4, 1987) ("the February, 1987 Statement"), which can be found in the EEOC Compliance Manual, Vol. II, Appendix 604-A.

The February, 1987 Statement reiterates a prior position of the EEOC: that because a policy or practice of excluding persons from employment on the basis of their conviction records has an adverse impact on African-Americans, such a policy violates Title VII unless the employer demonstrates a justifying business necessity. To establish business necessity, the employer must show its justification by reference to three factors:

- (1) The nature of the gravity of the offense or offenses;
- (2) The time that has passed since the conviction and/or the completion of the sentence; and
- (3) The nature of the job held or sought.

The February, 1987 Statement summarizes these factors as concerning the "job relatedness of the conviction" and "the time frame involved." It also explains that the first factor includes both the circumstances and the number of the offenses.

Arrests not resulting in convictions are addressed in EEOC's "Policy Guidance on the Consideration of Arrest Records in Employment Decisions under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.* (1982)" (Sept. 7, 1990) ("the 1990 Statement"), also contained in Section 604 of the EEOC Compliance Manual, Vol. II. The 1990 Statement reaffirms the analysis of the February, 1987 Statement. Moreover, because arrests do not constitute proof of the underlying criminal conduct alleged, an additional inquiry is required in the arrest context:

Even where the conduct alleged in the arrest record is related to the job at issue, the employer must evaluate whether the arrest record reflects the applicant's conduct. It should, therefore, examine the surrounding circumstances, offer the applicant or employee an opportunity to explain, and, if he or she denies engaging in the conduct, make the follow-up inquiries necessary to evaluate his/her credibility.

(page 2). Notably, the guidance provides, "Since business justification rests on issues of job relatedness and credibility, a blanket exclusion of people with arrest records will almost never withstand scrutiny." *Id.* at 5 (citing Gregory v. Litton Systems, 316 F. Supp. 401 (C.D. Cal. 1970), modified on other grounds, 472 F.2d 631 (9th Cir. 1972)).

Similarly, some states have laws that prohibit employers from rejecting job applicants based on convictions that are not job-related. Under Pennsylvania law, for instance, convictions may only be considered in hiring decisions to the extent which they relate to the applicant's suitability for employment for a particular job. 18 Pa. C.S.A. § 9125(b). That state law has been read to mean that "any experience with the criminal justice system which falls short of a conviction is not a fair consideration by an employer considering hiring an individual with that experience." Cisco v. United Parcel Services, Inc., 476 A.2d 1340, 1343 (Pa. Super. 1984).

Additional protections exist where a criminal record report is provided to an employer by a credit reporting agency ("CRA"), because the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. § 1681 *et seq.*, is applicable. See Beaudette, FTC Informal Staff Opinion Letter, June 9, 1998 (available at <http://www.ftc.gov/os/statutes/fcra/beaudett.htm>). Among the duties that FCRA imposes when an employer uses a consumer report of a criminal record provided by a CRA for purposes of a hiring decision are the following.

- ▶ The employer must provide a clear written notice to the job applicant that it may obtain a consumer report. 15 U.S.C. § 1681b(b)(2). It also must obtain written authorization from the job applicant to get the report. 15 U.S.C. § 1681b(b)(3). Therefore, in situations where a CRA is involved, ex-offenders ought to be made aware that their criminal record will be scrutinized, which often is not the case when criminal records are obtained directly by the employer from public sources.
- ▶ If the employer intends to take adverse action based on the consumer report, a copy of the report and a Federal Trade Commission ("FTC") Summary of Rights must be provided to the job applicant before the action is taken. 15 U.S.C. § 1681b(b)(3). The obvious reason for this requirement is to permit a job applicant to address the report before an employment decision is made. If this requirement were satisfied, ex-offenders would have a rare chance to check whether their criminal record were correctly reported and to address whether they would be suitable employees for the particular job notwithstanding their records.
- ▶ Afterwards, the employer, as a user of a consumer report, must notify the job applicant that an adverse decision was made as a result of the report and must provide, among other things, the name, address and telephone number of the CRA and the right to dispute the accuracy or completeness of the report. 15 U.S.C. § 1681m(a).

Despite these well established legal protections, ex-offenders find themselves repeatedly rejected for offenses that are minor, old, and/or completely unrelated to the position for which they are applying (and often even for arrests for which they were not convicted). Few employers or ex-offenders know that these protections exist. And even when an ex-offender wants to challenge an employment decision, legal assistance is seldom available. Moreover, not all ex-offenders are covered by the Title VII protections, as they apply only to the African-American and Hispanic populations which bear the racially disparate impact, so other ex-offenders may be without remedies if they live in the many states that do not provide any employment protections for persons with criminal records.

There are several ways in which the under-inclusive and under-utilized remedies described above can be improved.

- (1) *EEOC should improve its public education and enforcement efforts regarding Title VII violations against ex-offenders.* If EEOC were to engage in a public awareness campaign concerning the applicability of Title VII to minority ex-offenders, discrimination charges surely would follow, given the prevalence such discrimination. Simply by raising the profile of this issue, the entire employment environment for ex-offenders could be improved. Public education efforts by EEOC should be coupled with high prioritization of these charges for investigation and enforcement. To date, EEOC's efforts to address this extreme common form of racial discrimination have been woefully inadequate.
- (2) *The FTC should improve its public education and enforcement efforts concerning FCRA.* In our experience, few ex-offenders who have lost jobs because of consumer reports of their criminal record have experienced compliance with the FCRA requirements. Even where CRA boilerplate states the FCRA obligations, employers seldom appear knowledgeable about them. Indeed, in a recent case that we handled, an attorney for an employer initially insisted that FCRA does not apply to such reports (before conceding to multiple violations and settling the case). Like EEOC, FTC must step up to the plate to specifically address this issue, particularly given the burgeoning CRA industry for criminal records that can be discovered in a quick Google search.
- (3) *Federal and state laws providing employment protections to ex-offenders should be enacted.* The gaps in coverage discussed above should be closed, at the federal and/or the state level, adopting the job-relatedness principles embedded in the remedies discussed above. The formulation in EEOC's policy guidances is a model worth replicating.

Recommendation #3: Criminal history record accuracy must be improved.

CLS represents many persons who have been harmed in their efforts to find employment because their criminal records have been incorrectly reported, by the original public source or by a CRA. In some cases, innocent people with clean criminal records are caught in a Kafkaesque situation where they must prove that a seemingly infallible public record is wrong, or that they are not the person to whom a record is being reported. In others, an ex-offender who does have a criminal record is further prejudiced by the reporting of offenses that are incorrect. If employers are going to rely so heavily on criminal records in making employment decisions, then surely it is of utmost importance that those records be correct.

The most extreme example of this problem occurs when states refuse to appropriately restore the correct criminal records of victims of criminal identity theft. Criminal identity theft begins when a person who is arrested gives the name, date of birth, and/or social security number of another person. The person whose name and other information were fraudulently given to law enforcement (the

“criminal identity theft victim”) then is linked with the criminal record of the arrests, convictions and bench warrants that belong to the person who was arrested (“the criminal identity thief”). For a case study of criminal identity theft, see the story of Jermaine Flood in Attachment C.

CLS recently reached a pre-litigation settlement with the Pennsylvania State Police (“the PSP”) over this phenomenon, because the PSP did not sever the link between the record of the criminal identity theft victim and that of the criminal identity thief. Unless the victim’s criminal record was sought by using a procedure unfamiliar to most employers, the PSP produced the record of the identity thief when a background check was done on a criminal identity theft victim. In the settlement, the PSP will implement a technical solution in its database that allows “flagging” in the cases of established identity theft (which can be definitively proved by comparing the fingerprints of the victim to those taken at the arrest) so that the identity thief’s crimes will not be reported to the record of the victim.

A similar settlement has been reached by public interest lawyers with the Michigan State Police. However, we learned through our investigation of this problem that very few states have adequate procedures to remedy criminal identity theft. The consequence is that lives of innocent victims are destroyed because of circumstances not their fault and beyond their control, when the imposter’s criminal record results in their being denied employment, imprisoned on bench warrants, and the like.

Criminal records can also be erroneously reported for innocent people because the search criteria of a database permit “false positives” – that is, a criminal record is attributed to someone who is not the person charged with the offenses. While law enforcement often performs criminal record searches by fingerprints (Federal Bureau of Investigation (“FBI”) searches, for instance, are virtually all fingerprint-based), criminal background checks by the public usually are name-based. In name-based checks, the search criteria typically are some combination of name, date of birth, year of birth, and social security number. False positives are least likely to occur if the database requires a social security number for a match; more likely to occur if only a date of birth (and not a social security number) must be matched; and even more likely to occur if only the year of birth must match. Name-based checks in which only the names must match are extremely unreliable, yet such checks are done in some circumstances.

The stories of Erica Mackie and Barbara Still in Attachment C illustrate two cases where others’ criminal records were attributed to them because the search criteria of the Philadelphia criminal courts’ database fostered confusion. Although the courts’ system permits matches of date of birth (not social security number), this was not possible in Ms. Still’s case, because there is no date of birth in the court record. Consequently, Ms. Still has been saddled with the record of another individual with the same name. In Ms. Mackie’s case, a CRA searching criminal courts records combined her twin brother Eric’s record with hers. Obviously, they share the same date of birth, and without social security numbers to distinguish their records, the CRA erroneously determined that the offenses belonged to the same person.

In other situations, an erroneous record is less dramatically produced, but no less damaging. We regularly see criminal records in which there are errors. We have seen cases where incorrect data entry has resulted in a listing of the wrong offense or the attribution of an offense to the wrong individual; where the same offense has been listed twice (making the record look like there were two offenses); and where the disposition of arrests has not been reported long after charges were dropped. Indeed, in the most recent audit of the criminal record system for Pennsylvania, the Office of the Attorney General of Pennsylvania determined that criminal court and Pennsylvania State Police records matched less than 80% of the time on data such as charges, name, date of birth, and social security number, and less than 70% of the time on disposition of the charges. Office of the Attorney General, Commonwealth of Pennsylvania, 2000-2001 Audit Report, Criminal History Record Information Act, Graph 15.

The accuracy of criminal records should be improved by the following steps.

- (1) *Every state should implement and publicize a sound procedure for correcting criminal identity theft.* The procedures soon to be implemented by the Pennsylvania and Michigan State Police could be looked to as models for states that continue to disseminate erroneous criminal records for criminal identity theft victims. Alternatively, the state of Virginia's practice offers another alternative: expunge the record of the victim.
- (2) *Systems for conducting named-based criminal record checks should contain adequate safeguards so that false positives are avoided.* Date of birth and social security number should be mandatory search criteria. Never should "matches" be provided for solely a name match. Moreover, because false positives can be avoided in a fingerprint-based system, the FBI should continue to avoid providing name-based checks.
- (3) *Criminal record repositories should implement procedures that permit easy challenge and correction of inaccuracies in the criminal records that they disseminate.*

* * * * *

Should further information on any of the subjects that we have addressed be desired, please feel free to contact me at **215-981-3719**. Thank you for this opportunity to comment on these issues that are critical to ex-offenders.

Very truly yours,



SHARON M. DIETRICH
Managing Attorney

SMD

Attachment A

Community Legal Services' Legal and Policy Advocacy Assisting Ex-Offenders

Community Legal Services of Philadelphia has developed expertise in the civil (i.e., non-criminal) legal problems faced by ex-offenders. Although CLS does not have an "ex-offender unit," per se, several of our legal units do provide assistance to ex-offenders with civil legal problems caused by their criminal records. Those units include:

- ◆ Employment;
- ◆ Public benefits;
- ◆ Family advocacy (representing parents involved with the Philadelphia Department of Human Services);
- ◆ Public housing and Section 8.

Highlights of CLS's systemic advocacy efforts for ex-offenders include the following:

- ◆ We have co-counseled litigation under the state constitution challenging the Pennsylvania Older Adults Protective Services Act (OAPSA), which created a lifetime bar preventing most ex-offenders from working in nursing homes, home health care agencies and other long-term care facilities. On December 11, 2001, the Pennsylvania Commonwealth Court ruled in our favor by a five to two vote. Nixon v. Commonwealth of Pennsylvania, 789 A.2d 376 (Pa. Commw. 2001). The State appealed, and on December 30, 2003, the Pennsylvania Supreme Court also ruled in our favor by a six to one vote. Nixon v. Commonwealth, 839 A.2d 277 (Pa. 2003).
- ◆ As a Senior Soros Justice Fellow, CLS Supervising Attorney Amy Hirsch prepared the most in-depth study of the effect of the TANF and food stamps felony drug ban. Amy E. Hirsch, 'Some Days Are Harder Than Hard': Welfare Reform and Women with Drug Convictions in Pennsylvania (Center on Law and Social Policy, December, 1999). Ms. Hirsch has led efforts to educate the Pennsylvania legislature about the harmful effects of the felony drug ban. On December 23, 2003, the Governor signed Act 44 of 2003, which eliminated the ban on cash assistance and food stamps in Pennsylvania.
- ◆ In April 2002, CLS joined the Philadelphia Consensus Group on Ex-Offender Reentry and Reintegration, facilitated by Search for Common Ground. This group includes representatives of the prisons, the district attorney, the defender association, the courts, the probation and parole department, service providers, and other stakeholders. The Group

analyzed the barriers to prisoner reintegration in Philadelphia and made recommendations for their removal. Its report is available from our website.

- ◆ Our Family Advocacy Unit has begun efforts to improve the ability of incarcerated parents to participate in child welfare system proceedings, increase visitation, and improve services, with the goal of strengthening families and avoiding the termination of their parental rights. We are advocating for changes in the Department of Human Services, the Philadelphia Prison System, and the Family Court to improve their systems to better serve incarcerated parents and their children.
- ◆ The culmination of our work to date for ex-offenders was the release in May 2002 of Every Door Closed: Barriers Facing Parents With Criminal Records, a joint publication of the Center for Law and Social Policy and CLS, funded by the Charles Stewart Mott Foundation. The report documents the legal challenges that parents released from incarceration will face in successfully caring for their children, finding work, acquiring safe housing, going to school, and accessing public benefits. An “Every Door Closed Action Agenda” series of one- page fact sheets based on recommendations from the report was released in 2003 and has been widely distributed to policymakers across the country. The full report, executive summary, and fact sheets are available on CLASP’s website, and can be accessed from a link on CLS’s website.

CLS also provides frequent community education sessions for social service staff and participants in welfare-to-work programs, drug and alcohol treatment programs, AIDS education programs, ex-offender groups, the Philadelphia jails, and other settings in which we reach significant numbers of people with criminal records and their advocates.

To learn more about CLS’s work for ex-offenders, and to view our reports and community education, see our website at: http://www.clsphila.org/Ex-Offenders_Information.htm.

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Attachment B

Community Legal Services' Representation of Ex-Offenders in Employment Cases

*Note that CLS represents only low income Philadelphia residents.
Also, our ability to provide representation depends on the merits of a case and
the availability of staff.*

Cases in which CLS may be able to represent:

- An ex-offender is denied a job or fired because of his/her criminal record even though the record is not related to the job and/or is old. CLS might be able to write a demand letter to the employer, file an EEOC (discrimination) charge, or in extraordinary cases, file a lawsuit.*
- An ex-offender cannot work in a nursing home, home health care agency, mental health or mental retardation facility, or other facilities covered by the Older Adults Protective Services Act (OAPSA). In some cases, employers might "over-apply" the law, turning down people with certain convictions who could be employed despite the law. In other cases, there might be an exception to the law, such as when a facility is sold and the person with the record already works there. In such cases, CLS can try to convince the employer that it can and should hire or keep employing the person. But in many cases, the person will not be allowed to work under OAPSA. CLS is working to curtail the law, and we will talk to workers who are affected so we can tell them if and when our efforts are successful and advise them about their options in the meantime.*
- An ex-offender is denied entrance to a job training program for a profession for which his/her record does not prohibit the person from working. CLS can try to convince the training program that the person should be admitted.*
- An ex-offender's occupational license is threatened because of his/her criminal record. We might be able to represent the person in a licensing hearing.*
- An ex-offender who is providing child care for a parent is denied a Welfare Department subsidy. DPW may not have proper grounds for denying the subsidy. We can look into it.*
- A person who was adjudicated delinquent as a juvenile is having problems with that record. CLS can determine whether the employment problem is in violation of the law and can advise whether the record might be able to be expunged.*
- An ex-offender completed Accelerated Rehabilitative Disposition (ARD) in one of the counties, but his/her record has not been expunged. We can try to help get the expungement if there is no legal assistance for that problem available in the county. In Philadelphia, the*

Defender Association handles these expungements. We provide assistance in these cases only if employment is affected by the criminal record.

- ❑ *An ex-offender is willing to do the work to try to get a pardon but wants legal advice.* Except for cases involving ARD, almost all convictions can only be erased by a Governor's pardon. The person applying for a pardon must be prepared to do the legwork, such as collecting documents and information and writing answers to the pardon application. But if he/she is committed to the process, CLS may be able to provide advice and, in rare cases, representation at a pardon board hearing. We provide assistance in these cases only if employment is affected by the criminal record.
- ❑ *A person needs expungement of arrests for which he/she was not convicted.* CLS handles such cases in rare circumstances. The Defender Association of Philadelphia provides representation in cases where they represented the person in the criminal case; in other cases, the person can seek assistance from Pre-Trial Services. We would only consider providing assistance if neither of these organizations can help and if employment is affected by the criminal record.
- ❑ *A person who is not an ex-offender has a criminal record that is wrong.* An example would be a case in which the person is a victim of identity theft. CLS can try to help correct the record. We provide assistance in these cases only if employment is affected by the criminal record.

Cases in which CLS usually cannot help or will offer only brief advice:

- ❑ *CLS cannot help ex-offenders find jobs.* We are not an employment agency or job coaches. We do have a resource manual of programs that might be able to help.
- ❑ *CLS will not provide representation in criminal proceedings.* Again, these services are provided by the Defender Association.

People seeking representation by CLS's Employment Unit should begin by coming to our Intake Unit, Monday through Friday, 9:00 a.m. to noon, at 1424 Chestnut Street, Philadelphia. The intake paralegal will screen for eligibility, take information, and collect documents. The new file will then be assigned to the Employment Unit.

For more information about ex-offenders' legal rights, see CLS's website at http://www.elsphila.org/Ex-Offenders_Information.htm

Prepared, 2/21/03

Attachment C

Case Studies of Inaccurate Criminal Court Records

Community Legal Services, Inc. ("CLS") has handled the cases of many people who have lost jobs because of public misunderstanding of Philadelphia Criminal Justice Center ("CJC") records. A few examples of those cases follow.

In some cases, the court records do not clearly identify the person who is the subject of the case.

Barbara Still came to CLS after being denied badly needed employment by a temp agency which told her that she has a criminal record and an open bench warrant. In fact, CJC records show a finding of contempt of court and an open bench warrant against a Barbara Still, from 1999. However, Ms. Still states that she was never even in a court until recently. Moreover, there is another Barbara Still listed in the Philadelphia telephone book. But the scant information in the CJC record provides almost no information about the Barbara Still who was found in contempt, other than an address. The CJC record does not even contain a date of birth, and there are no fingerprints or photos on file. Ms. Still faces the Kafkaesque prospect of showing that she is not the person who is wanted. And even if she did, the record of the other Barbara Still would remain in the court index, for employers to believe is hers.

In some cases, the court records have been misinterpreted.

Erica Mackie has one minor offense on her criminal record, which is in the process of being expunged. But she was removed from her job when a credit reporting agency produced a report showing a large list of criminal offenses. Ms. Mackie was amazed to find that the credit reporting agency, which had used CJC records, had mixed in the criminal cases of her twin brother Eric with her case. The credit report clearly indicated that all but one of the sets of offenses were attributed to "Eric" and that the remaining set of charges was attributed to "Erica." Despite Ms. Mackie's protestations that the record was wrong and that she should be permitted to continue working, the employer sent Ms. Mackie on a chase around the City with the instruction to "fix" a record that was wrong only because the credit agency misunderstood the CJC records. She was unemployed for three months as a result of this fiasco.

In some cases, the court records are wrongly attributed to a victim of criminal identity theft.

"Criminal identity theft" begins when a person who is arrested gives the name, date of birth, and/or social security number of another person. The person whose name and other information were fraudulently given to law enforcement (the "criminal identity theft victim") then is saddled with the criminal record of all of the arrests, convictions and bench warrants that belong to the person who was arrested ("the criminal identity thief").

The Pennsylvania State Police (“the PSP”) refuses to expunge its records in cases where criminal identity theft was proved by comparison of the victim’s fingerprints to those taken from the person who was arrested. Often, the PSP produced the identity thief’s criminal record in response to a request for the record of the victim. CLS, with co-counsel, negotiated a pre-litigation settlement with the PSP, so that it will no longer give incorrect criminal records for criminal identity theft victims. However, some of these clients still face problems if background checkers examine their court records rather than their PSP records.

Jermaine Flood is one of the people whom CLS represented in its negotiations with the PSP. Mr. Flood has never been arrested. He has no criminal record of his own, but he has been the victim of criminal identity theft. This has been conclusively proved, because the PSP compared Mr. Flood’s fingerprints to those taken from the person who was arrested. Mr. Flood’s cousin Amin is the person who has used Jermaine’s identity when arrested. When background checks are done, Amin’s substantial record has been produced repeatedly as though it were Jermaine’s record.

The PSP settlement will not help Mr. Flood if a credit reporting agency searches the criminal court records rather than requesting a PSP record check. Because of Amin’s impersonation of his cousin, a person who searches for Jermaine Flood in the CJC computer will find that Police Photo (“PP”) No. 734605 has been assigned to Jermaine. As a result, when one searches for cases assigned to this PP number, a lengthy report is generated for Jermaine Flood even though it actually reflects the criminal record of his cousin who used Jermaine’s identity.

As a result of his cousin’s record being produced as his, Jermaine has suffered severe employment consequences. He has identified at least seven job opportunities that he lost just in early 2004 because of his cousin’s record being produced as his. He will continue to face these problems if background checkers check his name in the criminal court records.