

Testimony of
Maurice Emsellem
National Employment Law Project

Hearing Before the
U.S. Congress, House of Representatives,
Judiciary Committee, Subcommittee on
Crime, Terrorism & Homeland Security

April 26, 2007

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Chairman Scott and members of the Committee, thank you for this opportunity to testify on the subject of the growing reliance on criminal background checks on the job, which affects about one in five adults in the United States who have a criminal record that will show up on a routine criminal background check.

My name is Maurice Emsellem, and I am the Policy Director for the National Employment Law Project (NELP), a non-profit research and advocacy organization that specializes in the employment rights of people with criminal records. NELP's Second Chance Labor Project promotes a more fair and effective system of employment screening for criminal records. The Project seeks to protect public safety and security while supporting the rehabilitative value of work and the basic employment rights of all workers, including those with a criminal record.

At this critical juncture in the evolution of criminal background checks for employment, it is especially important that Congress properly evaluate the impact and effectiveness of current federal policy. Before considering proposals by the Attorney General to further expand criminal background checks and access to the FBI's criminal records by more employers and the growing industry of private screening firms, it is also necessary to scrutinize the problem of incomplete FBI records and other areas of concern that seriously prejudice large numbers of workers, especially people of color.

The good news is that there are also new model policies in federal, state and local laws that can significantly reduce unnecessary barriers to employment of people with criminal records. If incorporated more broadly into federal law and policy, as described below, these innovative reforms can go a long way to create a more fair and effective process of criminal background checks that serves the interests of workers, employers and the community.

I. The Scope & Impact of Criminal Background Checks for Employment

Before evaluating the federal criminal background check laws and policies, it helps to appreciate the vast expansion of criminal background checks of today's workers driven by concerns for national security and public safety and the extent to which this new reality impacts everyday workers and their families.

In 2006, the FBI performed more fingerprint-based background checks for civil purposes than for criminal investigations. In the past ten years, the number of civil requests for criminal records has more than doubled, exceeding 12.5 million in 2006. In 2004, nearly 5 million of the FBI's criminal record requests were conducted specifically for employment and licensing purposes.¹

¹ Steve Fisher, FBI, Criminal Justice Information Services Division, Office of Multimedia, Response to Information Request from Maurice Emsellem, National Employment Law Project (dated July 22, 2005).

State criminal background checks for employment and licensing purposes have also expanded as a result of the many new laws mandating screening of workers employed in a broad range of occupations and industries. For example, in California alone, about 1.5 million background checks are conducted by the state's criminal record repository pursuant to state laws, which accounts for roughly one in ten adult Californians employed in hundreds of industries. In addition, background checks conducted by private screening firms have increased at a record rate, with 80% of large employers in the U.S. now screening their workers for criminal records (an increase of 29% since 1996).²

What then do we know about those workers and communities who are most likely to show a criminal record as a result of the vast prevalence of background checks for employment?

- An estimated one in five adults in the United States have a criminal record on file with the states.³ Thus, there are literally millions of U.S. workers with a criminal record that will show up on a routine criminal background check, including large numbers of people with arrests that never led to convictions.
- A record 700,000 people are now released from prison each year, looking to find work in their communities and a new way of life. Three out of four individuals being released from prison have served time for non-violent offenses, including property crimes (40%) and drug offenses (37%). Nearly half of all non-violent offenders (48%) are African-American and another 25% are Latino.⁴
- Drug “trafficking” is the single largest category of all of the various state felony convictions, representing over 20% of all cases, followed by drug possession, which accounts for another 12.1% of all state felonies.⁵
- Large numbers of arrests and convictions are for especially minor crimes, like drunkenness and disorderly conduct (which account for almost 10% of all arrests in the United States, or over 1.2 million cases).⁶ According to a Minneapolis study, African Americans are 15 times more likely than Whites to be arrested for low-level

² Press Release, “SHRM Finds Employers are Increasingly Conducting Background Checks to Ensure Workplace Safety” (Society for Human Resources Management, January 20, 2004).

³ According to the latest official state survey, there are 64.3 million people with criminal records on file with the states, including serious misdemeanors and felony arrests. Bureau of Justice Statistics, *Survey of State Criminal History Systems*, 2001 (August 2003), at Table 2. Because of over counting due to individuals who may have records in multiple states and other factors, to arrive at a conservative national estimate we reduce this figure by 30% (45 million). Thus, as a percentage of the U.S. population over the age of 18 (209 million according to the 2000 Census), an estimated 21.5% of the U.S. population has a criminal record on file with the states.

⁴ Bureau of Justice Statistics, *Prevalence of Imprisonment in the U.S., 1974-2001* (August 2005), at page 1.

⁵ Bureau of Justice Statistics, *Felony Sentences in State Courts, 2002* (December 2004), Table 1.

⁶ U.S. Department of Justice, Federal Bureau of Investigation, *Crime in the United States, 2004* (2005), at Table 4.1.2004.

offenses, but less than 20% of African American arrests for these offenses result in convictions.⁷

Finally, what does the research say about how employers evaluate criminal records? According to a major survey, 40% of employers will not even consider a job applicant for employment once they are aware that the individual has a criminal record.⁸ African-Americans are far more likely than Whites to be denied an interview as documented in “testing” studies that specifically control for the individual’s criminal record. Indeed, White applicants were three times more likely to get a call back than similarly credentialed African-Americans.⁹

In contrast to this evidence that employers make broad negative conclusions about workers with a criminal record, the research also shows that those people who have not had any involvement with the criminal justice system over a limited period of time are no more likely than anyone else to commit another crime. Specifically, a recent study found that those with a prior record who have not been arrested or convicted of a crime over a period of five years are statistically no more likely than someone with no prior record to commit a crime.¹⁰ Not surprisingly, those who have been employed even for a year or less are also far less likely to commit another crime. According to a study in Illinois which followed 1,600 individuals recently released from state prison, only 8% of those who were employed for a year committed another crime, compared to the state’s 54% average recidivism rate.¹¹

II. Reforming Federal Laws that Deny Employment to People with Criminal Records

A. The Landscape of Federal Laws Requiring FBI Background Checks

Federal laws require or authorize FBI criminal background checks covering millions of workers, both in the public and private sectors. In addition to screening for criminal records, these federal laws often prohibit individuals with certain criminal records from being employed in various occupations.

The federal laws also authorize the states to conduct FBI background checks based on their state occupational and licensing laws. Thus, when a state passes a law setting screening standards for particular occupations, like school employees, private security officers, or nursing home workers, they can also authorize an FBI background check reviewed by the state licensing agency. In many cases, the states have not authorized FBI checks for certain occupations. The states have often questioned the significant fees

⁷ Council on Crime and Justice, *Low Level Offenses in Minneapolis: An Analysis of Arrests and Their Outcomes* (November 2004), at page 4.

⁸ Harry Holzer, Stephen Raphael, Michael Stoll, “Employer Demand for Ex-Offenders: Recent Evidence from Los Angeles,” (March 2003), at pages 6-7.

⁹ Devah Pager, “The Mark of a Criminal Record,” 108 *Am.J.Soc.* 937 (2003).

¹⁰ Kurlychek, et al. “Scarlet Letters & Recidivism: Does An Old Criminal Record Predict Future Criminal Behavior?” (2006).

¹¹ American Correctional Association, 135th Congress of Correction, Presentation by Dr. Art Lurigio (Loyola University) Safer Foundation Recidivism Study (August 8, 2005).

involved in running FBI checks (which can run \$40 to \$75, including the fingerprint processing fees) on top of other licensing fees already imposed on the workers or the employer.

After the September 11th attacks, Congress also enacted criminal record prohibitions that apply to workers employed in nearly the entire transportation industry (including aviation workers, port workers and truck drivers who haul hazardous material). These laws, which are specifically intended to identify terrorism security risks, have adopted standards regulating the severity of disqualifying offenses (limited to selected felonies in most cases) and the age of the offense (limited to 7 years in the case of the laws regulating 700,000 port workers and 2.7 million hazmat drivers). These criminal background requirements, which are implemented by the Transportation Security Administration (TSA), apply equally to current workers and new applicants for transportation jobs and licenses.

Also significant, the TSA regulations have made an effort to remove disqualifying felonies that are especially broad to prevent unfair treatment and more effectively screen for true security risks. Thus, the regulations no longer include felony offenses for drug possession, welfare fraud and bad check writing as disqualifying.¹² Especially important, the laws regulating port workers and hazmat drivers also include a “waiver” procedure allowing those who have a disqualifying offense to petition to remove the disqualification based on evidence of rehabilitation and their employment record.¹³ Finally, the laws and regulations also impose several “permanent disqualifications” not subject to waivers and time limits, like espionage and other crimes that raise special terrorism-related concerns.

In the past decade, Congress has also enacted laws making the FBI’s criminal records available in the case of background checks regulating private security officers,¹⁴ nursing home and home health care workers,¹⁵ workers who “have the responsibility for the safety and security of children, the elderly or individuals with disabilities,”¹⁶ and school employees.¹⁷ Often, these laws make the FBI’s criminal records directly available to employers or certain intermediary organizations, usually when the state laws regulating these occupations do not authorize the use of FBI records. As in the case of the new private security officer law, the employer is authorized to request the FBI record, which is then processed by the state.

In contrast to the post-9/11 transportation laws, which screen for terrorism security risks, the laws that authorize individual employers and intermediary organizations to request the FBI’s records include few, if any, minimum screening standards. For example, except for the 10-year limit on some misdemeanors in the new private security law, none of these laws

¹² 72 Fed. Reg. 3600 (January 25, 2007).

¹³ USA Patriot Act of 2001, 49 U.S.C. Section 5103a (2.7 million hazmat drivers); Aviation and Transportation Security Act of 2001, 40 U.S.C. Section 44936 (unescorted access to airport security areas); Maritime Transportation Security Act of 2002, 46 U.S.C. Section 70105 (secured areas of ports).

¹⁴ Private Security Officer Employment Authorization Act of 2004, P.L. 108-458, Title VI, Subtitle E, Section 6402; 71 Federal Register 1690, dated January 11, 2006 (interim final regulations)

¹⁵ P.L. 105-277, Div. A., Title I, Section 101(b).

¹⁶ 42 U.S.C. Section 5119(a)(1).

¹⁷ H.R. 4472, Adam Walsh Child Protection & Safety Act (signed July 27, 2006).

limit the age or seriousness of the offense that can be considered by the employer or the intermediary organization. Nothing in federal law specifically requires that the employer only consider offenses that are “job related,” which is the standard set forth in Equal Employment Opportunity Commission (EEOC) guidances interpreting Title VII of the Civil Rights Act of 1964.¹⁸ Meanwhile, these federal laws regulate occupations that employ especially large numbers of minority workers.¹⁹

Also, in contrast to the transportation security laws, the other federal laws do not require a “waiver” procedure, which specifically allows all individuals to make the case that they have been rehabilitated and that they are not a threat to safety or security on the job. The absence of meaningful appeal and waiver procedures not only deprives qualified workers of their livelihood, even after years of service to the same employer, it also undermines the goal of encouraging rehabilitation. As described more below, federal policies that reward and promote rehabilitation, including waiver procedures, are paramount to the goals of the reentry movement to reduce recidivism by removing unnecessary barriers to employment of people with criminal records.

To help appreciate the critical need for federal standards, consider the following example of the kind of arbitrary treatment that workers often suffer as a result of federal background checks. Last year, two women who were each employed for decades in the cafeteria of the federal building in Pittsburgh, were deemed “unsuitable” for employment by the Department of Homeland Security (DHS). One had a 1997 shoplifting conviction that was supposed to be expunged, and the other was never arrested but DHS found a record because it ran the wrong Social Security number.²⁰ The women were literally escorted from the building and told they could no longer work there, immediately resulting in a loss in pay.

Congressman Mike Doyle’s office intervened with DHS to help them appeal the determination get them back their jobs. After the women attempted unsuccessfully to reach the number provided by DHS to appeal the case and the DHS refused to provide the Congressman’s staff with information on the appeal process, the Congressman himself intervened which led to the workers being reinstated. As result of this experience, the Congressman called for a Congressional review of DHS background check process.²¹

B. Priorities for Reform of Federal Screening Laws

Recognizing the significant impact that federal and state occupational laws play in promoting the successful reentry of people with criminal records into society, experts in the

¹⁸ U.S. Equal Employment Opportunity Commission, *Policy Statement on the Consideration of Arrest Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964, as amended*, EEOC Compliance Manual (Sept. 7, 1990).

¹⁹ PowerPoint, National Employment Law Project Presentation Before the Congressional Black Caucus Foundation. 35th Annual Legislation Conference (September 24, 2005).

²⁰ “Homeland Security Clears Cafeteria Workers After a Puzzling 2-Week Hiatus Two Women Allowed Back on the Job Tuesday,” *Pittsburgh Post-Gazette* (July 18, 2006).

²¹ Press Release, “Congressman Doyle Calls for Review of Homeland Security Screening Process,” (August 3, 2006).

field have uniformly called for a systematic review of state federal employment and licensing laws to limit unnecessary barriers to employment.

Thus, the Re-Entry Policy Council, a bi-partisan panel of leading state officials and practitioners, recommended that policy makers “conduct a review of laws that affect employment of people based on criminal history, and eliminate those provisions that are not directly linked to improving public safety.”²² Similarly, the American Bar Association, adopting the recommendations of the Justice Kennedy Commission, urged the federal government to “limit situations in which a convicted person may be disqualified from otherwise available benefits, including employment, to the greatest extent consistent with public safety.”²³

Thus, Congress should be especially cautious before authorizing any new FBI background checks until standards are developed based on the best of the federal laws and the model policies developed by the states and cities that have been leaders on this issue. Consistent with the recommendations of the ABA and Reentry Policy Council, we urge the Committee to adopt the following standards before further expanding criminal background checks.

- Inventory Federal Laws & Policy: Last year, Governor Jeb Bush of Florida issued Executive Order 06-89 requiring an “inventory” of all state laws and state agency practices that limit employment of people with criminal records, the collection of data to determine the impact on employment opportunities, and state agency recommendations for reform including “eliminated or modified ex-offender employment disqualifications.”²⁴ This is a critical first step that the federal government should take to evaluate the impact of federal laws on employment of people with criminal records and develop proper standards that ensure a more fair and effective screening process while protecting public safety.
- Adopt Minimum Federal Standards: As required by the federal transportation security laws regulating port workers and hazmat drivers screened by TSA (H.R. 1401 passed by the House of Representatives also applies to private screening firms that conduct background checks of railroad workers), disqualifying offenses should be time limited, and all lifetime disqualifications should be eliminated except in special circumstances. Equally important, all federal laws should include waiver provisions. Thus, all workers with disqualifying offenses should be provided an opportunity to establish that they have been rehabilitated and do not pose a safety or security threat.

²² Reentry Policy Council, *Charting the Safe and Successful Return of Prisoners to the Community* (2004), at page 299.

²³ American Bar Association, Justice Kennedy Commission, *Reports with Recommendations to the ABA House of Delegates* (August 2004), Recommendation at page 2 (adopted by the House of Delegates on August 4, 2004).

²⁴ PowerPoint Presentation by Vicki Lukis Lopez, Chair, Governor’s Ex-Offender Task Force, “Creating Employment Opportunities for Ex-Offenders: Realizing the Goal of the Second Chance” (September 27, 2006).

- Require Disqualifying Crimes to “Directly Relate” to the Job. Consistent with the directives of the EEOC and the employment and licensing laws of half the states, a more fair and effective federal policy requires that disqualifying crimes for employment and licensing “directly relate” to the responsibilities of the job.²⁵ Of special concern, drug offenses should be closely scrutinized given their disproportionate impact of communities of color. In addition, broad categories of disqualifying offenses found in federal laws, such as “dishonesty, fraud and misrepresentation” should be disfavored. For example, TSA excluded drug possession from its list of disqualifying felonies regulating security threat assessments of transportation workers, along with welfare fraud and bad check writing which previously were considered disqualifying “dishonesty” offenses.²⁶
- Limit the Background Check Until the Final Stages of the Hiring Process: To ensure that applicants are evaluated on the merits of their qualifications and not unfairly discriminated against based on an irrelevant criminal record, the federal government should follow the lead of several major cities (Boston, Chicago, Minneapolis, St. Paul, San Diego, San Francisco) in limiting consideration of criminal records until the final stages of the hiring process.²⁷ Thus, except in safety sensitive positions, such as law enforcement and national security, job applications for federal employment should not be asked about their criminal record as part of the initial application.

III. Improve the Integrity of the FBI’s Rap Sheets Produced for Employment Screening Purposes

While never originally designed to screen workers for employment, the FBI’s rap sheets are now the major gateway for employment for millions of workers employed in a range of industries and occupations. Based on the FBI’s rap sheets, large numbers of individuals are denied employment or licensing, often in cases where they have a long record of employment and their criminal record is not directly related to the job. Despite the growing role that FBI rap sheets play in denying employment to people with criminal records, there has been very limited scrutiny of this critical function performed by the FBI.

Moreover, in the recent report to Congress (*The Attorney General’s Report on Criminal History Background Checks*, June 2006), the U.S. Attorney General called for broad new authority to make the FBI’s rap sheets available at the DOJ’s discretion to all private employers not now authorized by federal law to directly access the FBI’s rap sheets.²⁸

²⁵ Margaret Colgate Love, *Relief from the Collateral Consequences of a Criminal Conviction: A State-by-State Resource Guide* (July 205), at page 9.

²⁶ 72 Fed. Reg. at 3600 (January 25, 2007).

²⁷ Editorial, “Cities that Lead the Way,” *New York Times* (March 31, 2006); Editorial, “Twin Cities Adopt Smart Job Stances: Effort is to Help Stop Revolving Prison Door,” *Star Tribune* (January 2, 2007).

²⁸ Specifically, the Attorney General recommended that “State criminal history repositories and the FBI should be authorized to disseminate FBI-maintained criminal history records directly to authorized employers or entities and to consumer reporting agencies acting on their behalf, subject to screening and training requirements and other conditions for access and use of the information established by law and regulation.” *Id.* at page 61.

Indeed, the AG's proposal goes further and recommends that the private screening firms that conduct criminal background checks, including Choicepoint and others, be authorized to access the FBI's records on behalf of a private employer. Thus, this hearing is a critical first step to evaluate the integrity and accuracy of the FBI's criminal records for employment screening purposes in the context of proposals to expand access to the FBI's records.

A. The Basics of FBI Rap Sheets Produced for Employment Screening Purposes

First, it is important to appreciate that the FBI rap sheet produced for employment screening purposes is not unlike the rap sheet produced for criminal investigations. Even for experienced criminal justice officials, the FBI's rap sheets are often difficult to interpret because they are an unedited version of nearly all the criminal record information provided by the states, including all arrests and convictions no matter the age of the offense.

The rap sheet does not distinguish between felonies, misdemeanors and lesser categories of offenses, like "violations," which are particularly significant in evaluating an individual's record for employment screening purposes. Instead, the FBI's rap sheet indicates the specific offense as expressed in the state's penal code (e.g., "criminal mischief – 2nd") without characterizing the severity of the crime. As a result, expanding access to FBI records, especially if accessed by individual employers with no criminal justice experience, creates the potential for significant employer error in assuming that many offenses on an individual's record rise to the level of a serious felony or other more grave offenses.

B. Incomplete FBI Rap Sheets Undermine the Integrity of the Background Check Process

Probably the most prejudicial flaw of the FBI rap sheets produce for employment purposes is the extent to which the state information reported is out-of-date or incomplete, thus also undermining the integrity of the criminal background check process.

According to the report by the U.S. Attorney General, the FBI's rap sheets are "still missing final disposition information for approximately 50% of its records."²⁹ Mostly, that includes arrest information which makes its way on the rap sheet after the individual has been fingerprinted, but the arrest information is never updated electronically by the state. In more than half the states, 40% of the arrests in the past five years have no final disposition recorded, which means that the FBI's records are similarly incomplete.³⁰

This serious reporting gap exists despite federal regulations intended to ensure that the records produced by the FBI are accurate and up-to-date. Specifically, the regulations state that "[d]ispositions should be submitted by criminal justice agencies within 120 days after the disposition has occurred."³¹ More generally, the FBI's regulations also require that the

²⁹ *The Attorney General's Report on Criminal Background Checks*, at page 3.

³⁰ Bureau of Justice Statistics, *Survey of State Criminal History Information Systems*, 2002 (August 2003), at page 2.

³¹ 28 C.F.R. Section 20.37.

“information on individuals is kept complete, accurate and current so that all such records shall contain to the maximum extent feasible disposition of all arrests data included therein.”

Thus, workers who have never been convicted of a crime or have charges on their rap sheet that have been dismissed are seriously prejudiced by arrest information that still makes its way onto the FBI rap sheet. This undermines the laws of a number of states that prohibit employers from taking into consideration an individual’s arrest record absent a conviction. When the information is reported to employers, it also conflicts with the policy of the EEOC. Citing the discriminatory impact of arrest information on African-Americans and Latinos, the EEOC stated “[s]ince using arrests as a disqualifying criteria can only be justified where it appears that the applicant actually engaged in the conduct for which he/she was arrested and that conduct is job related, the Commission further concludes that an employer will seldom be able to justify making broad general inquiries about an employee’s or applicant’s arrest.”³²

In significant contrast to the FBI rap sheets produced for employment purposes, the FBI rap sheets produced for federal gun checks are far less incomplete. In the case of gun checks, 65% of the missing dispositions from the state are tracked down by the FBI within three days.³³ If more targeted federal resources are devoted to rap sheets produced for employment purposes, there is no apparent reason why similar results could not be produced. In California, the law prevents the state criminal records repository from releasing state rap sheets for employment and licensing purposes unless it has been verified within the past 30 days that the case is still actively in the courts or in the local District Attorney’s office. More resources should also be devoted to funding the states to improve their criminal record keeping systems.

C. FBI’s Proposed Regulation to Report “Nonserious” Offenses

Seriously compounding the problem of old arrests reported on FBI rap sheets, the FBI has proposed new regulations overturning more than 30 years of policy by allowing “nonserious” offenses to also be reported on the FBI’s rap sheets for employment purposes (71 Fed. Reg. 52302, dated September 5, 2006).

Nonserious offenses include juvenile arrests and convictions and any adult arrests or convictions, including anything from vagrancy, to drunkenness to many traffic violations. All that is required is for the state to require the individual to be fingerprinted, which is happening far more often, even in the case of juvenile arrests. The current regulation (28 C.F.R. Section 20.32(b)), which the FBI has now proposed removing, was the product of a 1976 lawsuit, ruling that the FBI failed to adequately remove non-serious offenses from the rap sheets produced for non-criminal justice purposes.³⁴

³² U.S. Equal Employment Opportunity Commission, *Policy Statement on the Consideration of Arrest Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964, as amended*, EEOC Compliance Manual (Sept. 7, 1990).

³³ *The Attorney General’s Report on Criminal Background Checks*, at page 108.

³⁴ *Tarleton v. Saxbe*, 407 F.Supp. 1083 (D.D.C. 1976).

The only justification and evidence provided in support of the FBI's decision to reverse 30 years of policy was the following statement: "the FBI believes that this rule provides substantial, but difficult to quantify, benefits by enhancing the reliability of background checks for non-criminal justice employment purposes. . . ." ³⁵ While the current regulations limit FBI's rap sheets for non-criminal justice purposes to "serious and/or significant adult juvenile offenses," the state records now submitted to the FBI routinely include non-serious offenses. Once the fingerprint record is submitted to the FBI by the states, the FBI does not systematically delete these records when the rap sheets are produced for non-criminal justice purposes.

We believe the FBI's proposed regulation, which has not yet been finalized, is seriously misguided. Of special concern, large numbers of workers will, for the first time, show an FBI rap sheet based on solely on a non-serious offense, which is unwarranted given the limited safety and security threat posed by these offenses. Although current figures were conspicuously not included in the proposed regulation, when the FBI implemented its policy excluding nonserious offenses in the 1970s, it resulted in a 33% decrease in the total number of fingerprint cards retained by the FBI. In 2004, drunkenness and disorderly conduct alone accounted for almost 10% of arrests in the U.S., and these offenses will now be reported for employment purposes on the FBI rap sheet.

In addition, the FBI's proposal represents a radical departure from the state policies protecting the privacy of juvenile records for non-criminal justice purposes and promoting rehabilitation. In 2005, there were more than 1.5 million arrests of people less than 18 years old, often for property crimes. Most studies indicate that only one-third of youthful offenders ever commit a second offense. ³⁶

To keep these sensitive juvenile records confidential and promote rehabilitation, almost all states authorize certain juvenile records to be expunged and sealed. However, the records can still be listed in the state record systems (and then reported to the FBI) unless and until the young person successfully petitions the courts to have them removed by the state. ³⁷ Most states never seriously contemplated that an individual's minor juvenile offense, including mere arrests, would make its way onto the FBI's rap sheets and create a devastating stigma that will follow the individual for life, from job to job and from state to state.

The FBI's policy will also seriously undermine the civil rights of people of color, who are more likely to be arrested for many nonserious crimes. For example, while African-Americans represent about 13% of the population, they account for about one-third of all those arrested for disorderly conduct, vagrancy and juvenile offenses. ³⁸ A leading study in

³⁵ 71 Fed.Reg. at 52304.

³⁶ Bureau of Justice Statistics, *Privacy and Juvenile Justice Records: A Mid-Decade Status Report* (May 1997), at page 4.

³⁷ Indeed, even in federal court proceedings involving juveniles, where the juvenile is required to be fingerprinted, the federal law the proceedings cannot be share for any employment purpose "except for a position immediately and directly affecting the national security." (18 U.S.C. Section 5038(a)(5)).

³⁸ U.S. Department of Justice, *Federal Bureau of Investigation, Crime in the United States, 2005*, at Table 43A. For example, in 2005, African-Americans accounted for 27.8% of all arrests in the United States.

Minneapolis also documented that African-Americans are 15 times more likely than Whites to be arrested for low-level offense, but less than 20% of the African-American arrests resulted in convictions.³⁹

In a letter dated March 23, 2007, Chairman Scott and Congresswoman Maxine Waters sent a letter to the Attorney General urging the FBI “to delay implementation of the regulation to allow Congress to conduct oversight.” A recent *New York Times* editorial recommended that Congress act to preclude the FBI from finalizing its regulations for fear that that they would “transform single indiscretions into lifetime stigmas.” (“Closing the Revolving Door,” dated January 25, 2007). Given the conspicuous absence of compelling evidence supporting their reliability or probative value of non-serious offenses, we urge the Committee to pursue the issue with the FBI, while also evaluating whether the FBI is actively enforcing the current regulations.

D. Priorities for Reform of FBI Rap Sheets Produced for Employment Purposes

Before further expanding access to the FBI rap sheets to any new industries or employers, the first priority of Congress should be to ensure that the five million records produced now for employment purposes are accurate, complete, and accountable both to the workers and their employers. Given the new realities of criminal background checks for employment, the FBI should adopt a new system of reporting that is properly tailored to the needs of employers and workers, similar to the rights that now govern disclosure of credit reports, including criminal background check reports produced by private screening firms.

We recommend the following priorities for reform of the FBI rap sheet produced for employment screening purposes:

- Preclude Non-Serious Offenses from the FBI Rap Sheets: For the reasons described above,⁴⁰ the FBI should not compound the many concerns that now plague the FBI rap sheets by reversing its regulation precluding reporting of non-serious offenses. Thus, the proposed regulation should be abandoned by the FBI for the purposes of employment and licensing screening. In addition, Congress should request a review to evaluate compliance with the existing regulation to ensure that non-serious offenses are not making their way onto rap sheets that are now reported by the FBI.
- Enforce & Improve Existing Regulations Requiring Updated Rap Sheets: In addition, Congress should request a review of policies and procedures to improve compliance with the FBI regulations that call for timely and complete reporting of all dispositions within 120 days. As provided for FBI rap sheets produced for

However, for several non-serious offenses, their rates of arrest were much higher, including disorderly conduct (33.6%), vagrancy (38.4%) and curfew and loitering violations (35.5%).

³⁹ Council on Crime and Justice, *Low Level Offenses in Minneapolis: An Analysis of Arrests and Their Outcomes* (November 2004).

⁴⁰ For a more detailed treatment of this issue, see the public comments to the regulations submitted on November 6, 2006, by NELP and a number of unions, civil rights and privacy rights organizations available on-line at <http://www.nelp.org/docUploads/FBI%2DNSOComments%2Epdf>.

gun permits, the majority of missing dispositions for FBI rap sheets produced for employment purposes should be investigated and corrected by the FBI within three days. As required by California law, in no case should the FBI be permitted to report an arrest that has not been verified as active within the past 30 days.

- Provide Workers A Copy of the FBI Rap Sheet Before an Adverse Action: In addition to the procedures described above, which place the burden on the FBI and the states to generate complete and accurate records produced for employment screening purposes, the FBI should provide the worker with a copy of the record before an employer, an intermediary or a government agency makes an adverse determination based on the record. This proposal corresponds to the protections of the Fair Credit Reporting Act which apply to private screening firms that conduct criminal background checks for employers.⁴¹ This consumer protection standard will go a long way to help correct incomplete and inaccurate information on the FBI's rap sheets, while also reducing the prejudicial delays that occur in seeking to correct the record and make the case to the employer or the government agencies that the adverse determination should be reversed.

* * *

Thank you again for the opportunity to testify on this critical issue of concern to millions of hard-working families and their communities. We look forward to working with the Subcommittee to help develop more fair and effective federal criminal background check policies that promote and protect public safety.

⁴¹ 15 U.S.C. Section 1681b(b)(3)(A).

Appendix

Sample FBI Rap Sheets

U.S. Department of Homeland Security
Arlington, VA 22202



Transportation
Security
Administration

Re: Initial Determination of Security Threat Assessment, [REDACTED] CDL # [REDACTED]

Dear Mr. [REDACTED]

The Transportation Security Administration (TSA) conducts security threat assessments on persons who hold commercial driver's licenses (CDL) with hazardous materials endorsements (HME). The regulations regarding these security threat assessments may be found at Title 49, Code of Federal Regulations (C.F.R.), Part 1572, a copy of which may be located on TSA's website, www.tsa.gov.

TSA will not authorize a state to issue or renew an HME if TSA determines that an individual does not meet the security threat assessment standards described in 49 C.F.R. Section 1572.5. This letter serves as TSA's initial determination that you pose or are suspected of posing a security threat and may not be eligible to obtain or renew your HME on your CDL.

BASIS FOR INITIAL DETERMINATION OF THREAT ASSESSMENT

After a review of certain records, TSA has determined or suspects that you pose a security threat because:

Your criminal history record shows that you were convicted of a disqualifying criminal offense, Perjury, in [REDACTED], on or about January 8, 2004, and sentenced to 180 days incarceration. In addition, your criminal history record shows that you were arrested, indicted, or otherwise have an open disposition for a potentially disqualifying criminal offense, Perjury, [REDACTED], on or about July 2, 2003. Under Section 1572.103, you are disqualified from holding an HME if either the date of your HME application is less than seven years from the date of your conviction or if you were sentenced to a period of incarceration, the date of your application is less than five years since you were released from jail, prison, or other correctional institution.

Please provide TSA with written proof **within 45 days after the date of service of this letter** that the aforementioned legal matters did not result in a disqualifying criminal conviction and/or incarceration. If TSA does not receive proof in that time and you take no further action, TSA's security threat assessment will automatically become final 45 days after the date of service of this letter and you will not be permitted to renew or obtain an HME on your CDL.

Please note, convictions for certain offenses will permanently preclude you from holding an HME, while convictions for other offenses will only preclude you from holding an HME for a period of time. Please refer to TSA's website for a complete list of disqualifying criminal offenses which constitute a permanent ban and those offenses which are a temporary ban from holding an HME.

Prior to TSA directing the state whether to issue or renew your HME, you may seek releasable materials upon which this initial determination of security threat assessment is based, submit an appeal, and/or request a waiver. For information on how to do any of the foregoing, please refer to the insert provided with this letter.

INSTRUCTIONS TO SEND CORRESPONDENCE TO TSA

All correspondence to TSA should have the TSA HAZMAT Request Cover Sheet attached to the front of your correspondence. This cover sheet can be found at the end of this letter and includes your full name, mailing address, and CDL number. Please change any information on this cover sheet that is incorrect. You should check one of the request boxes on this cover sheet and attach it to the front of your correspondence.

Correspondence must be mailed to:

Transportation Security Administration
TSA HAZMAT Processing Center
P.O. Box 8117
Fredericksburg, VA 22404-8117

You are not required to obtain an attorney to seek releasable documents, dispute this initial determination, and/or seek a waiver and/or time extension, but may do so at your own expense.

Sincerely,



Frank Skroski
Program Manager, Adjudication Center

Enclosure

- FBI IDENTIFICATION RECORD -

WHEN EXPLANATION OF A CHARGE OR DISPOSITION IS NEEDED, COMMUNICATE DIRECTLY WITH THE AGENCY THAT FURNISHED THE DATA TO THE FBI.

NAME	FBI NO.	DATE REQUESTED
[REDACTED]	[REDACTED]	2006/03/28
SEX RACE BIRTH DATE HEIGHT WEIGHT EYES HAIR BIRTH PLACE		
M W [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED]		
FINGERPRINT CLASS PATTERN CLASS		CITIZENSHIP
[REDACTED] [REDACTED]		UNITED STATES

END OF PART 1 - PART 2 TO FOLLOW

UNITED STATES DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF INVESTIGATION
CRIMINAL JUSTICE INFORMATION SERVICES DIVISION
CLARKSBURG, WV 26306

USHAZ000Z
PART 2

ICN [REDACTED]

- FBI IDENTIFICATION RECORD - FBI NO- [REDACTED]

1-ARRESTED OR RECEIVED 1991/12/15 SID- [REDACTED]
AGENCY-POLICE DEPARTMENT MILLBRAE ([REDACTED])
AGENCY CASE- [REDACTED]
CHARGE 1-PETTY THEFT

COURT-CAMC SO SAN FRAN SO SAN FRANCISCO ([REDACTED])
CHARGE-148 PC-OBSTRUCTS RESISTS PUBLIC OFFICER
SENTENCE-
DISMISSED
CHARGE-484 490 5 PC-THEFT PETTY THEFT MERCHANDISE
SENTENCE-
CONVICTED-PROBATION -018MONTHS
PROBATION - FINE -
IMP SEN SS

2-ARRESTED OR RECEIVED 2003/07/02 SID- [REDACTED]
AGENCY-SHERIFF'S OFFICE REDWOOD CITY ([REDACTED])
AGENCY CASE- [REDACTED]
CHARGE 1-001 COUNTS OF CONSPIRACY, COMMIT CRIME
CHARGE 2-001 COUNTS OF PERJURY

3-ARRESTED OR RECEIVED 2004/01/08 SID- [REDACTED]
AGENCY-SHERIFF'S OFFICE REDWOOD CITY ([REDACTED])
AGENCY CASE- [REDACTED]
CHARGE 1-001 COUNTS OF PERJURY

COURT-
CHARGE-001 COUNTS OF PERJURY
SENTENCE-
180 DAYS JAIL

RECORD UPDATED 2006/03/28

ALL ARREST ENTRIES CONTAINED IN THIS FBI RECORD ARE BASED ON FINGERPRINT COMPARISONS AND PERTAIN TO THE SAME INDIVIDUAL.

THE USE OF THIS RECORD IS REGULATED BY LAW. IT IS PROVIDED FOR OFFICIAL USE ONLY AND MAY BE USED ONLY FOR THE PURPOSE REQUESTED.

