

**Proposed Regulation Expanding FBI
Rap Sheets to Include “Non-Serious” Offenses
for Employment & Licensing Purposes
(Docket No. FBI 111P)**

**Joint Comments
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**Joint Comments to the Proposed Regulation Expanding
FBI Rap Sheets to Include “Non-Serious” Offenses
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I. Summary

We are writing jointly to oppose the proposed regulation (71 Fed. Reg. 52302, dated September 5, 2006) authorizing the FBI to report all juvenile and adult “non-serious” offenses when responding to a criminal background check conducted for employment and occupational licensing purposes.

Our national organizations represent a broad spectrum of communities that seek to promote and protect the basic rights of all workers, including their civil rights, labor rights, privacy rights in the information age, and the rights of those who are unfairly denied employment due to a criminal record. We also share a strong commitment to safety and security, both on the job and in our communities. Thus, we support effective public safety strategies that properly balance the interests of fairness which we value as a society.

As described below, we believe the proposed federal regulation – expanding the FBI’s rap sheets to include juvenile arrests and convictions, as well as non-serious adult offenses – cannot be justified given the devastating impact it will have on large numbers of working families. Of special significance, the policy will seriously undermine the civil rights of communities of color, where there are disproportionately more arrests for many non-serious offenses. The FBI’s proposed policy also represents a dangerous departure from the protected status of juvenile records used for employment and other non-criminal justice inquiries. At the same time, the regulation compromises the integrity of the FBI’s criminal records by significantly expanding the volume of incomplete and inaccurate information reported on the FBI’s rap sheets.

Recommendation: We strongly urge the FBI not to expand the agency’s authority to collect and report non-serious offenses for employment and occupational licensing purposes. We agree with the position of the federal appeals court, which concluded that the “FBI cannot take the position that it is a mere passive recipient of records received from others, when it in fact energizes those records by maintaining a system of criminal files and disseminating the criminal records widely, acting in effect as a step-up transformer that puts into the system a

capacity for both good and harm.”¹ We also urge the FBI to more aggressively protect the rights of people with criminal records by enforcing the current federal law which precludes the reporting of minor offenses that are already making their way from some states to the FBI rap sheets.

II. Current Law & the Proposed FBI Policy

Current federal regulations limit the fingerprint-based criminal history information reported by the states to the FBI by precluding non-serious offenses.² The proposed regulation would repeal this restriction, thus authorizing the FBI to report non-serious offenses on the FBI’s rap sheets.

The FBI’s regulations do not specifically define the scope of “non-serious” offenses except to refer broadly to all juvenile and adult non-serious arrests or convictions. In practice, the proposed regulation will authorize the FBI to accept and report any record generated by the states for which an individual has been arrested and fingerprinted, including such offenses as vagrancy, urinating in public, public intoxication, and many traffic violations.

In 1976, a federal lawsuit mandated stricter compliance with the current regulation, ruling that the FBI had failed to adequately remove non-serious offenses from the FBI rap sheets reported for non-criminal justice purposes.³ As directed by the court, non-serious offenses were to be “deleted from all FBI criminal records – upon request for dissemination for all individuals over 35, and upon conversion to computerized files for all other individuals”⁴ Thus, by regulation and court order, the information reported on the FBI’s rap sheet for non-criminal justice purposes is now restricted to “serious and/or significant adult and juvenile offenses.”⁵ In contrast, the state records now submitted to the FBI routinely include non-serious offenses, and the FBI often does not delete these records when the rap sheets are produced for non-criminal justice purposes.

Finally, federal law generally requires the FBI to maintain accurate and reliable criminal records. As a federal appeals court held, “the FBI’s function of maintaining and disseminating criminal identification files carries with it as a corollary the responsibility to discharge this function reliably and responsibly and

1 Menard v. Saxbe, 498 F.2d 1017, 1026 (D.C. Cir. 1974).

2 28 C.F.R. § 20.32(b) (2006).

3 Tarlton v. Saxbe, 407 F. Supp. 1083, 1088 (D.D.C. 1976).

4 Id. at 1089.

5 28 C.F.R. Section 20.32(a).

without unnecessary harm to individuals.”⁶ Currently, 50% of the records in the FBI’s system are incomplete according to the Attorney General’s recent report to Congress, mostly because of arrests which have not been updated to include the final dispositions.⁷

Despite the FBI’s mandate to protect the reliability of its rap sheets, the proposed FBI regulation does not evaluate the accuracy or completeness of non-serious juvenile and adult offenses. Nor does the proposal project the numbers of people who will show a criminal record due solely to a non-serious offense, or the proportion of non-serious offenses that never lead to convictions. Finally, the proposal does not address the “unnecessary harm to individuals” generated by the new information. Instead, the preamble to the regulations states that, “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”⁸

In 2004, the FBI responded to nearly 5 million requests for rap sheets for employment and licensing purposes.⁹ These FBI rap sheets are prepared in response to requests from the state occupational licensing agencies and other entities authorized by federal law to evaluate the information and make a “suitability determination.” In recent years, Congress has also authorized selected employers to directly access the FBI’s rap sheets, including schools (public and private) and nursing homes. In the recent Attorney General’s *Report on Criminal History Background Checks*, the Department of Justice recommended that Congress expand the AG’s authority to release the FBI’s rap sheets to private employers and eventually make the FBI’s records available to all employers and to certified private screening firms.¹⁰

⁶ *Menard*, 498 F.2d at 1026).

⁷ U.S. Department of Justice, *The Attorney General’s Report on Criminal History Background Checks* (June 2006), at 17.

⁸ 71 Fed.Reg. at 52304.

⁹ FBI/CJIS/Multimedia Response to the National Employment Law Project Information Request, dated July 22, 2005). Employment and licensing requests for FBI rap sheets represented 26% of the total rap sheets generated by the FBI for both civil and criminal investigations.

¹⁰ Specifically, the Attorney General recommended to Congress that “State criminal history record 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.” U.S. Department of Justice, *The Attorney General’s Report on Criminal History Background Checks* (June 2006), at 61.

III. Comments

A. By reporting large numbers of “non-serious” arrests and convictions, the FBI will unfairly deny employment to far more people with criminal records.

The FBI’s proposed policy could expand the volume of non-serious arrests and convictions reported on an FBI rap sheet by at least 20%. In 2004, drunkenness and disorderly conduct alone accounted for almost 10% of all arrests in the United States (or over 1.2 million cases).¹¹ As described below, this prejudicial information significantly increases the likelihood that employers and licensing agencies will unfairly deny employment to large numbers of people with criminal records.

With the proliferation of employment and licensing decisions based on the FBI’s rap sheets, the FBI’s proposal to report large numbers of low-level crimes takes on special significance. Indeed, a major survey found that 40% of employers will not even consider a job applicant with a criminal record.¹² Moreover, the FBI rap sheets are especially prone to error and abuse by employers and state licensing agencies because they include all arrests and other contacts with the criminal justice system from any state. They also fail to distinguish between major categories of offenses (felonies, misdemeanors, and other lower-level offenses), instead listing the penal code title of the offense as reported by each state.

The fact that the FBI lists all outstanding arrests for non-serious offenses also increases the likelihood that employers and licensing agencies will reject an applicant without adequate justification. That is because many state and federal agencies that conduct background checks treat arrests without dispositions as a special category, requiring the worker to produce disposition information on old arrests in order to be approved for employment or licensing. As a result, through no fault of the worker, the arrest information reported on the FBI rap sheet can produce major delays in processing, which jeopardize the individual’s employment prospects. And in many cases, the old arrest information will result in an outright rejection by the state licensing agency or the employer when the worker cannot produce the disposition information from the court in a timely fashion.

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

12 According to a major survey of Los Angeles employers, over 40% indicated they that they would “probably not” or “definitely not” be willing to hire an applicant with a criminal record, compared with 20% who indicated they would consider doing so and 35% who indicated it would depend on the applicant’s crime. Harry Holzer, Steven Raphael, Michael Stoll, “Employer Demand for Ex-Offenders: Recent Evidence from Los Angeles,” (March 2003), at 6-7.

Finally, the FBI's proposed policy also has to be evaluated in the context of the limited standards that regulate employment screening decisions. For example, occupational screening laws typically do not specify reasonable age limits on disqualifying offenses, and they often do not identify the major disqualifying crimes that are directly related to the qualifications of the job. Instead, they rely on especially broad disqualifications, such as crimes of "moral turpitude," that can apply to even the most minor offenses, including drunkenness and disorderly conduct. Nor do most state and federal laws provide for "waiver" procedures that guard against such abuses. In the case of those employers who can now also access the FBI's records, they routinely have no clear substantive standards regulating their screening decision. Thus, literally any offense can be considered disqualifying by most employers.

Accordingly, we strongly take issue with the FBI's position in support of the proposed regulation -- that non-serious offenses provide "substantial, but difficult to quantify, benefits by enhancing the reliability of background checks for non-criminal justice employment and licensing purposes"13 As argued above, non-serious arrest and conviction information is so prejudicial when applied to today's screening procedures that it seriously undermines the reliability of the criminal background check process. On balance, therefore, the "unnecessary harm to the individual" of the proposed regulation far outweighs any legitimate purpose in reporting non-serious offenses for employment and licensing background checks.

B. The FBI's policy represents a radical departure from current 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.¹⁴ In contrast to the large number of juvenile arrests, most studies indicate that only one-third of youthful offenders ever commit a second offense.¹⁵ By reporting non-serious juvenile offenses, the FBI will transform these typical one-time property offenses into a devastating stigma that will follow the individual for life, from job to job and state to state.

All but two states have sealing and expungement laws governing juvenile

13 71 Fed.Reg. at 52304.

14 *Crime in the United States*, 2005, Table 43B.

15 Bureau of Justice Statistics, *Privacy and Juvenile Justice Records: A Mid-Decade Status Report* (May 1997), at 4. According to the report, "a very low percentage of juvenile offenders, ranging from as low as 5 percent to as high as perhaps 25 percent, are so-called 'chronic' offenders"

records.¹⁶ State sealing and expungement laws were designed to reward rehabilitation and eliminate the stigma of a juvenile offense, especially in the context of employment decisions and other non-criminal justice settings. However, these procedures often have serious gaps that undermine their effectiveness. For example, the juvenile records can still be listed in the state record systems and reported to the FBI unless and until the young person successfully petitions the courts to have them removed. As a result, the juvenile records often remain on the FBI rap sheet, either because the court petition was never filed or the FBI record was never properly updated.

While state juvenile records are often available in the public domain, most states never seriously contemplated that an individual's minor juvenile offense would now make its way onto the FBI's rap sheets and forever undermine the person's future employment prospects. In contrast, federal law regulating juvenile delinquency proceedings occurring in federal court strictly limits access to these juvenile records for employment purposes. Even for serious felonies where the juvenile is required by federal law to be fingerprinted and photographed, the juvenile proceedings cannot be shared for any employment purposes except for "a position immediately and directly affecting the national security."¹⁷ Thus, while federal law precludes the sharing of juvenile proceedings involving federal crimes for employment purposes, the FBI's proposal would make state juvenile records broadly available to federal agencies.

Finally, juvenile records are especially unreliable, as documented by a leading report prepared by SEARCH and the National Consortium for Justice Information and Statistics. Based on a review of juvenile records, the report concluded that, "If juvenile records are going to be used by adult courts for sentencing and other purposes, and used by non-criminal justice organizations for key decisions affecting access to security clearances, licenses and employment, it follows that there will be significant pressure to ensure that juvenile records are accurate and complete."¹⁸ Without producing any compelling evidence supporting their reliability or probative value in relation to employment decisions, the FBI proposes to make even the most minor juvenile records readily available nationwide.

C. The FBI's policy will seriously undermine the civil rights of people of color.

¹⁶ *Id.* at 16.

¹⁷ 18 U.S.C. Section 5038(a)(5).

¹⁸ Bureau of Justice Statistics, *Privacy and Juvenile Justice Records: A Mid-Decade Status Report* (May 1997), at 29.

The proposed policy to report all juvenile and non-serious offenses seriously undermines the civil rights of African-Americans and Latinos, who are more likely to be arrested for many non-serious crimes.

For example, while African Americans represent about 13% of the U.S. population, they account for about one-third of all those arrested for disorderly conduct, vagrancy, and juvenile offenses.¹⁹ Even compared to their average arrest rates for all crimes, the arrest rates for many minor crimes are often much higher for people of color.²⁰ While data related to non-serious offenses are limited, a major study in Minneapolis documents their discriminatory impact in one major city. According to the study, African-Americans are 15 times more likely than Whites to be arrested for low-level offenses, but less than 20% of African-American arrests result in convictions.²¹

As recognized by the Attorney General's recent report to Congress, federal and state anti-discrimination laws apply to criminal background checks "to prevent the unfair exclusion of qualified persons with criminal records from employment opportunities."²² For example, many state laws specifically preclude employers from asking about arrest records, and the Equal Employment Opportunity Commission's Title VII guidance strictly regulates the use of arrest records by employers.²³ Citing their discriminatory impact 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."²⁴

These discrimination protections relating to arrest records are especially relevant to the FBI's proposed policy which, if adopted, would significantly expand the availability of minor arrest records without dispositions. As the EEOC concluded, the discriminatory impact of arrest records requires special scrutiny as

¹⁹ *Supra*, note 11.

²⁰ For example, in 2005, African Americans accounted for 27.8% of all the arrests in the United States. However, for several non-serious crimes, their rates of arrest were much higher, including disorderly conduct (33.6%), vagrancy (38.4%) and curfew and loitering violations (35.5%). *Crime in the United States*, 2005, Table 43A.

²¹ Council on Crime and Justice, *Low Level Offenses in Minneapolis: An Analysis of Arrests and Their Outcomes* (November 2004), at 4.

²² U.S. Department of Justice, *The Attorney General's Report on Criminal History Background Checks* (June 2006), at 47.

²³ *Id.*; 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*, 42 U.S.C. Section 2000 *et seq.*, EEOC Compliance Manual (Sept. 7, 1990).

²⁴ EEOC *Policy Statement on the Consideration of Arrest Records*, at 2.

applied to employment decisions. By expanding arrest records, especially those involving minor juvenile and adult offenses that have no relevance to employment decisions, the FBI is inviting far more discrimination in hiring decisions. As a federal appeals court concluded, the "FBI cannot take the position that it is a mere passive recipient of records from others, when it in fact energizes those records by maintaining a system of criminal files and disseminating criminal records widely. . . ."25

D. The FBI's proposed policy will further compromise the integrity of the FBI's rap sheets and the reliability of the growing volume of employment and licensing decisions based on FBI records.

By adding non-serious offenses, the FBI will further compromise the integrity of the FBI's rap sheets because the records are inconsistently reported by the states and they are more likely to include inaccurate and incomplete information.

According to the United States Attorney General, more than 50% of the FBI criminal records are already incomplete, mostly due to the failure of the states to update their arrest records. If the FBI is called upon to retain about 20% more information by including non-serious offenses, the accuracy and completeness of the FBI record system will further deteriorate. As described in Section B, juvenile records are especially unreliable due to less automation and other factors. In addition, juvenile records are more often subject to sealing and expungement, while these events are routinely not reported to the FBI. Thus, with the addition of many more non-serious offenses juvenile offenses, it is fair to anticipate a corresponding increase in incomplete and inaccurate records.

E. Many more workers will, for the first time, show an FBI rap sheet based solely on a non-serious offense.

While current figures are not available, when the FBI implemented its policy excluding non-serious offenses in the 1970s, it resulted in a 33% decrease in the total number of fingerprint cards retained by the FBI.²⁶ Unless the proportion of FBI records with non-serious charges has changed dramatically since then, a large number of people will for the first time show a criminal record with the FBI if the proposed policy is adopted. As described earlier, studies show that 40% of employers will not even consider hiring an individual with a criminal record. Thus, if the proposed regulation is adopted, many more workers will be wrongly denied employment based solely on a non-serious offense.

²⁵ Menard, 498 F.2d at 1026.

²⁶ Tarlton, 407 F.Supp. at 1087.

F. Including non-serious adult and juvenile offenses on FBI rap sheets will undermine the uniformity of the FBI's records rather than achieving greater consistency.

The FBI's stated goal in seeking to retain and exchange nonserious offense information is to create a more "uniform policy" and to "increase the likelihood that law enforcement agencies in one state requesting criminal history searches for a criminal justice purpose will have the same information available to law enforcement agencies in the state where the records originate."²⁷

However, the reality is that many states will provide very disparate information, which undermines the FBI's stated goal. For example, some states, like Maryland,²⁸ will choose not submit non-serious offenses to the FBI's criminal records system. Other states will report non-serious offenses dating back many years, while some will start reporting prospectively. Finally, the states often have disparate policies related to fingerprinting of non-serious offenses, especially juvenile offenses, which means that the same offense will often be reported in one state but not in another. Although this patchwork system may prove useful for criminal justice purposes, it adds yet another layer of unreliability for employment screening purposes.

Thus, even in the case of the school bus driver example put forth by the FBI in support of the regulation, it is not clear that the FBI record will allow an employer to effectively evaluate traffic offenses in other states. The contents of the FBI record, especially low-level traffic records, will vary significantly depending on the state where the offense occurred -- whether the state collects fingerprints on low-level offenses like traffic violations, whether these offenses are reported by local law enforcement to the states, and whether the records will accurately make their way on to the FBI rap sheet. Thus, if the goal is indeed to promote greater consistency and uniformity of the FBI's records, then the FBI should retain and enforce the current policy precluding non-serious offenses as applied to employment and licensing decisions.

G. The FBI's proposal to increase the availability of criminal records undermines public safety by creating new barriers to employment of people with criminal records.

A broad consensus has developed among policy makers, criminal justice professionals, and communities hit hard by crime that far more should be done to reduce recidivism -- and thereby increase public safety -- by creating job

²⁷ 71 Fed. Reg. at 52303.

²⁸ Associated Press, "FBI Expands Fingerprint Database to Misdemeanors, Juvenile Offenders" (September 26, 2006).

opportunities for the record numbers of people with a recent criminal record. The FBI's policy, expanding the scope of criminal records, reflects a major step backwards in the national movement to reduce barriers to employment of people with criminal records.

In his 2004 State of the Union address, President Bush joined in support of this cause, stating "We know from experience that if [former prisoners] can't find work, or a home, or help, they are much more likely to commit more crimes and return to prison America is the land of the second chance, and when the gates of the prison open, the path ahead should lead to a better life." Of special significance, the American Bar Association's Commission on Effective Criminal Sanctions has formally recommended that "federal, state, territorial and local governments . . . *develop policies limiting access to and use of criminal records for non-law enforcement purposes*, which would balance the public's reasonable right to information against the government's interest in encouraging successful offender reentry and reintegration."²⁹ [Emphasis added].

The President and other community leaders are responding to the challenge facing the staggering numbers of people who now have a criminal record. Access to meaningful employment, including many of the entry-level occupations now regulated by state and federal employment prohibitions, is critical to their successful "reentry" to society. The addition of even minor criminal records to their FBI rap sheets can present major employment barriers, especially for those who have more isolated crimes on their record. Thus, if adopted, the FBI's policy will undermine the significant strides being made to reduce recidivism and increase public safety by limiting the employment prospects of those seeking work with a criminal record.

IV. Recommendations

We strongly urge the FBI not to expand the agency's authority to collect and report non-serious offenses for employment and occupational licensing purposes.

Instead, the FBI should maintain distinct reporting systems for rap sheets generated for employment purposes. Other criminal record repositories, such as the Pennsylvania State Police, have separate reporting mechanisms that generate a full report when an individual seeks to review his or her own record, and a more limited report when an employer seeks to review the record. Similarly, the California Department of Justice, which generates almost 1.5 million rap sheets each year for employment and licensing purposes, only reports selected offenses to

²⁹ American Bar Association, Commission on Effective Criminal Sanctions, *Report with Recommendations to the ABA House of Delegates* (August 2006), Recommendation IV.

the state occupational licensing agencies charged with conducting criminal background checks.³⁰ During the 1970s, the FBI also had the capacity to produce reports that segregated non-serious offenses for non-criminal justice purposes.³¹ With the availability of more current technologies, it should be even more feasible and efficient to do so now.

As a federal appeals court explained, the “FBI cannot take the position that it is a mere passive recipient of records received from others, when it in fact energizes those records by maintaining a system of criminal files and disseminating the criminal records widely, acting in effect as a step-up transformer that puts into the system a capacity for both good and harm.”³² Given the devastating impact that non-serious records can have on the employment prospects of people with criminal records, we also recommend that the FBI more aggressively protect the rights of people with criminal records by enforcing the current federal law, which precludes the reporting of minor offenses that are already making their way from the states to the FBI rap sheets.

* * *

Thank you for your consideration of our comments responding to the concerns of millions of people in the United States who are working hard to overcome their criminal records and the stigma that prevents them from realizing their full potential in the workplace and as contributing members of society.

³⁰ California Penal Code, Section 11105

³¹ Tarlton, 407 F.Supp. at 1087 (noting that “non-serious offenses are deleted and the entire rap sheet retyped . . . when requested by a banking institution or a non-federal employer).

³² Menard, 498 F.2d at 1026.