

# Public Criminal Record Information: Law and Practice

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# Primary topics for discussion

- Background
- Accuracy (“access and review”)
- Disposition reporting
- Dissemination
- New SEARCH reporting on expungement and sealing



# Key Resources to Seek Out

- Survey of State Criminal History Information Systems, 2020 (indispensable information about your state in the tables)(“2020 Survey”).
- Compendium of State Privacy and Security Legislation: 2002 Overview (old and not updated, but see for summary of state statutes)(“Compendium”).



# Hello, Becki Goggins!

- Introduction to Becki and SEARCH.
- SEARCH's members.
- What is a “central repository?”



# BACKGROUND AND LAW

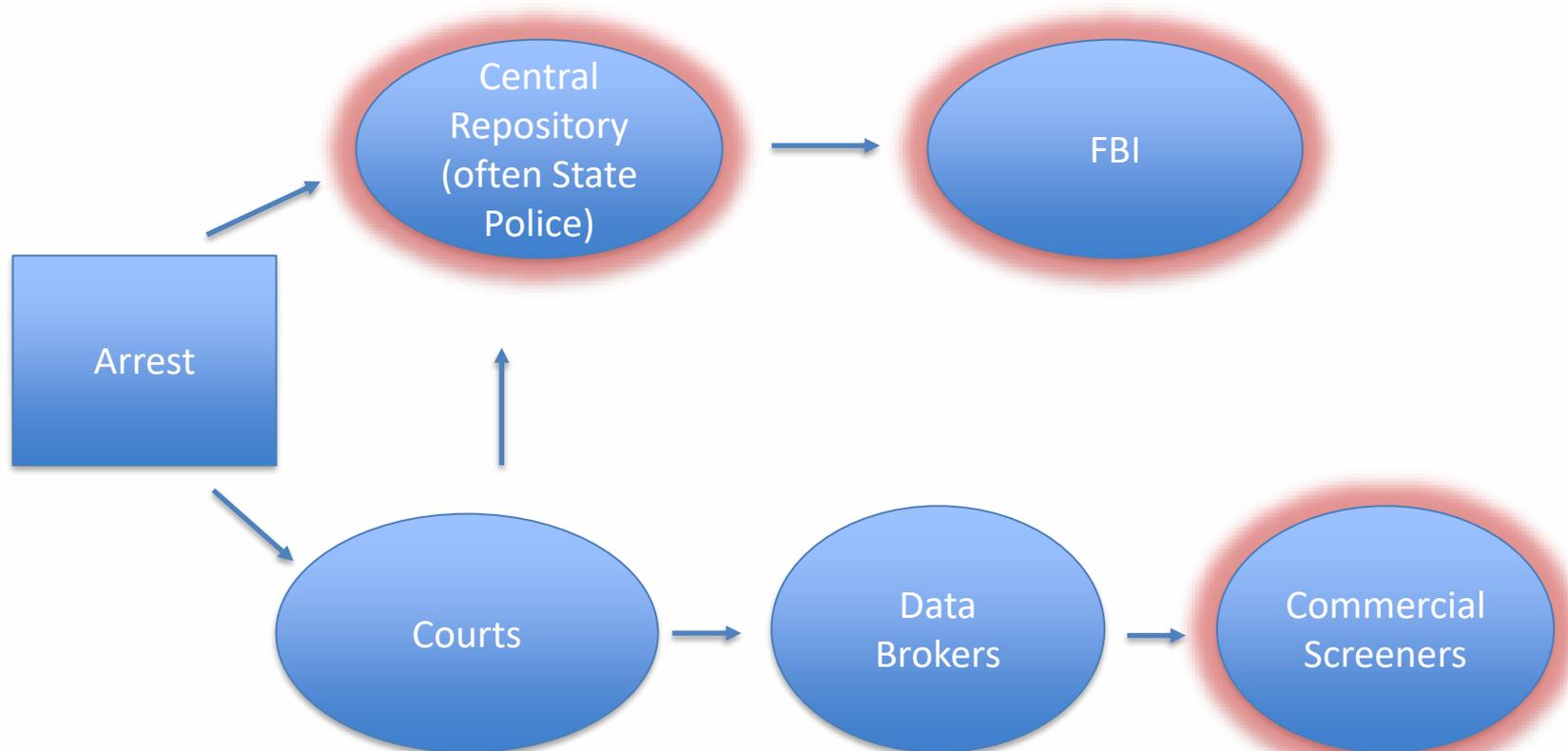


# Why Do We Care About Public Records?

- They are the sources for commercial background checks.
- Central repositories produce millions of background check per year, esp. in caregiving and safety-sensitive jobs.
- Also FBI checks (compiled mostly from state records).



# Life Cycle of a Criminal Case: Arrest/Disposition/Expungement



# National and State Checks - Examples

- Daycare providers
- Caregivers at residential facilities
- Teachers/other school personnel
- Volunteers who work with children
- Prospective foster/adoptive parents
- Relative caregivers
- Nurses/elder caregivers
- Legal guardians



# Federal Sources of Law Governing Public Records

- Justice Systems Improvement Act (see 42 USC § 3789g).
- USDOJ regulations: 28 USC Part 20 (1976).
- There may not be a private right of action to enforce the federal laws. But corresponding state laws may have right of action.



# Why do we care about the federal laws?

- They led to virtually every state adopting a criminal records statute, with many common characteristics.
- **Learn your state law!** See the Compendium to get started.
- USDOJ ostensibly has a right to enforce its rules. See 28 CFR § 20.25 (penalties, including cutting off federal funds).



## What is a “criminal record” under DOJ regs?

- Public source (central repository, courts, corrections), not commercial. “Criminal justice agency” - 28 CFR § 20.3(g).
- Convictions vs. non-convictions (latter defined at 28 CFR § 20.3(q)).
- Depending on above, different legal rules apply regarding accuracy and dissemination.



# ACCURACY



# Accuracy – why does it matter?

- Improve record quality.
- Part of a core representation strategy of eliminating harmful criminal records to the extent possible.
- Accuracy challenges help undermine the notion that “criminal records” are immutable, unquestionable things.



# Accuracy/Access and Review

- USDOJ reg: 28 CFR § 20.21(a)(complete and accurate), 20.21(g)(right to individual Access and Review).
- All states have laws governing accuracy and completeness of public records.
- All have A&R procedures – permitting individuals to review their records and seek corrections/file challenges.
- Remember, this reg applies to courts, also.



# Accuracy – other features of state laws

- Majority of states have **dissemination logs**, so that recipients of background checks can be notified of errors.
- 30 states require **audits** of the central repository – FOIA?
- See Table 5b of the 2020 Survey for your state's audit practice.



# Are your state statute's accuracy rules being implemented?

- Pennsylvania's courts are covered by the state law A&R provisions. Yet there used to be no procedure for correction of court records until CLS pushed for it.



# What errors might you want to fix?

- Offense is wrong.
- Grade (ie., misdemeanor, etc.) is wrong.
- Charges are listed more than once.
- Disposition is not reported.
- Others?

These errors might affect employability, coverage by a prohibitive law, eligibility for sealing, etc.



# Affirmative advocacy where CLS has used state accuracy requirement

- Fixing criminal identity theft (with both State Police and courts).
- Negotiating error correction procedure with courts.
- Forcing courts to correct computer glitches resulting in positive dispositions not being reported on website.



# DISPOSITION REPORTING



# Disposition reporting - Why do we care?

- Original charges are usually worse than the outcome.
- Sometimes, all dropped.
- Even if conviction, chances are that conviction on less than all charges.
- If disposition not present, employer will assume that charges are pending.
- No outcome, no Clean Slate.



# Disposition standards

- USDOJ: to be “complete,” a Central Repository arrest record must have disposition information **within 90 days of disposition**. 28 CFR § 20.21(a)(1).
- All but one state have law governing disposition requirements, according to the Compendium.



# Are states living up to disposition standards?

- Does it ever vary! Elapsed time between court disposition and central repository record update can take between a few days and **over 2 years**.
- You can have similar states with wildly different outcomes.
  - Iowa – 2 days or less
  - Kansas – 1.5 to more than 2 years



# Delay by Courts in Sending Info

Notable performances (from the 2020 Survey)

- One day or less: 14 states
- 31-90 days: 10 states (AZ, AR, FL, NV, NM, OH, OK, SC, WV, WY)
- 91-180 days: ND
- 181-365 days: KS
- More than a year: IN



# Delay by Central Repositories in Entry

## Notable performances

- One day or less: 22 states
- 31-90 days: 5 states (AR, CA, LA, NV, WY)
- 91-180 days: NM
- 181-365 days: AZ
- More than a year: KS



# Role of Prosecutors in Disposition Reporting

- Only about 60% of states require notification of central repository if prosecution declined following an arrest.
- Without their circling back, these arrests will NEVER have dispositions.
- Implication: expungements needed.



# Impact of Pandemic on Dispositions

- 2020: 13M fewer dispositions (15% decrease). Why? Fewer arrests? Behind on record keeping?
- Also issues with fingerprint-based arrests?
- Do those impacts linger?
- Is there any good news on dispositions? Disposition recovery projects; increasing automation.



# What's An Advocate to Do?

- Analysis and advocacy may be needed.
- Look at Table 7b of the 2020 Survey to see where your state stands.
- You should especially worry about this issue if:
  - Your state is behind on automation;
  - You are interested in Clean Slate.



# DISSEMINATION RULES/ EXPUNGEMENT



# Dissemination: federal standards

- USDOJ reg: permits dissemination of non-conviction information only if permitted by official policy (such as statute or court rule), 28 CFR § 20.21(b)(2).
- As a result, many states do distinguish between conviction and non-conviction information.



# Dissemination: Depends on the state and the source

- Central repository: state laws vary greatly, from “closed record” to “open record” states.
- Court records: historical presumption of open access.



# New Expungement Data

- Table 20a – national and state data – new! Tracked by 33 states.
- 2020 petitions: 298k for expungement, 2.8M for sealing.
- 2020 state initiated: 504k expunged, 1.5M sealed.
- Some large numbers sealed without petition (FL, GA, VA), expunged without petition (500k+ in IL).
- How was this data provided? Future plans for this data tracking?



# What about privacy rights?

- United States Dept. of Justice v. Reporters Committee for Freedom of the Press, 489 U.S. 749 (1989) – FBI rap sheets are not available under FOIA because of privacy interests.
- Note language about “practical obscurity” concerning compilation of information that is already public.



# Questions?

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