



WHITE PAPER

DISMISSED CRIMINAL RECORDS & OTHER NON-CONVICTION DATA



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Over the past 30 years, the digital age of the screening industry has made criminal background checks a common everyday practice for most businesses. Some estimates suggest that almost 87% of US businesses utilize a background report that includes criminal information for employment and other business related decisions. Depending on the position, a job applicant with a criminal history of violence, drunk driving, fraud, embezzlement, or other crimes might pose a risk to the work environment. But employers often don't realize that public record searches can yield many types of criminal records, with no corresponding convictions. A single criminal case can create many different types of public records, most of which are easily searchable. This vast array of publicly available information often includes arrest records, dismissed cases/charges, as well as other types of administrative court records that are necessary components of the criminal case management process, but offer no legitimate standing with regard to the guilt or innocence of the person accused of the crime.

A criminal charge or an arrest, in itself, is not an automatic assignment of guilt nor does it indicate that an individual has done something illegal or wrong. In the American Criminal Justice System, individuals that have been charged with a crime, are presumed innocent until proven guilty in a court of law. While the notion of "of innocence until proven guilty" is

an established tenet of our legal process, scholars agree that it doesn't necessarily extend into all aspects of a person's life. However, over time it has become an ideological construct that is commonly embraced by modern society. This leads most experts to conclude that criminal charges not resulting in a conviction should not be considered or count against candidates for jobs, housing, or other opportunities. There is indeed, a strong argument that an arrest without a conviction, dismissed charges, or a not guilty verdict are all actions that tend to lean more heavily in favor of a person's innocence rather than their guilt.

The Judicial System routinely processes millions of cases through courts annually. Yet experts suggest that less than 10% percent of all criminal cases conclude by trial, indicating that most criminal cases get disposed of through myriad remedies available to the justice system. The US Department of Justice defines a "disposed case" as one in which there has been a judicial order that (1) dismisses the charge, (2) acquits the defendant, (3) convicts the defendant, (4) defers adjudication of the defendant under a deferred-adjudication rule or statute, or (5) diverts a defendant into a diversion program.¹ Even when a criminal case does not conclude with a conviction, the records associated with the arrest, charges, and prosecution, remain matters of public interest and have long been considered vital to the administration of justice and possible future law enforcement investigations.

Perhaps the greatest "fly in the ointment" is of course, the question of the dismissed criminal record and its omnipresence in our public record systems.

Charge dismissals are formal legal remedies that will completely end the prosecution of the charges and the trial process, without any presumptions regarding the guilt or innocence of the person charged. Based on simple legal theory, a dismissal of a criminal charge is in fact a good thing for the defendant; essentially leaving the charged person whole and not convicted of the crime(s) as charged. Dismissed criminal records are residual court system records, being most similar and equal to arrest records. The legitimacy and use of dismissed criminal records and other non-conviction information has long been debated. One of the most common justifications for the use of this information frequently comes from law enforcement agencies and investigators, claiming investigative value in criminal information regardless of case disposition. However, in a 1957 US Supreme Court case, **Schwabe v. Bd of Bar Examiners, 353 U.S. 232, 241**, the court opined "the mere fact that a person has been arrested has very little, if any, probative value in showing that he has engaged in any misconduct. An arrest shows



nothing more than that someone probably suspected the person apprehended of an offense.”² In 1975 the US Court of Appeals – DC Circuit case, **Utz v. Cullinane, 520 F.2d at 479**, the court stated “A collection of dismissed, abandoned or withdrawn arrest records are no more than gutter rumors when measured against any standard of constitutional fairness to an individual and, along with records resulting in an acquittal are not entitled to any legitimate law enforcement credibility whatsoever.”³ In the case **United States v. Zapete-Garcia, 447 F.3d 57, 60 (1st Cir. 2006)**, the court claimed “A mere arrest, especially a lone arrest, is not evidence that the person arrested actually committed any criminal conduct.”⁴

There are uses for these records in statistical analysis, case law research and certainly with regard to the general administration of the courts, these legitimate uses cannot be denied. But the consequences of an arrest or criminal charges, even absent a conviction, can last a lifetime. These residual case records, can no doubt lead to the wrongful denial of access to many of life’s most fundamental human rights, including education, employment and housing. In a 1979 California Court of Appeals decision, in the case **Central Valley Chapter of the 7th Step Foundation, Inc., et al., Plaintiffs and Appellants, v. Evelle J. Younger, as Attorney General, etc., et al (1st Dis 1979)**, the court held that allegations of complaint that arrest records were commonly misinterpreted by public employers, that subjects of those records suffered damage to their reputation and were stigmatized and exposed to unnecessary and unjustified public harassment and humiliation, and that there was widespread discrimination against individuals with arrest records in obtaining employment were sufficient to state a prima facie violation of the state constitutional right of privacy.⁵

One of the most notable cases challenging the use of these records is **Green v. Missouri Pacific Railroad, 523 F. 2d 1290 (8th Cir. 1975)**.⁶ The court ruled that Missouri Pacific Railroad’s overly broad use of certain criminal record information in employment decisions, was discriminatory and a violation of the applicant’s right to privacy. In 2012, the EEOC issued a guidance known as the **Green Factors**, an **Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions under Title VII of the Civil Rights Act** - <https://www.eeoc.gov/laws/guidance/enforcement-guidance-consideration-arrest-and-conviction-records-employment-decisions#:~:text=The%20three%20Green%20factors%20are,the%20job%20held%20or%20sought>. In the employment context, the Equal Employment Opportunity Commission has





explained that barring applicants from employment on the basis of arrests not resulting in conviction is not consistent with business necessity under Title VII because the fact of an arrest does not establish that criminal conduct occurred.⁷ Since the Green decision, the EEOC has pursued many legal challenges against companies for using overly broad screening practices (using non-relevant records), including **EEOC v. Pepsi Bottling Group, 2005**, **EEOC v. DOLGENCORP, 2013**, **EEOC v. BMW Manufacturing, 2013**, all resulting in very large financial settlements along with administrative sanctions, regulatory oversight.

Since 1998, over 36 states have passed various laws (Ban the Box, Fair Chance, Second Chance) that either limit or completely ban the use of non-conviction records, including dismissed criminal charges particularly for purposes of employment and housing. States continue to review challenges caused by the over-reporting of certain public records, leading many states to create laws that will now automatically expunge or seal some convictions and almost all non-conviction records. These new automatic sealing and expungement laws, particularly in the cases of non-conviction records should help screening companies create more accurate and action worthy reporting.

Times have changed - the Internet makes information about people more readily available than any other time in our history. The use of public record data is more prolific than ever before and using this information properly, fairly, and with a sense of equity will continue to help enhance the safety of our society. But in doing so, we cannot ignore the potential harm that can be caused through the reporting of non-conviction criminal information, it is not imaginary and can result in long lasting economic and reputational hardships, especially for anyone with limited access to adequate legal representation.

At Cisive, we recognize the important role we play as a steward of the public record information provided in our reports. Believing that non-conviction criminal records offer no legitimate value in the business decisions of our clients, our reports will be limited to the return conviction data that is reportable, in accordance with current federal, state and local laws.

CITATIONS

1. US Department of Justice - NCJ 305157, Data on Adjudication of Misdemeanor Offenses, 2022 (4).
2. Schware v. Bd of Bar Examiners, 353 U.S. 232, 241 (1957)
3. Utz v. Cullinane, 520 F.2d at 479
4. United States v. Zapete-Garcia, 447 F.3d 57, 60 (1st Cir. 2006)
5. Central Valley Chapter of the 7th Step Foundation, INC., et al., Plaintiffs and Appellants, v. Evelle J. Younger, as Attorney General, etc., et al (1st Dis 1979),
6. Green v. Missouri Pacific Railroad, 523 F. 2d 1290 (8th Cir. 1975)
7. EEOC - Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions under Title VII of the Civil Rights Act

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ABOUT CISIVE

At Cative, we are experts in the specific risks and regulations that apply to the financial services and other highly regulated industries including healthcare and transportation. For many years, we have provided tailored solutions to meet the unique requirements of our enterprise clients.

Cative's service model provides a single, integrated system throughout the globe using complete applicant information and country-specific forms. Cative returns information to our clients through a centralized system for analysis, quality control, presentation, and billing.

With over four decades of experience and expertise in working with many of the world's largest financial services institutions, Cative's deep insight into employment screening practices and industry knowhow, is unlike any other background screening provider in the industry.

Your business will not only get a background screening provider, but a lifelong partner – a company that stands by their work; protects their clients and provides the consultation and guidance world class act organizations are looking for.

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