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## Collateral Effects of Arrests in Minnesota

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## COMMENT

### COLLATERAL EFFECTS OF ARRESTS IN MINNESOTA

SHAWN D. STUCKEY\*

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\* J.D. Candidate 2008, University of St. Thomas School of Law; Vanderbilt University; Troy University; B.S.,B.A. I would like to thank Jane Dockery for encouraging me and further convincing me that I have an obligation to use the blessings God has given me to make this world a better place; and that law school was the next important step towards doing my part to uplift the African American community. I would like to thank my grandmother, Gussie Moody, for being such a strong woman, and ensuring that I broke the negative cycle afflicting our family: six out of seven of my aunts and uncles were, at one time, all addicted to crack-cocaine, as was my mother, who is still currently addicted, in addition to three of my uncles and two younger brothers who have spent significant time in prison. I would also like to thank my wonderful cousin Kisha Moody for her continuous love and support. Special thanks to Nathaniel Khaliq, St. Paul NAACP, Council on Crime and Justice, Judge Larry J. Cohen, Prof. Nekima Levy-Pounds, Scott Swanson, and Jon P. Erickson for making the fight for equal rights and social justice a life passion and an attainable goal. Also, special thanks to Zelle Hofmann for giving a first generation college and law student a chance and for pledging to continue to support my efforts to ensure equal justice for all through *pro bono* work. And thanks to Max Kieley for his continuous support and for believing in the need to publish material such as this that will potentially have a very positive effect on the lives of the disadvantaged.

A portion of this Comment was the subject of testimony I gave to the United Nations when I spoke regarding the United States' non-compliance with a ratified treaty at the 72nd Convention on the Elimination of All Forms of Racial Discrimination in Geneva, Switzerland. As a result of this Comment and the subject of that testimony, at least one head of a Minnesota County Attorney's office has agreed to change one of their policies negatively impacting the poor and disadvantaged. My hope is that after viewing this Comment, in addition to my other Comment (published in UCLA's CCLL Law Review) discussing the collateral effects of African Americans in Minnesota, other County Attorneys will have the courage and compassion to follow his lead.

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## I. INTRODUCTION

When a Minnesotan is convicted of a crime, that individual is subject to the direct and collateral effects of a conviction. But, unfortunately, many are surprised to learn that when an individual is arrested and the case is neither charged, nor dismissed, nor results in a not guilty adjudication, the arrest record is neither discarded nor sealed.<sup>1</sup> Anyone can access that information for many years.<sup>2</sup> And, many people, in fact, use this information to make determinations for employment and housing. Others make the person's arrest known to the community.<sup>3</sup> And, if there is a resolution in favor of the defendant, the resolution is often unreported. Unless the individual—who is the subject of the arrest record—takes immediate action, that person will be in danger of being denied employment, housing, or worse, having his or her record made publicly available.

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1. See CrimNet Program Office, BACKGROUND CHECKS AND EXPUNGEMENTS – RESEARCH REPORT 87 (2006), <http://www.crimnet.state.mn.us/Projects/BGchecks.htm> (follow “Research Report on Background Checks and Expungements (October 2006)” hyperlink) [hereinafter CrimNet, BACKGROUND CHECKS] (“When arrested, some people are most concerned about going home, keeping the kids, and not going to jail because they would lose their jobs. They’re told it’s ‘dismissed’ . . . . But it’s guilt, with many consequences. People aren’t informed and don’t understand.”).

2. See MINN. STAT. ANN. § 13.82(2) (West 2007) (Arrest data “shall be public at all times in the originating agency.”); see, e.g., Gregg E. Johnson, Dist. Ct. Judge, Ramsey County Courtroom Address: Consideration of Executive Agency Inherent Power Expungement (Oct. 18, 2006) (describing how a defendant who petitioned for expungement explained that an arrest put on her record in 1979—ultimately dismissed by the prosecutor—still prevented her from obtaining decent employment and housing).

3. See *In re Quinn*, 517 N.W.2d 895, 898 (Minn. 1994) (discussing that the public (and thus, the media) is entitled under the Government Data Practices Act to access to law enforcement records).

Collateral effects are invisible,<sup>4</sup> civil punishments<sup>5</sup> attached to any crime.<sup>6</sup> Collateral effects arise immediately following an arrest.<sup>7</sup> In the past, the public could not easily access criminal history records—remedies curtailing their availability were not compelling.<sup>8</sup> Today, technology has greatly increased the public's accessibility to criminal records.<sup>9</sup> Employers, landlords, media,<sup>10</sup> data harvesters<sup>11</sup> and any member of the public,<sup>12</sup> have access to almost every single arrest record. The only protected arrest records are those that are sealed and/or removed completely.

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4. Jeremy Travis, *Invisible Punishment: An Instrument of Social Exclusion*, in *INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT* 15, 15–16 (Marc Mauer & Meda Chesney-Lind eds., 2002)

Not all criminal sanctions are as visible as prisons: We punish people in other, less tangible ways. . . . This form of punishment is not as obvious to the public . . . [A] criminal sanction that is nearly invisible . . . [is] the punishment that is accomplished through the diminution of the rights and privileges of citizenship and legal residency in the [U.S.]. . . . Because these laws operate largely beyond public view, yet have very serious, adverse consequences for the individuals affected, [they are] 'invisible punishment.'

5. *Id.* at 16 ("Through judicial interpretation . . . these forms of punishment have been defined as 'civil' rather than criminal in nature . . .").

6. Shawn D. Stuckey, Comment, *Decreasing the Accessibility to Criminal History Records to Diminish the Devastating Impacts of Collateral Effects on African Americans in Minnesota*, 27 *CHICANO-LATINO L. REV.* (Feb. 2008) (manuscript at 1); see Gabriel J. Chin & Richard W. Holmes, Jr., *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 *CORNELL L. REV.* 697, 700 (2002) ("Collateral consequences can operate as a secret sentence."); A.B.A., *STANDARDS FOR CRIMINAL JUSTICE: COLLATERAL SANCTIONS AND DISCRETIONARY DISQUALIFICATION OF CONVICTED PERSONS*, Standard 19-1.1(a) (3d ed. 2003), [http://www.abanet.org/crimjust/standards/collateral\\_toc.html](http://www.abanet.org/crimjust/standards/collateral_toc.html) (follow "Standard 19-1.1(a)" hyperlink); see generally Rodney J. Uphoff, *The Criminal Defense Lawyer as Effective Negotiator: A Systemic Approach*, 2 *CLINICAL L. REV.* 73, 100–01 (1995) (noting that collateral effects may be worse than sentences).

7. Stuckey, *supra* note 6, (manuscript at 1); see Tom Johnson, President, Council of Crime and Justice, *Why Arrest Legislation Should Be Approved in Minnesota*, Lecture for Council on Crime and Justice (Nov. 22, 2006) ("Most people either discuss the consequences of arrest or the consequences of conviction. Although the consequences of conviction are worse than the consequences of arrest, the two should be considered together.").

8. Stuckey, *supra* note 6, (manuscript at 3). See generally CrimNet, *EXPUNGEMENTS SUB-TEAM: MEETING MINUTES 4* (Aug. 11, 2006), <http://www.crimnet.state.mn.us/Governance/TaskForceMinsAgendas.htm> (follow "Minutes" hyperlink beside the meeting date "8/11/06") (noting that the current expungement statute is narrow and not very helpful to many because it was implemented before widespread electronic distribution); CrimNet, *BACKGROUND CHECKS*, *supra* note 1, at 79 (finding that in 2000, 318 people were granted expungements and in 2005, the number rose to 1,295).

9. Stuckey, *supra* note 6, (manuscript at 3); see Jon Bonné, *Most Firms Now Use Background Checks: Survey; 8 in 10 Probe Criminal History Amid Security Worries*, MSNBC, Jan. 21, 2004, <http://www.msnbc.msn.com/id/4018280/> ("Most companies now conduct criminal background checks on potential employees . . . A sharp increase in this practice . . . reflects . . . the growing public availability of personal information."); CrimNet, *BACKGROUND CHECKS*, *supra* note 1, at 79.

10. See *Quinn*, 517 N.W.2d at 898.

11. See *MINN. STAT. ANN.* § 13.82; *MINN. STAT. ANN.* § 15.162 (West 2007).

12. *MINN. STAT. ANN.* § 13.82(16); see also *Quinn*, 517 N.W.2d at 898 (finding that an aggrieved person may claim a protectable interest in the information of an arrested individual).

This Comment explores the collateral effects of arrests that directly impact Minnesotans. The Comment discusses all arrests but will specifically focus on those that do not result in conviction. Section II explains how low-income citizens and minorities are particularly susceptible to the creation of arrest records. I then discuss how particular police policies subject individuals to criminal records by arresting and releasing them without prosecution. Section III discusses how arrest information in Minnesota is easily accessible to the public after it is gathered and stored. Section IV concerns the collateral effects of arrests and various pieces of legislation that have been introduced to address this issue. Section V discusses relevant legislative matters. Section VI offers advice for protecting personal data. Finally, section VII provides recommendations to guide the public, community activists, legislators, and the judiciary and facilitate change in how arrest information not resulting in convictions is used in Minnesota; the suggestions include a little-known option that allows such individuals to quickly and easily alleviate the negative consequences of collateral effects.

## II. THE IMPACT OF COLLATERAL EFFECTS ON LOW-INCOME AND MINORITY CITIZENS AND RELATED PROBLEMS WITH LAW ENFORCEMENT POLICIES

Although collateral effects of arrests provide negative consequences for all Minnesota residents, the consequences are particularly dangerous for low-income individuals and disadvantaged minorities, specifically African Americans. Studies have repeatedly shown that African Americans are policed, prosecuted and sentenced at rates greatly disproportionate to their numbers in society.<sup>13</sup> A major source of this problem is that African Americans are more often arrested and prosecuted for low-level offenses—such as petty misdemeanors and misdemeanors—than Caucasians; these arrests usually occur in poorer and predominately African American neighborhoods.<sup>14</sup> Nationally, African Americans are arrested at rates almost three times their percentage of the population.<sup>15</sup> Despite comprising 12 to 13 percent of the United States' population, African Americans "account for more than 30 percent of all arrests."<sup>16</sup> For felony-level crimes, minorities are

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13. See Lenese C. Herbert, *Bête Noire: How Race-Based Policing Threatens National Security*, 9 MICH. J. RACE & L. 149, 205 n.341 (2003) (citing KATHERYN K. RUSSELL, *THE COLOR OF CRIME: RACIAL HOAXES, WHITE FEAR, BLACK PROTECTIONISM, POLICE HARASSMENT, AND OTHER MACROAGGRESSIONS* 29 (1998)).

14. See generally Thomas L. Johnson & Cheryl Widder Heilman, *An Embarrassment to All Minnesotans: Racial Disparity in the Criminal Justice System*, BENCH & BAR OF MINN., May/June 2001, <http://www2.mnbar.org/benchandbar/2001/may-jun01/racial-disparity.htm> (last visited Feb. 17, 2008); Alan Page, Assoc. J. of Minn. S. Ct., *Bias in the Courts?*, Address at the Eighth Circuit Judicial Conference (July 17, 2003), available at <http://www.courts.state.mn.us/district/0/?page=NewsItemDisplay&item=20243>.

15. Herbert, *supra* note 13, at 205 n.341.

16. *Id.*

seven times more likely to be arrested than whites.<sup>17</sup> Many of these arrests result in cases being dismissed or not charged at all.<sup>18</sup> At every level of law enforcement—the police, prosecuting agencies and courts—a paper and electronic record is created and passed on to the next level. Often, the report of the favorable termination does not follow.

In Minnesota, the story is embarrassing.<sup>19</sup> The arrest rate in Minnesota for African Americans compared to Caucasians is ten to one—more than twice the national average.<sup>20</sup> For some low-level crimes, African Americans are 21 times more likely to be arrested than a Caucasian person.<sup>21</sup> In 2000 alone, the State arrested almost half of all African American males between the ages of 18 and 30 residing in Hennepin County, Minnesota.<sup>22</sup> In 2006, a sampling of 168 defendants arrested in Minneapolis for low-level offenses showed that 133 (or 80 percent) of the defendants were African American.<sup>23</sup> Although many arguments may be made against the legitimacy of some of these arrests, the arrest records alone create criminal records for these individuals. Unfortunately, the criminal record remains available to the public for many years. Fortunately, options are available to one who wishes to permanently remove his or her information from the public's accessibility, which are discussed later in this Comment.<sup>24</sup>

“Zero tolerance” policing is a model which began in California, became popularized during former Mayor Rudy Giuliani's tenure in New York and has been adopted by many police agencies around the country, including in Minnesota.<sup>25</sup> “Zero tolerance” policing essentially means that

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17. Johnson & Heilman, *supra* note 14, at *What Do We Know?: Arrests*.

18. See, e.g., *id.*, at *What Do We Know?: Prosecutions*.

19. See generally Page, *supra* note 14 (noting that compared with Caucasians, African Americans are “arrested more often, charged more often, given higher bails, tougher plea bargains, less fair trials, and far longer sentences. . . [and are] under-represented in justice system jobs”) (quoting MINN. SUP. CT. TASK FORCE, ON RACIAL BIAS IN THE JUDICIAL SYSTEM (May 1993), available at <http://archive.leg.state.mn.us/docs/pre2003/mandated/930387.pdf>).

20. Stuckey, *supra* note 6, (manuscript at 14); COUNCIL ON CRIME & JUSTICE, REDUCING RACIAL DISPARITY WHILE ENHANCING PUBLIC SAFETY 5, available at [http://www.racialdisparity.org/reports\\_final\\_report.php](http://www.racialdisparity.org/reports_final_report.php) (follow “READ THE FINAL REPORT” hyperlink) [hereinafter COUNCIL ON CRIME & JUSTICE, RACIAL DISPARITY].

21. See generally Johnson & Heilman, *supra* note 14, at *What Do We Know?: Arrests*.

22. Stuckey, *supra* note 6, (manuscript at 14); COUNCIL ON CRIME & JUSTICE, FINAL DRAFT RESOLUTION LANGUAGE? (2006) (on file with author) (“WHEREAS, In . . . 2000, [44 percent] of African American males between the ages of eighteen and thirty and residing in Hennepin County were arrested and booked in that year alone.”).

23. E-mail attachment from Guy Gambill, Advocacy Coordinator, Council on Crime & Justice, to author (Apr. 13, 2007, 03:58 CST) (on file with author). Accord e-mail from Guy Gambill, Advocacy Coordinator, Council on Crime & Justice, to author (Apr. 5, 2007, 10:08 CST) (on file with author).

24. See MINN. STAT. ANN. § 299C.11(1)(b) (West 2007) (stating that if a person is arrested but not charged, she may have her arrest records returned and, when applicable, other identification data, simply upon request).

25. See generally *Partners in Justice: A Colloquium on Developing Collaborations Among Courts, Law School Clinical Programs and the Practicing Bar*, 30 N.Y.U. REV. L. & SOC. CHANGE 739, 748 (2006) [hereinafter *Partners in Justice*]; COUNCIL ON CRIME & JUSTICE, RACIAL

police officers crack down on small crimes with the purpose of deterring more serious violations. For example, “zero tolerance” policing would call for arresting someone for loitering with the hope that the individual will either not be on the street to commit a more serious crime or will somehow be dissuaded from future criminal activity. Police officers might defend “zero tolerance” policing, and other similar arrest and deterrence policies around the country, by showing the vast numbers of arrests that are made—even though many of the arrests are for very low-level offenses. These low-level offenses enhance the seriousness of later charges and penalties, which lead individuals to public dependence and further crime; the obvious effect of this policing model is to place more individuals in jeopardy of being subject to the collateral effects of arrest records.

Police in Minneapolis, Minnesota, for example, use a system called CODEFOR<sup>26</sup> to place officers in “hot spots.”<sup>27</sup> As one government official noted, “When you want to catch fish, you go where the fishing is easiest.”<sup>28</sup> These “hot spots” are historically high crime areas, usually located in low-income, minority neighborhoods.<sup>29</sup> The results of these policies present an “embarrassing” racial disparity.<sup>30</sup>

In Minneapolis, African Americans are 35 times more likely to be arrested for providing false information and 27 times more likely to be arrested for lurking. African Americans are also 19 times more likely to be arrested for trespassing and 10 times more likely to be arrested for disorderly conduct than whites.<sup>31</sup>

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DISPARITY, *supra* note 20, at 6–7 (“CODEFOR is the primary strategy used by the Minneapolis Police Department (MPD) to identify and respond to reported crime, with traffic law enforcement stops being used as the primary crime reduction tactic for a wide range of ‘hot spots’” located in primarily African American and lower income neighborhoods); Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271, 1280 (2004) (“The disproportionate incarceration of African Americans results more from systemic factors, such as law enforcement priorities and sentencing legislation, than from biased decisionmaking in individual cases.”).

26. COUNCIL ON CRIME & JUSTICE, RACIAL DISPARITY, *supra* note 20, at 6.

27. Stuckey, *supra* note 6, (manuscript at 15); see COUNCIL ON CRIME & JUSTICE, RACIAL DISPARITY, *supra* note 20, at 6–7 (noting that CODEFOR places a high police presence in African American neighborhoods); CrimNet, BACKGROUND CHECKS, *supra* note 1, at 83 (“Some jurisdictions use arrest ‘sweeps’ to maintain order and prevent crime. Even for people who are arrested but never charged or convicted, the record of arrest is public data and shows on some criminal background checks. Arrestees would have an interest in expunging their arrest records.”).

28. David T. Courtwright, *The Drug War’s Hidden Toll*, ISSUES IN SCI. & TECH. 5 (1996/1997), available at [http://findarticles.com/p/articles/mi\\_qa3622/is\\_199601/ai\\_n8738302/pg\\_5](http://findarticles.com/p/articles/mi_qa3622/is_199601/ai_n8738302/pg_5).

29. Stuckey, *supra* note 6, (manuscript at 15).

30. See Johnson & Heilman, *supra* note 14.

31. *Id.* at *What Do We Know?: Arrests*.

Minnesota is one of the nation's leaders in disproportionate arrest rates for African Americans<sup>32</sup> and disparity of incarceration rates for African Americans.<sup>33</sup>

In addition to arresting individuals for minor offenses, the officers are encouraged to make traffic stops in order to find weapons and other contraband.<sup>34</sup> African Americans account for 40 percent of traffic stops in Minneapolis, even though they make up only 20 percent of the city's population.<sup>35</sup>

One example of the effect of this policing model is seen in Hennepin County, Minnesota. At one point in 1995, after Minnesota adopted a "zero-tolerance"<sup>36</sup> policing model, roughly 4,500 defendants were arrested in Hennepin County.<sup>37</sup> Of that number, only 1,600 of them were presented to the Hennepin County Attorney's Office. Out of the 1,600, roughly 1,200 were charged. Three hundred of the 1,200 received diversion (a program which allows first-time offenders the ability to avoid jail time on the condition that the criminal charges against the offender will be dismissed after a specified period of time if the offender successfully completes the program).<sup>38</sup> One hundred of them went to prison. Over 90 percent of the defendants were released without convictions. Many of these were released because of a lack of probable cause.<sup>39</sup>

"In 2004 in Hennepin County, there were 46,806 misdemeanor cases filed in the Fourth Judicial District Court. 28,818 did not result in a conviction."<sup>40</sup> In the same year in Ramsey County, there were 38,245 misdemeanor cases filed in court; 16,838 did not result in conviction.<sup>41</sup> According

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32. COUNCIL ON CRIME & JUSTICE, RACIAL DISPARITY, *supra* note 20, at 5.

33. Human Rights Watch, *Incarceration and Race*, in UNITED STATES PUNISHMENT AND PREJUDICE: RACIAL DISPARITIES IN THE WAR ON DRUGS § III (May 2000), <http://www.hrw.org/reports/2000/usa/> (follow "INCARCERATION AND RACE" hyperlink) (last visited Feb. 17, 2008) (Minnesota has "the greatest racial disparity in incarceration" of any state in the nation. "[B]lacks are incarcerated at 23 times the rate of whites. . . . [In Minnesota] a black man is 26.8 times more likely to be in prison than a white man."); COUNCIL ON CRIME & JUSTICE, AFRICAN AMERICAN MALES IN THE CRIMINAL JUSTICE SYSTEM 1, [http://www.racialdisparity.org/reports\\_defining.php](http://www.racialdisparity.org/reports_defining.php) (follow "African American Males in the Criminal Justice System" hyperlink) (last visited Feb. 17, 2008) [hereinafter COUNCIL ON CRIME & JUSTICE, AFRICAN AMERICAN MALES] ("Compared to other states, Minnesota has the greatest black-to-white disparity in imprisonment rates.").

34. See COUNCIL ON CRIME & JUSTICE, RACIAL DISPARITY, *supra* note 20, at 6.

35. Johnson & Heilman, *supra* note 14, *What Do We Know?: Police Stops*.

36. See generally COUNCIL ON CRIME & JUSTICE, RACIAL DISPARITY, *supra* note 20, at 7.

37. Kevin Burke, Dist. Court Judge, Defendants Contact with Criminal Justice System After Arrest, Lecture at the University of St. Thomas School of Law (Feb. 6, 2007).

38. MINN. STAT. ANN. § 401.065 (West 2007).

39. Burke, *supra* note 37 (A "probable cause determination" is a determination, based on the full record, of whether sufficient probable cause exists to proceed to trial.); *State v. Bragg*, 577 N.W.2d 516, 520 (Minn. Ct. App. 1998).

40. COUNCIL ON CRIME & JUSTICE, A BALANCED APPROACH TOWARD PUBLIC ACCESSIBILITY TO ARREST RECORDS NOT LEADING TO CONVICTION 2 (unpublished legislation, Mar. 2007), available at <http://www.pepp.org/new/tan/brief.pdf> [hereinafter COUNCIL ON CRIME & JUSTICE, NON-CONVICTION LEGISLATION].

41. *Id.*



to a Hennepin County District Court Judge, in certain situations, police have been known to arrest individuals in circumstances where the officers knew probable cause was lacking or non-existent only to release the individuals a few hours later with the goal of dissuading them from participating in criminal activity.<sup>42</sup>

Evidence of the judge's declaration may be reflected by a report on low-level offenses conducted by the Council on Crime and Justice. African Americans are 15 times more likely than Caucasians to be arrested for low-level offenses, but African American arrests were only 7 times more likely to result in conviction.<sup>43</sup> "African Americans accounted for 72.3% of low level offense arrests" in Minneapolis; conviction rates for crimes such as lurking and loitering, however, were less than 10 percent.<sup>44</sup> Out of 800 arrests for the Minneapolis "lurking ordinance" in three and one-half years, almost 90 percent were dismissed.<sup>45</sup>

A study of search warrants by the St. Paul Chapter of the NAACP and law students from three Minnesota law schools<sup>46</sup> showed that search warrants were being executed by police officers in Ramsey County, Minnesota and the resulting arrests were frequently either dismissed or not charged as a result of a lack of probable cause.<sup>47</sup> The arrest information for these individuals is not automatically sealed. Arrest records are publicly available until individuals take the proper steps to seal their records. Few individuals are able to take the proper steps to seal their records, however, because these options are not well known and may be cost-prohibitive.

### III. WHAT HAPPENS TO ARREST INFORMATION?

After one is arrested in Minnesota, law enforcement agents must report a record of this arrest along with any other identifying information to the arresting agency, Minnesota's central court system and Minnesota's central repository.<sup>48</sup> Minnesota's "central repository is the Bureau of Criminal Ap-

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42. Burke, *supra* note 37.

43. COUNCIL ON CRIME & JUSTICE, *LOW LEVEL OFFENSES IN MINNEAPOLIS – AN ANALYSIS OF ARRESTS AND THEIR OUTCOMES* 3 (Nov. 2004), [http://www.racialdisparity.org/reports\\_defining.php](http://www.racialdisparity.org/reports_defining.php) (follow "Low Level Offenses in Minneapolis – An Analysis of Arrests and their Outcomes" hyperlink).

44. COUNCIL ON CRIME & JUSTICE, *KEY FINDINGS AND RECOMMENDATIONS*, [http://www.racialdisparity.org/reports\\_main.php](http://www.racialdisparity.org/reports_main.php) (follow "READ THE BRIEFING SHEET" hyperlink under the heading "Key Findings") (last visited Feb. 17, 2008).

45. Gambill (Apr. 13, 2007, 03:58 CST), *supra* note 23.

46. University of St. Thomas School of Law, Hamline School of Law, and William Mitchell School of Law.

47. MINN. NAACP LEGAL CMTY. JUSTICE INITIATIVE, *FINAL REPORT OF THE NAACP LEGAL COMMUNITY JUSTICE INITIATIVE: SEARCH WARRANT PROJECT 2 (2007)* (unpublished final report, copy on file with author and St. Paul NAACP).

48. See Stuckey, *supra* note 6, (manuscript at 6); MINN. STAT. ANN. § 299C.11(1); MINN. STAT. ANN. § 299C.10(1)(b) (West 2007).

prehension (BCA),”<sup>49</sup> which maintains a comprehensive criminal record for each person.<sup>50</sup>

Any member of the community may go online, go to the BCA or any authorized dissemination terminal and receive conviction data on an individual.<sup>51</sup> Public accessibility of *conviction* information is arguably justifiable considering criminal and civil liability associated with due diligence requirements. Nevertheless, the public may still access the highly prejudicial, and arguably irrelevant, non-conviction arrest data.<sup>52</sup>

“Currently, 15 states make their arrest data available to the public through their central repositories.”<sup>53</sup> “Another 17 states make exceptions which allow the data to be obtained almost as freely through their central repositories.”<sup>54</sup> The exception allows access to the arrest information by any individual with a notarized Informed Consent Form signed by the adult subject of the record.<sup>55</sup> This exception allows employers or landlords to circumvent any restrictive arrest record laws.

Arrest records in Minnesota are even easier to access at the local level. Any member of the public may contact an arresting agency and receive any arrest information on an arrested individual. The arrest information includes one’s name, age, sex, address, charge, time and place of arrest and place of incarceration—but no information on the case’s final disposition.<sup>56</sup>

Additionally, information gatherers better known as “data harvesters,” “data verifiers,” “stringers” or “runners” have complete access to a person’s

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49. Stuckey, *Collateral Effects and Accessibility to Criminal Records*, *supra* note 6, (manuscript at 6); Minn. Dep’t of Pub. Safety, Bureau of Criminal Apprehension Criminal Justice Information Systems, *CJIS-Criminal Record Checks*, <http://www.bca.state.mn.us/CJIS/Documents/Page-15-01.html> (follow “What is the Computerized Criminal History (CCH) system?” hyperlink: [http://www.dps.state.mn.us/bca/CJIS/Documents/CCHInformation.html#What%20is%20the%20Computerized%20Criminal%20History%20\(CCH\)%20system](http://www.dps.state.mn.us/bca/CJIS/Documents/CCHInformation.html#What%20is%20the%20Computerized%20Criminal%20History%20(CCH)%20system)) (last visited Feb. 17, 2008).

50. Stuckey, *supra* note 6, (manuscript at 6); *see* MINN. STAT. ANN. § 13.87(1)(b) (West 2007) (information “public data for 15 years”); MINN. STAT. ANN. § 299C.11(1).

51. Minn. Dep’t of Pub. Safety, *supra* note 49, at “Who can access public records?”; *see* MINN. STAT. ANN. § 13.87(1) (“Conviction will be publicly disseminated for 15 years after discharge of sentence.”).

52. Stuckey, *supra* note 6, (manuscript at 6); *see* Minn. Dep’t of Pub. Safety, *supra* note 49, at “How can I obtain a copy of another person’s criminal history record?” and “What is the Informed Consent procedure that needs to be followed when requesting another individual’s private criminal history?” (authorized agencies receive arrest data; however, arrest data may be obtained with the arrestee’s authorized signature).

53. Stuckey, *supra* note 6, (manuscript at 6); SHAWN D. STUCKEY & HEATHER E. CHAUSSEE, *CRIMINAL RECORD ACCESSIBILITY SURVEY: A SUMMARY OF ARREST AND CONVICTION INFORMATION AMONG THE 50 STATES MAINTAINED BY THE STATE’S CENTRAL REPOSITORY*, <http://www.crimeandjustice.org> (forthcoming 2008) (copy on file with author and Council on Crime & Justice) (15 states make arrest data public; however, 17 states have exceptions which make arrest data accessible).

54. *Id.*

55. Minn. Dep’t of Pub. Safety, *supra* note 49, at “What is the Informed Consent procedure that needs to be followed when requesting another individual’s private criminal history?”

56. MINN. STAT. ANN. § 13.82(2)(a)–(m).

arrest information.<sup>57</sup> Data harvesters are people who go to dissemination terminals in courthouses, law enforcement centers, or the BCA, and gather information on any individual who has been arrested in that particular jurisdiction. The data harvesters attend the dissemination terminals daily; the information on someone arrested the night before has the potential to be accessed by the data harvester. Those individuals then sell that bulk information to anyone who is willing to buy (e.g., data verification agencies, credit agencies and attorneys). The Minnesota legislature has gone to considerable means to make arrest information *electronically* inaccessible to the public.<sup>58</sup> This, in turn, astronomically increases the value of information possessed by data harvesters.

Furthermore, the media has access to the arrested individual's information regardless of the outcome of the charge.<sup>59</sup> In other words, someone whose arrest was dismissed many years ago may still have his arrest information reported by the media. Since the disposition of that charge is often unknown, the media will often neglect to report that the charge was ultimately thrown out.

#### IV. WHAT ARE THE COLLATERAL EFFECTS OF AN ARREST?

An arrest results in two types of consequences: direct and collateral. Direct consequences flow directly from a conviction (e.g., the sentence or fine).<sup>60</sup> In contrast, collateral consequences, better known as collateral effects,<sup>61</sup> are "civil and regulatory in nature and are imposed in the interest of

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57. See MINN. R. OF PUB. ACCESS TO REC. OF THE JUD. BRANCH § 8(2)(a) (2005), available at <http://www.mncourts.gov/rules/publicaccess/accessrules.pdf> (describing how a person shall be allowed to obtain copies of original versions of records that are accessible to the public. "[A] custodian . . . must provide remote electronic access to . . . records.").

58. See *id.* at § 8(2)(c):

*Preconviction Criminal Records.* The Information Technology Division of the Supreme Court shall make reasonable efforts and expend reasonable and proportionate resources to prevent preconviction criminal records from being electronically searched by defendant name by the majority of known, mainstream automated tools . . . A 'preconviction criminal record' is a record for which there is no conviction as defined in MINN. STAT. § 609.02, subd. 5 (2004) . . . .

59. See MINN. STAT. ANN. § 13.82(2) ("[Arrest data] shall be public at all times in the originating agency."); see generally *Quinn*, 517 N.W.2d at 895.

60. Stuckey, *supra* note 6, (manuscript at 16) (citing *Alanis v. State*, 583 N.W.2d 573, 578 (Minn. 1998) ("those which flow definitely, immediately, and automatically from the guilty plea, namely, the maximum sentence to be imposed and the amount of any fine")).

61. Stuckey, *supra* note 6, (manuscript at 16) (citing A.B.A., *supra* note 6, at Standard 19-1.1(a)). This Comment uses the terms collateral effects, collateral consequences, and collateral sanctions synonymously.

public safety.”<sup>62</sup> Collateral effects have a stigmatizing effect on individuals.<sup>63</sup>

With [collateral effects], people are separated into groups of acceptables and unacceptable or . . . classifications of insiders and outsiders . . . . The label therefore infers that the person did not just do something wrong, but that there is something wrong with the person.<sup>64</sup>

Collateral effects have a legally binding impact on arrested individuals in Minnesota. Although explicitly pertaining to convictions, the Minnesota revisor of statutes identified approximately 150 statutory collateral effects in Minnesota.<sup>65</sup>

Collateral effects of arrests hinder the progress of Minnesotans in many ways, but most importantly through the denial of jobs and housing.<sup>66</sup> Over 80 percent of large employers use criminal history checks in the hiring process.<sup>67</sup> Over 60 percent of employers indicate that they probably would not or definitely would not hire someone with a criminal record, including those with only an arrest record containing no conviction.<sup>68</sup> Additionally, private screening companies have made it very easy and inexpensive to locate an individual’s complete criminal record, further encouraging employers to access non-conviction arrest information in Minnesota.<sup>69</sup>

Competing interests justify making conviction records easily accessible to employers.<sup>70</sup> Nevertheless, the public availability of arrest informa-

62. Stuckey, *supra* note 6, (manuscript at 16) (citing *Kaiser v. State*, 641 N.W.2d 900, 905 (Minn. 2002)).

63. See Megan C. Kurlychek, Robert Brame, & Shawn Bushway, *Enduring Risk? Old Criminal Records and Predictions of Future Criminal Involvement*, 53 CRIME & DELINQUENCY 64 (2007).

64. COUNCIL ON CRIME & JUSTICE, NON-CONVICTION LEGISLATION, *supra* note 40, at 2 (quoting *id.*).

65. *Id.*; see generally MINN. STAT. ANN. § 609B (West 2007).

66. Stuckey, *supra* note 6, (manuscript at 20).

67. *Id.*; Jon Bonné, *supra* note 9:

A report from the Society for Human Resource Management shows that 80 percent of companies said they run a criminal check on applicants before hiring, up nearly 30 percent from 1996—making the practice as common as checking references or prior work histories. . . . Large firms were the most likely to run criminal checks, but nearly 70 percent of small companies also said they checked on a potential hire’s criminal history.;

Megan C. Kurlychek, Robert Brame, & Shawn Bushway, *Scarlet Letters and Recidivism: Does an Old Criminal Record Predict Future Offending?*, 5 CRIMINOLOGY & PUB. POL’Y 483, 483–504 (2006).

68. Stuckey, *supra* note 6, (manuscript at 21) (citing Steven Raphael, *Should Criminal History Records Be Universally Available?*, 5 CRIMINOLOGY & PUB. POL’Y 515, 517 (2006)).

69. Cf. SEARCH, REPORT OF THE NATIONAL TASK FORCE ON THE COMMERCIAL SALE OF CRIMINAL JUSTICE RECORD INFORMATION 32 (2005) (describing how after 9/11 ChoicePoint reported a 30 percent increase and HireCheck reported a 25 percent increase in business).

70. DEREK HINTON, CRIMINAL RECORDS BOOK: THE COMPLETE GUIDE TO THE LEGAL USE OF CRIMINAL RECORDS 79 (Michael L. Sankey & Peter J. Weber eds., 2002) (describing how negligent hiring is a legal doctrine which imposes a duty upon employers who fail to perform a reasonable background check); see also U.S. DEP’T OF JUSTICE, THE ATTORNEY GENERAL’S REPORT ON

tion which has not resulted in conviction is far too prejudicial and aids greatly in denying deserving individuals of beneficial job opportunities. The constitutional argument against employer accessibility of arrest records is that the individual was not or—in the case of a pending criminal proceeding—has not been convicted of the crime and, therefore, should not be denied a position based on the accusations detailed in the police report and court documents. Employers will sometimes use the information to categorically deny employment to individuals who are accused but not proven guilty.<sup>71</sup>

Sympathetic employers are hamstrung by legislative activity and the necessity of maximizing profit by limiting liability.<sup>72</sup> Many employers are legally obligated—by either criminal or civil sanctions—to ask for criminal history information.<sup>73</sup> Still others have a legitimate personal interest in assessing the risks to their assets and reputations posed by placing persons with criminal histories in certain positions.<sup>74</sup>

Most people think low-level jobs, which have lower educational requirements, like fast-food employers or grocery and retail chains, are always an avenue to which persons with criminal histories may turn for employment.<sup>75</sup> Unfortunately, employers whose workers interact directly with customers are the most adverse to hiring workers with criminal histories.<sup>76</sup> This heavily impacts entry-level fast food employers like McDonald's or department stores like Wal-Mart.<sup>77</sup> Often an employer will make an offer, only to rescind it after completing a background check.<sup>78</sup> If an individual is arrested and has not taken efforts to expunge his or her arrest data, there is a significant chance that individual will be denied employment.

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CRIMINAL HISTORY BACKGROUND CHECKS 1 (June 2006), available at [http://www.usdoj.gov/olp/ag\\_bgchecks\\_report.pdf](http://www.usdoj.gov/olp/ag_bgchecks_report.pdf) (describing how employers and organizations are subject to liability under negligent hiring doctrines if they fail to exercise due diligence in determining whether the individual would create an unreasonable risk to other employees or the public).

71. See generally *Partners in Justice*, *supra* note 25, at 742 (describing how employers in most states can deny jobs to anyone with a criminal record).

72. See HINTON, *supra* note 70, at 79.

73. U.S. DEP'T OF JUSTICE, *supra* note 70, at 1 (describing how negligent hiring imposes a duty upon employers to perform a background check and subjects them to potential liability if they fail to exercise due diligence in determining whether the individual would create an unreasonable risk to other employees or the public).

74. Stuckey, *supra* note 6, (manuscript at 21) (citing U.S. DEP'T OF JUSTICE, *supra* note 70, at 1 (describing how employers want to assess the risks to their assets and reputations posed by placing persons with criminal histories in certain positions)).

75. See *id.*

76. *Id.* (manuscript at 22) (citing Raphael, *supra* note 68, at 515).

77. Stuckey, *supra* note 6, (manuscript at 22).

78. *Id.* As one rehabilitated African American father stated, "You not asking for some specific discipline, I'm coming in here, this is a warehouse, you want someone to lower boxes and work on the dock, I think I can do that. And then we'll do the background check and comes back, 'thanks for your interest' and all that. I got a whole folder for 'thanks for your interest'—But I don't got a job." COUNSEL ON CRIME & JUSTICE, RACIAL DISPARITY, *supra* note 20, at 7.

Although many believe an employer cannot make a decision based on an arrest record, it happens frequently. In the absence of a state law or regulation, employers in 37 states are permitted to use arrest information as well as conviction information when deciding whether or not to hire someone.<sup>79</sup> But, even in states where the practice is illegal, an employer may still circumvent the law by using arrest information to judge an applicant's fitness for a job, the same way they would use one's answers or demeanor in an interview. Even the Equal Employment Opportunity Commission (EEOC) permits the use of arrest and misdemeanor information in the hiring process. Nevertheless, the EEOC "states that employers should not ask applicants about arrests which have not lead [sic] to convictions, since such questions may have a 'chilling effect' upon minorities and discourage them from applying for a job."<sup>80</sup> Therefore, if employers may access one's information, there is nothing to prevent the employer from using the non-conviction data against applicants.

Similarly, landlords perform background checks which many times unfairly disqualify applicants.<sup>81</sup> Decent housing prevents crime because where one lives influences many aspects of one's life.<sup>82</sup> Nevertheless, a landlord may access arrest information on an individual which may or may not contain the disposition of the charge. Therefore, to relieve themselves of civil or criminal liability, landlords may refuse to rent apartments or houses to individuals who were justifiably or unjustifiably arrested.

As long as the arrest information is available, use of the information is arguably justified. Even if an arrestee asserts that his arrest was dismissed, since the disposition of a charge is often unreported, the employer or landlord may feel the applicant is simply denying the charge to obtain the employment or housing. Employers or landlords are in a precarious position

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79. *Partners in Justice*, *supra* note 25, at 743. Thirty-seven states have laws permitting all employers and occupational licensing agencies to ask about and consider arrests that never led to conviction in making employment decisions. Ten states prohibit all employers and occupational licensing agencies, and 3 states prohibit some. Employers in most states can deny jobs to—or fire—anyone with a criminal record, regardless of individual history, circumstance, or "business necessity." *Id.*

80. GLOBAL INFORMATION NETWORK, USING ARREST, CONVICTION, AND MISDEMEANOR INFORMATION IN THE HIRING PROCESS I, <http://www.searchinfo.com/resources/links.asp> (follow "Using Arrest, Conviction, and Misdemeanor Information in the Hiring Process" hyperlink) (last visited Feb. 18, 2007).

81. Heidi Lee Cain, Student Author, *Housing Our Criminals: Finding Housing for the Ex-offender in the Twenty-First Century*, 33 GOLDEN GATE U. L. REV. 131, 149–50 (2003). See generally 24 C.F.R. § 5.903 (2000) (permitting public housing agencies to access criminal records); 42 U.S.C. § 1437d(q) (2000) (explaining that criminal activity by any member of the tenant's household or guest results in eviction); *Minneapolis Pub. Hous. Auth. v. Lor*, 591 N.W.2d 700, 702 (Minn. 1999) (holding criminal activity committed off premises grounds for eviction); Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 5101, 102 Stat. 4181, 4300; 42 U.S.C. § 1437d(l)(6) (2000).

82. See Cain, *supra* note 81, at 137–38; Rene Bowser, Prof. of Law, Univ. of St. Thomas Sch. of Law, Segregation and Housing Discrimination in the African American Community, Lecture (Nov. 13, 2006) ("Where one lives often influences one's health, education, and income.").

when they face hiring someone who may have been arrested for a violent crime or a property crime, and the employer or landlord does not know the disposition of the charge. If an employer or landlord refuses to hire or rent to the arrestee, they may be unjustifiably denying someone an opportunity. If they hire or rent to the arrestee and he commits a crime while on the premises, then the employer or landlord can be subject to civil liability (e.g., negligent hiring and supervision) or costly property loss and damage. Rather than face the latter, employers and landlords lean toward the most financially secure option—denial of employment or housing.

Additionally, applications which ask if an individual has “ever been arrested” may be a hindrance to an individual with an arrest record—but for an unexpected reason.<sup>83</sup> Employers and landlords actually disqualify more individuals for issues relating to truthfulness and “moral turpitude” when the applicants refuse to reveal the information when asked.<sup>84</sup> Only if an applicant seals or removes his or her information will he or she lawfully be able to deny the arrest.

Finally, the effects of a published arrest record can be devastating. Many times people assign guilt with accusation, especially if an arrest is published in a newspaper or any other bona fide media outlet. All media outlets have access to arrest information by virtue of the information’s public classification, or the ability of the media to be classified as an “aggrieved person.”<sup>85</sup> Since most media outlets do not publish the disposition of the crimes, one is usually presumed guilty until they prove themselves innocent—this can hinder one’s public or social reception severely and significantly hinder the chances of a public career.

## V. LEGISLATION

In the 2007 spring legislative session, there were four states—Minnesota, Maryland, New Jersey and Massachusetts—that introduced proposals to automatically seal arrest data not resulting in convictions (non-conviction data).<sup>86</sup> Of particular interest was the impetus for the proposed bill in Maryland. The proposal derived from a class-action suit filed jointly by the NAACP and ACLU. The lawsuit highlighted arrest and dismissal rates in Maryland—with special interest on the effect on the African American and

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83. See Telephone Interview with Kevin Spang, President, Verified Credentials, Inc., in Lakeville, Minn. (Feb. 21, 2007) (copy on file with author).

84. *Id.*

85. *Quinn*, 517 N.W.2d at 898 (explaining the media was entitled under Government Data Practices Act to access to law enforcement records; an aggrieved person may claim a protectable interest in the information of an arrested individual).

86. See Minn. S.F. No. 279, 85th Leg., Reg. Sess. (Mar. 12, 2007), available at <http://www.revisor.leg.state.mn.us/bin/bldbill.php?bill=S0279.2.html&session=ls85>; E-mail from Guy Gambill, Advocacy Coordinator, Council on Crime & Justice, to author (Aug. 12, 2007, 12:45 CST) (on file with author).

minority communities.<sup>87</sup> Maryland enforcement agencies were asked to respond to the revelation that a large number of arrests for misdemeanors were ultimately dismissed, leaving thousands of individuals—many of them minorities—subject to the collateral effects of arrests.<sup>88</sup> Maryland officials did not respond adequately and the result was a favorable settlement to the NAACP and ACLU.<sup>89</sup>

In Minnesota, the Council on Crime and Justice (CCJ) introduced legislation similar to that introduced in Maryland for similar reasons. Senator Moua, CCJ's chief author, and her colleagues Senators Neuville, Higgins, Betzold and Ortman all signed on as bipartisan co-authors. CCJ proposed the automatic sealing of arrest data so that only criminal justice agencies could access arrest data and use it against an individual before a determination of guilt.<sup>90</sup> This *automatic sealing* would occur for all arrests that did not result in prosecution within 180 days after the arrest.<sup>91</sup>

Additionally, many agencies have proposed expungement legislation with the goal of overruling the holding in *State of Minnesota v. Schultz*,<sup>92</sup> which eliminated the inherent authority of the courts to expunge records held at the BCA. Various pieces of legislation seek to present an alternative to inherent power expungement, but will, in effect, constrain the available remedies to the extent that help for petitioners will be very limited. The best outcome would be to overturn *Schultz*<sup>93</sup> so that courts have their inherent authority restored.

## VI. WHAT CAN ONE DO TO PROTECT PERSONAL ARREST INFORMATION?

One who would like to seal and, in many cases, completely remove arrest information from the public may do so in one of several ways: by requesting the return of one's *original* arrest information from the arresting agency (where law requires the material must be held), by obtaining an expungement through the inherent powers of the court, by obtaining an ex-

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87. See Md. State Conference of the NAACP Branches v. Balt. City Police Dep't, Complaint (Civil Case No. 24-C-06-005088) (June 14, 2006), available at <http://www.aclu-md.org/aPress/BCPD%20Complaint.pdf> [hereinafter NAACP v. Balt. City Police Dep't]; Gambill, (Aug. 12, 2007, 12:45 CST), *supra* note 87.

88. See NAACP v. Balt. City Police Dep't, *supra* note 87; Gambill (Apr. 13, 2007, 3:58 CST), *supra* note 23.

89. Racial Profiling Data Collection Resource Center, *Federal and State Litigation*, <http://www.racialprofilinganalysis.neu.edu/legislation/litigation.php?state=4> (last visited Feb. 18, 2008).

90. COUNCIL ON CRIME & JUSTICE, COMPARISON OF RECOMMENDATIONS BY EXPUNGEMENT DELIVERY TEAM AND THE 2007 PROPOSED 609B LEGISLATION (Feb. 2006) (on file with author and the Council on Crime & Justice) [hereinafter COUNCIL ON CRIME & JUSTICE, COMPARISON OF RECOMMENDATIONS].

91. *Id.* ("Arrests that do not result in prosecution: automatic sealing of record of arrest 180 days after arrest.")

92. See *State v. Schultz*, 676 N.W.2d 337, 342 (Minn. Ct. App. 2004).

93. *Id.*



pungement according to the provisions enumerated in the Minnesota statutes or by receiving a judicial pardon.

A minority of states—including Minnesota—offer procedures whereby individuals may contact an arresting agency and request that the original documents and any copies be surrendered so that the public may *never* again access the arrest and identification information.<sup>94</sup> However, even in the states offering this procedure, most citizens and many, if not most, practitioners are unaware of its existence.<sup>95</sup> Moreover, when the author called several police and government offices responsible for returning the information, they were not aware that such an option is available.<sup>96</sup> The author phoned to request the return of an individual's arrest information after the individual's charges were dropped absent a finding of probable cause.<sup>97</sup> The author was told by these sources that no such option existed until the author spoke with a city attorney and quoted a copy of the statute.<sup>98</sup> The city attorney eventually agreed to return the original arrest information.

There is a compelling argument to be made that one should almost always attempt to receive a combination of these options. Arrest information is held at the arresting agency, at the BCA, and in the statewide court system. A statutory expungement and a request for the return of arrest information sometimes encompass similar circumstances; in this situation an individual may apply for both in the same proceeding.<sup>99</sup> A request for the return of arrest information does not require a fee; however, some arrest agencies will charge a fee of five dollars.<sup>100</sup> If that happens, the arrest agency is referring to a copying fee and is not operating under the understanding that the requestor is asking for the *original* arrest records so that they are no longer available for copying.<sup>101</sup> Both expungement forms require a \$250.00 filing fee, which may be waived in cases of demonstrated

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94. See MINN. STAT. ANN. § 299C.11(1)(b) (requiring the return of law enforcement identification data where a person is arrested but not charged). She may have her identification data returned upon request as long as she has not been convicted of a felony or gross misdemeanor in the 10 years preceding the resolution of the criminal proceeding. *Id.*

95. See, e.g., Interview with Terry Duggins, criminal defense attorney, in St. Paul, Minn., (June 21, 2007) (copy on file with author).

96. The author contacted a Minneapolis suburban police department on Dec. 29, 2006, and spoke to its clerk of records, who had not heard of the procedure (copy of conversation on file with author).

97. *Id.*

98. Telephone Interview with the Minnetonka City Attorney, Minnetonka, Minn., (Dec. 29, 2006) (on file with author).

99. *State v. Bragg*, 577 N.W.2d 516, 521 (Minn. Ct. App. 1998) (holding that defendant may seek an order for recovery of identification evidence in the same proceedings as a petition for expungement).

100. See generally MINN. STAT. ANN. § 13.87.

101. See *supra* note 96 and accompanying text.

poverty.<sup>102</sup> Additionally, proceedings that have ended in favor of a petitioner will not require a filing fee.<sup>103</sup> Nevertheless, a requestor must inform the clerk and, in many cases, send a copy of the authorizing statute before the clerk will waive the filing fee. A pardon does not require a filing fee, but requires a call to the secretary of the Minnesota Board of Pardons, at which time the secretary will screen the caller to determine initial pardon eligibility.<sup>104</sup> None of the options require a requestor to have an attorney, and there are clinics and attorneys who are willing to help, in some cases for free.

#### A. *Retrieving Records from Arresting Agency*

Before contacting the arresting agency, interested persons should make sure they satisfy the preconditions. First, the charges that flow from the arrest must be dismissed before an official determination of probable cause is made. Second, an individual must verify that he or she had not been convicted of a felony or gross misdemeanor within a ten-year period immediately before the arrest *and* ensure that one of the following is also true: all charges were (1) dismissed prior to a determination of probable cause;<sup>105</sup> or (2) the prosecuting authority declined to file any charges and a grand jury did not return an indictment. If these conditions are met, then one need only submit a request to the arresting agency for the return of the arrest and identification records.<sup>106</sup>

For example, if one is arrested for a crime (e.g., lurking, loitering, or assault) and, after release, the prosecutor dismissed the charges or declined to file charges because of a conclusion that there was not probable cause to arrest, and the individual has not been convicted of a felony or gross misdemeanor within ten years prior to arrest, then an arrestee need only mail in the "Return of Arrest Records Request" form in Appendix II. If an arrestee does not receive a notification of the dismissal of the charges, or notification from the prosecutor or court of refusal to file charges, that person must contact the court or prosecutor to ensure that charges are not being pursued. No matter what happens an individual must still request the return of the identifying information.

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102. MINN. STAT. ANN. § 609A.03(1) (West 2007) ("An individual . . . shall file a petition . . . and pay a filing fee. . . . The filing fee may be waived in [some] cases . . .").

103. *Id.*

104. See Telephone Interview with Randolph J. Hartnett, Sec. Minn. Bd. of Pardons, Minn. Dep't of Corrections, Pol'y and Legal Services, Admin. Interstate Agreement on Detainers, in St. Paul, Minn. (Apr. 16, 2007) (on file with author).

105. *Bragg*, 577 N.W.2d at 520 (interpreting "probable cause determination" to mean a determination, based on the full record, of whether sufficient probable cause exists to proceed to trial, essentially referring to an omnibus hearing).

106. MINN. STAT. ANN. § 299C.11(b).

## B. Expungement

If charges were not dismissed until after a determination that probable cause was lacking, then one must request an expungement.<sup>107</sup> Expungement is the removal of a conviction from a person's criminal record.<sup>108</sup> However, an expungement only seals a person's criminal record; it does not destroy it.<sup>109</sup> In Minnesota, expungements are available by statute or through the inherent power of the court.<sup>110</sup> The main difference is that statutory expungement allows all records to be expunged from the public record whereas inherent power expungement is limited to only the courts and not to executive agencies like the BCA.<sup>111</sup>

Statutory expungement may only be obtained if an individual qualifies according to very strict standards set forth by the Minnesota legislature, which makes this outcome very hard to obtain.<sup>112</sup> Minnesota Statute Section 609A calls for the "sealing" of records for all proceedings that have ended "in favor of" the defendant, as well as juvenile adjudications, and certain drug convictions.<sup>113</sup> Proceedings ending "in favor of" the defendant would include a decision by the prosecutor not to charge the case, a not guilty verdict or dismissal from appeal.<sup>114</sup> An order for statutory expungement extends to all agencies that have a record of the incident, including the BCA, where the vast majority of the requests for criminal history information are made.<sup>115</sup>

Inherent power expungement gives the court the discretion to consider, on a case-by-case basis, an individual's request to have his or her record

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107. Jon Geffen & Stefanie Letze, *Chained to the Past: An Overview of Criminal Expungement Law in Minnesota—State v. Schultz*, 31 WM. MITCHELL L. REV. 1331, 1333 (2005); see MINN. R. OF PUB. ACCESS TO REC. OF THE JUD. BRANCH § 8(4) (defining the contents of police department investigative file as public data within meaning of Government Data Practices Act, but classification of information as public does not prevent its expungement). A trial court can, in its discretion, order expungement of all publicly classified information pertaining to arrest and prosecution. *Id.* For information about expungement of a criminal record, contact the Minnesota Judicial Center at 651-297-7650 or the Self-Help Center on the Minnesota Judicial Center's web site: [www.mncourts.gov/selfhelp](http://www.mncourts.gov/selfhelp). Or contact a private attorney or visit [www.MinnesotaExpungement.com](http://www.MinnesotaExpungement.com).

108. *State v. C.P.H.*, 707 N.W.2d 699, 705 (Minn. Ct. App. 2006) ("Expungement means to erase all evidence of the event as if it never occurred."); see also BLACK'S LAW DICTIONARY, at "expungment of record" (8th ed. 2004) (defining expungement of record).

109. MINN. STAT. ANN. § 609A.01 (West 2007).

110. *State v. Ambaye*, 616 N.W.2d 256, 257 (Minn. 2000) (explaining that a court order or statutory language may provide the authority for expungement); MINN. STAT. ANN. § 609A.01.

111. See Geffen & Letze, *supra* note 107, at 1360 (discussing the use of the BCA to respond to requests about criminal history information); *State v. P.A.D.*, 436 N.W.2d 808, 810 (Minn. Ct. App. 1989).

112. See generally MINN. STAT. ANN. § 609A.01–02 (West 2007).

113. MINN. STAT. ANN. § 609A.02(2) (offering expungement where petitioner was a juvenile).

114. See *State v. M.C.*, 304 N.W.2d 362, 363 (Minn. 1981); *Schultz*, 676 N.W.2d at 340.

115. See MINN. STAT. ANN. § 609A.01 ("The remedy. . . prohibit[s] the disclosure of their existence or their opening except under court order or statutory authority."); Geffen & Letze, *supra* note 107, at 1360.

expunged. The courts examine whether the petitioner's constitutional rights have been infringed upon by the publication of the information.<sup>116</sup> If there is no constitutional infringement, the courts determine whether society's interest in information about the person's criminal history is outweighed by the detriment to the rehabilitation efforts of the individual.<sup>117</sup> However, *State v. Schultz*<sup>118</sup> eliminated the inherent authority of the courts to expunge records held at the BCA,<sup>119</sup> restricting the power of the courts to only the records held by the court system. Thus, these expungements lack effectiveness because almost all employment agencies and landlords go through the BCA to obtain criminal history information.<sup>120</sup>

### C. Pardon

Another mechanism available to protect arrest information is a judicial pardon.<sup>121</sup> Although the constitutional and statutory authority for pardons in Minnesota is limited to granting clemency for "convictions," they can, in rare cases, address arrest information.<sup>122</sup> Opponents of expanding the expungement statute suggest pardons as a sufficient alternative because the Minnesota State Board of Pardons<sup>123</sup> has the power to allow the recipient

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116. *Schultz*, 676 N.W.2d at 340, 343 (pointing out that the requirement is that petitioner's "constitutional rights may be seriously infringed" by keeping the record, which is rarely met because of the state's interest in separation of powers).

117. *Id.* at 340–41 ("[E]xpungement will yield a benefit to the petitioner commensurate with the disadvantages to the public.").

118. *Id.* at 342–44 (explaining that the separation of powers doctrine limits inherent power of court to records held by judiciary); see generally *CriMNet, BACKGROUND CHECKS*, *supra* note 1, at 75 ("The *Schultz* case has become a focal point and center of controversy for the discussion about courts' lack of authority to order executive branch agencies, notably the BCA and other law enforcement agencies, to expunge their records under inherent authority expungement orders of the courts.").

119. *Schultz*, 676 N.W.2d at 339, 343 (upholding *State v. T.M.B.*, 590 N.W.2d 809, 811 (Minn. Ct. App. 1999)) (limiting inherent power expungements, where the records are held by agencies of another branch, absent evidence of "an injustice resulting from an abuse of discretion in the performance of a governmental function"); see also *State v. H.A.*, 716 N.W.2d 360, 364 (Minn. Ct. App. 2006) (upholding *Schultz*, 676 N.W.2d at 341); *State v. A.C.H.*, 710 N.W.2d 587, 591 (Minn. Ct. App. 2006) (upholding *Schultz*, 676 N.W.2d at 343).

120. *Geffen & Letze*, *supra* note 107, at 1360–61; *Johnson*, *supra* note 2 ("[The] [r]eality is, [an inherent power of court expungement] doesn't make much of a difference because employers and landowners go to the BCA. This is a decision the Supreme Court should look into.").

121. MINN. STAT. ANN. § 638.02(1) (West 2007) ("The board of pardons may grant an absolute or a conditional pardon. . ."); see *CriMNet, BACKGROUND CHECKS*, *supra* note 1, at 66 ("Every state constitution provides for an executive pardon authority. In 42 states and for federal offenders, pardon is the only system-wide mechanism for relief by which adult felony offenders can mitigate collateral effects. . .").

122. See MINN. BD. OF PARDONS, ANNUAL REPORT TO THE LEGISLATURE: 2005 ACTIVITY 3 (2006), available at <http://www.corr.state.mn.us/publications/legislative-reports/documents/BOP2005report.pdf> ("[T]he Office of the Attorney General issued an opinion that the Board did have authority under these unique circumstances and the applicant was granted a pardon extraordinary.").

123. *CriMNet, BACKGROUND CHECKS*, *supra* note 1, at 66 ("The Governor, Attorney General, and Chief Justice of the Supreme Court constitute the Board of Pardons.").

the benefit of never again having to reveal the conviction, with a few exceptions.<sup>124</sup> But, this argument is very misleading because pardons are rarely given.<sup>125</sup> In the last twenty-two years, the Board of Pardons has not granted any pardons and few “pardon extraordinary” grants.<sup>126</sup> Also, when a pardon or pardon extraordinary is given, the records are never sealed.<sup>127</sup> Therefore, agencies, landlords, and employers performing background checks may still access the record.<sup>128</sup> Since a person may legally deny a conviction,<sup>129</sup> a landlord or employer may think that person is dishonest and deny him or her an opportunity for housing or employment.<sup>130</sup> Additionally, in many states, unless an individual receives a pardon extraordinary, a party in court may use an individual’s criminal record to impeach his or her testimony.<sup>131</sup>

## VII. RECOMMENDATIONS

This Comment serves as a call to the Minnesota legislature, the Minnesota Supreme Court and all Minnesota stakeholders, including those who view accessibility to criminal history records as an unequivocal right, and those who fight vehemently to protect the rights of the accused, to work together to acknowledge and understand the impact of collateral effects.<sup>132</sup> The recommendations below serve as a roadmap to facilitate this discussion and provide adequate tools to consequently alter the backlash of collateral effects to be more consistent with the original purpose and intent of the laws.<sup>133</sup>

### A. *Protect Information Now!*

I recommend anyone with an arrest record follow the procedures outlined in Section VI.

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124. See Stuckey, *supra* note 6, (manuscript at 11). See generally Geffen & Letze, *supra* note 107, at 1346; MINN. STAT. ANN. § 638.02(1).

125. Stuckey, *supra* note 6, (manuscript at 11); see also CriMNet, BACKGROUND CHECKS, *supra* note 1, at 60, 68 (“In Minnesota, pardons are very rare . . . [and] used sparingly in all but a very few U.S. jurisdictions.”); MARGARET COLGATE LOVE, RELIEF FROM THE COLLATERAL CONSEQUENCES OF A CRIMINAL CONVICTION: A STATE-BY-STATE RESOURCE GUIDE, at Minnesota-4 (2006) (“In 2003 10 pardons [were] granted out of a total of 17 applicants—six [were] denied, one did not appear for hearing. Three [were] found ineligible.”) (citing BOARD OF PARDONS, ANNUAL REPORT TO THE LEGISLATURE: 2003 ACTIVITY (2004)).

126. Hartnett, *supra* note 104.

127. State v. Haugen, No. K8450, 1999 WL 138730, at \*1 (Minn. Ct. App. 1999) (statute calls for a copy of the pardon to be sent to the executive agencies but does not call for them to seal the record).

128. Geffen & Letze, *supra* note 107, at 1360–61.

129. MINN. STAT. ANN. § 638.02(2) (West 2007).

130. Stuckey, *supra* note 6, (manuscript at 12); Geffen & Letze, *supra* note 107, at 1346–47.

131. See Stuckey, *supra* note 6, (manuscript at 12); MINN. STAT. ANN. § 638.02(2).

132. Stuckey, *supra* note 6, (manuscript at 29–30).

133. *Id.*

B. Consider the CCJ's Arrest Expungement Legislation<sup>134</sup>

I recommend that the Minnesota legislature pass the arrest records accessibility legislation produced by the CCJ.<sup>135</sup> CCJ proposes placing an automatic seal on arrest data, so that non-criminal justice agencies cannot access a person's data and use it against him or her before a determination of guilt.<sup>136</sup> The arrest legislation also requests that all arrests that do not result in prosecution be automatically sealed within 180 days after the arrest.<sup>137</sup> This will preclude the public from "publicly convicting" a person and making unfair determinations before the individual's case has been adjudicated. Additionally, CCJ's legislation asks that arrest records in cases with dispositions in favor of the defendant be *automatically* sealed and the records strictly controlled and kept only within the criminal justice agencies.<sup>138</sup>

Alternative legislation is being proposed by a Minnesota task force, CriMNet Expungement Delivery Teams.<sup>139</sup> For non-person crimes, the task force is proposing an automatic seal of arrest information one year after arrest.<sup>140</sup> If accepted, the legislation will achieve the overarching goal of decreasing the availability of long-term prejudicial arrest information. Nevertheless, the task force's recommendation ignores the short-term prejudicial effect of arrest information. Minorities are arrested exceedingly more often in Minnesota and are, therefore, left vulnerable to the weaknesses of the task force's recommendation. CCJ's legislation would ensure that proper criminal justice agencies have the necessary and relevant information while providing a justifiable protection to arrested individuals.

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134. Stuckey, *supra* note 6, (manuscript at 29).

135. See COUNCIL ON CRIME & JUSTICE, COMPARISON OF RECOMMENDATIONS, *supra* note 90, at 1-2.

136. *Id.*

137. *Id.* at 1 (discussing "[l]egislation (Section 2, Subd.1) [for] automatic sealing of record of arrest 180 days after arrest").

138. COUNCIL ON CRIME & JUSTICE, COMPARISON OF RECOMMENDATIONS, *supra* note 90, at 1 ("Legislation (Section 3, Subd.1 & 3): automatic sealing of records of 1) charges that were dismissed; 2) acquittals; 3) continuance for dismissal; 4) diversion; 5) dismiss and discharge under § 152.18."); see also *id.* ("Legislation (Section 3): 1) Sealed data may still be transmitted between criminal justice agencies.").

139. See generally CriMNet, *Criminal and Juvenile Justice Information Policy Group: Report to the Legislature on Background Checks and Sealing of Criminal Records*, <http://www.crimnet.state.mn.us/docs/BGCheckSealingReportFinal2008.pdf> (last visited Mar. 3, 2008) (comprised of Criminal and Juvenile Justice Information Task Force and Background Checks and Expungements Delivery Team with the purpose of making a proposal to the Minnesota legislature regarding criminal history accessibility legislation).

140. COUNCIL ON CRIME & JUSTICE, COMPARISON OF RECOMMENDATIONS, *supra* note 90, at 1.

C. *Implement Mandated Informed Consent of Collateral Effects When a Person Is Released After Arrest*

Every arrested individual should be advised of his or her rights to receive the return of arrest information if the arrest does not end in a conviction. I recommend the "Collateral Consequences Committee," which was created by the Minnesota legislature per the American Bar Association's recommendations, take the research compiled by the Minnesota revisor in Section 609B.050 of the Minnesota statutes regarding statutory codification of criminal convictions in Minnesota, and apply that information to facilitate an exploration of every collateral effect applicable to arrests.<sup>141</sup> The results of the study commissioned by the Collateral Consequences Committee should then mandate that the applicable collateral effects be delineated at each arrest and displayed in a simplified, understandable format for the defendant. Each collateral effect should be placed on the charging form or on a separate form. A brief explanation should be required, which need not be long and cumbersome. An explanation would take no longer than the time it currently takes to release a defendant.

All police agencies should be required to advise arrestees of the collateral effects they may face if their arrests do not result in a conviction. Additionally, all police agencies should be required to advise an arrestee of the options available if his or her arrest does not result in a conviction. This is a feasible solution because this information may simply be attached to the defendant's charging form or given to him or her separately in a pamphlet as they are released.

Following these recommendations will foster awareness among defendants and police agencies about the total consequences of an arrest. The police agencies will have to see firsthand the effects of any abuse of discretion in which they engage when they arrest an individual without probable cause. The arrestee will become more aware of options available. Finally, motivation and deterrence are achieved. Full knowledge of the collateral effects associated with each arrest will cause one to more thoroughly consider all of the ramifications of one's behavior instead of simply the immediate or direct effects.

Prosecutors and state officials will argue that this option presents potential issues for appeals and may overburden police agencies. But, there will be no grounds for appeals because Minnesota has decided that there is no constitutional obligation to inform defendants of collateral effects. Furthermore, a form which simply lists the options available to one who is

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141. See A.B.A., *supra* note 6, at Standard 19-2.1 ("The legislature should collect . . . all collateral sanctions in a single chapter . . . of the jurisdiction's criminal code. The chapter . . . should identify with particularity the type, severity and duration of collateral sanctions applicable to each offense . . ."); see also CrimNet, BACKGROUND CHECKS, *supra* note 1, at 58.

arrested<sup>142</sup> and potential collateral effects of arrests<sup>143</sup> will not present a barrier sufficient for preclusion. This option is feasible, necessary, and the rewards to society far outweigh any inconveniences.

### VIII. CONCLUSION

The increase of accessibility to criminal history records and the decrease of protection of those same records through recent court decisions have made an arrest record extremely accessible. This record, regardless of its disposition, is used by employers and landlords when making hiring and housing decisions, and additionally by media, data harvesters, and other sources for purposes contradictory to outcomes that would best suit an individual. Low-income citizens and disadvantaged minorities, specifically African Americans, are arrested in Minnesota at much higher rates than any other segment of the population, with many of these arrests resulting in cases being dismissed or not charged at all. Unfortunately, the experience creates a criminal record that remains available to the public. Our criminal justice system is supposed to operate to give individuals a chance at rehabilitation, not punish people forever for mistakes. If anyone has ever been arrested, *regardless of the outcome*, he or she should take steps now to protect personal information. If immediate steps are not taken to address this problem, technology will allow the public to know about one's private and highly prejudicial information.

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142. See *supra* Section IV.

143. See *id.*



## APPENDIX I: RETURN OF ARREST RECORDS INFORMATION

**What can an individual do to avoid the collateral effects of an arrest record if no charges are filed or the charges are dismissed prior to a formal determination of probable cause?**

## I. INTRODUCTION

Minnesota offers a procedure that allows an individual the opportunity to minimize the collateral consequences of an arrest. This procedure allows someone with an arrest record to contact an arresting agency and request that the original documents containing the arrest information (not copies of the originals) be surrendered so that the public may *never* access the information. Follow the instructions detailed in this document to: 1) determine if you are eligible to demand the return of your arrest records; and 2) sign, date, and mail the attached "Return of Arrest Records Request" sheet to the arresting agency.

## II. ELIGIBILITY

Before contacting the agency, one must ensure one qualifies:

First, determine if the charge(s) flowing from your arrest was dismissed before a state court officially determined whether there was probable cause. If probable cause was officially found, then you are ineligible for this option.

Second, determine if you were convicted of a felony or gross misdemeanor within a ten year period immediately before the arrest. If you were convicted of a felony or gross misdemeanor within this period, you are ineligible.

Third, determine if one of the following is true:

Were the charges dismissed prior to a determination of probable cause;  
or

Did the prosecuting authority decline to file any charges and did a grand jury not return an indictment?

If the first and second steps, and one of the above conditions, are met, then you are eligible to retrieve your arrest record. Now, you need to mail the "Return of Arrest Records Request" form in Appendix II to the arresting agency. For example, if one is arrested for a crime, and, after one's release, the prosecutor dismisses one's charges or declines to file charges because the prosecutor or judge concluded that the police officer did not have probable cause to arrest, and one has not been convicted of a felony or gross misdemeanor within ten years prior to one's arrest, then the arrestee need only mail the "Return of Arrest Records Request" form in Appendix II to the arresting agency. If one does not receive a notification of the dismissal of any charge(s) from the arrest or a refusal to file charges notification from

the prosecutor or court, one must contact the court or prosecutor to obtain this information. Even if your charges are dropped, however, **you must request** the return of your information.

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In the following situations, an individual would not be able to seek return of arrest records, but could petition to have records sealed in an inherent power of the court expungement. Certain outcomes that do not apply are:

The record was sealed under the expungement law after probable cause was found;

The arrested person completed a diversion program;

The person completed a sentence and was released from incarceration with his or her civil rights restored or a pardon was granted; or

The charges were dismissed after a guilty plea or admission of guilt or a stay of adjudication.

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**Minn. Stat. § 299C.11, subd. 1(b):**

No petition under chapter 609A is required if the person has not been convicted of any felony or gross misdemeanor, either within or without the state, within the period of ten years immediately preceding the determination of all pending criminal actions or proceedings in favor of the arrested person, and either of the following occurred:

(1) all charges were dismissed prior to a determination of probable cause; or

(2) the prosecuting authority declined to file any charges and a grand jury did not return an indictment.

Where these conditions are met, the bureau or agency shall, upon demand, return to the arrested person finger and thumb prints, photographs, distinctive physical mark identification data, information on known aliases and street names, and other identification data, and all copies and duplicates of them.

*This form is an optional, non-required, document given at the discretion of the arresting agency. Nothing in this document constitutes legal advice nor does it provide any basis for appeal. By accepting this document, you agree that this document is provided for the sole purpose of informing you about some of the options you may have available to you. By accepting this document you agree to waive any liability or claims that may arise from this form.*

APPENDIX II: LETTER TO REQUEST RETURN OF ARREST RECORDS

Att: Records Department

\_\_\_\_\_  
(Name of a Arresting Agency)

\_\_\_\_\_  
(Address)

RE: Return of Arrest Records of:

\_\_\_\_\_  
First Name Middle Initial Last Name  
Born \_\_\_\_\_/\_\_\_\_\_/\_\_\_\_\_

Dear Clerk of Records:

On behalf of \_\_\_\_\_, born on  
\_\_\_\_\_/\_\_\_\_\_/\_\_\_\_\_,

(Arrestee's Name) (Date of Birth)

pursuant to Minn. Stat. 299C.11, I am requesting that all **ORIGINAL** "finger and thumb prints, photographs, distinctive physical mark identification data, information on known aliases and street names, and other identification data, and all copies and duplicates of them" be returned to

\_\_\_\_\_  
(Address)

I attest that \_\_\_\_\_ has met all obligations  
(Arrestee's Name)

required under the statute, including not having been convicted of any felony or gross misdemeanor, either within or without the state, within the period of ten years immediately preceding the determination of all pending criminal actions or proceedings in favor of the arrested person, and either of the following occurred: (pick one)

- all charges were dismissed prior to a determination of probable cause; or
- the prosecuting authority declined to file any charges and a grand jury did not return an indictment. Minn. Stat. § 299C.11.

The details of the arrestee and the incident are as follows:

Name:

\_\_\_\_\_  
Date of Birth:

\_\_\_\_\_  
Date of Incident:

\_\_\_\_\_  
Arresting Officer (if known):

\_\_\_\_\_  
Police Department:

\_\_\_\_\_  
Description of Incident:

Please return the **ORIGINAL** records and not copies to the address provided so that no copies of the event are ever disseminated.