# The BackGround Inbestigator

Your Information Resource

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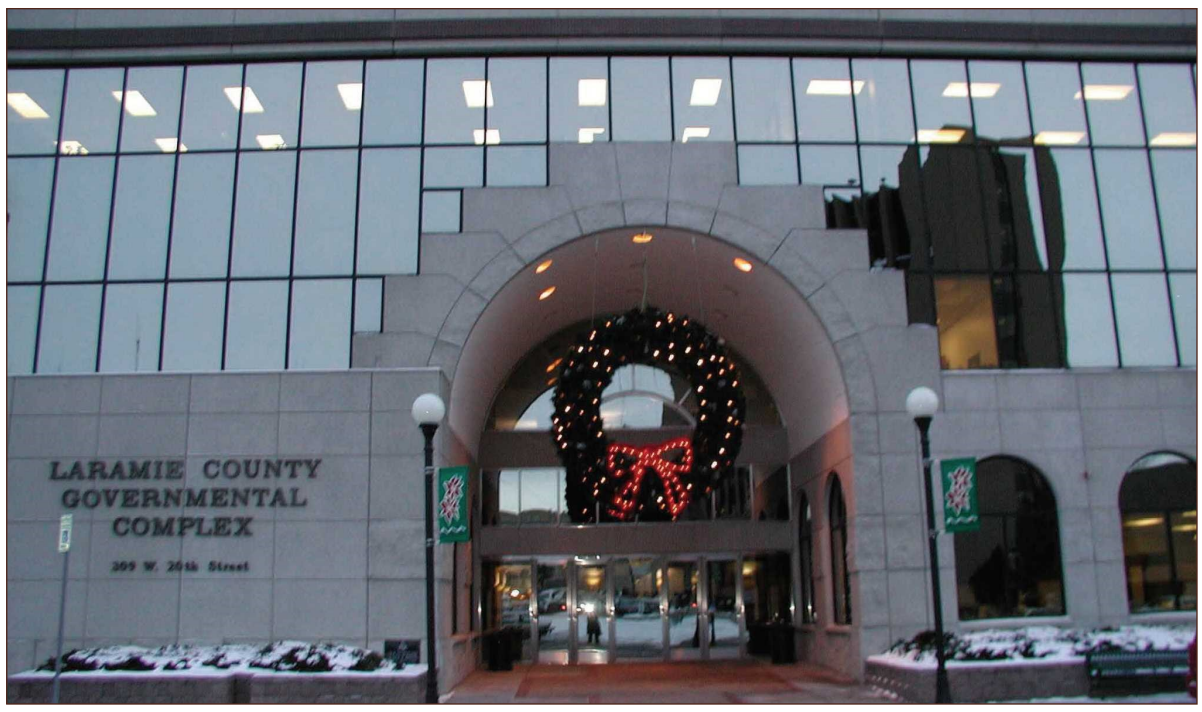
# Happy Holidays

**And to all a good year**




**Cheyenne, Wyoming Courthouse**
*Photograph by Steven Brownstein*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## Canada Wants Your Input To Figure Out If People With Criminal Records Should Work In The Legal Weed Business

People with prior drug convictions may not be totally shut out of Canada's legal weed industry.

The federal government unveiled a consultation paper on Tuesday, asking the public for input on how they'll design the nitty-gritty of the legalized recreational market. Unsurprisingly, the paper makes it clear that anyone with past associations or convictions connected to drug trafficking or organized crime may be denied the security clearance required to work at cannabis companies.

And yet the paper recognizes that not everyone with a drug conviction ought to be blocked from working in the legal system.

The government "acknowledges that there are individuals with a history of nonviolent, lower-risk activities (e.g., simple possession or small-scale cultivation of cannabis)" who may want to work in the legal weed business, once it starts up next summer.

Ottawa is asking the public its thoughts on "the degree to which these individuals should be permitted to participate in the legal cannabis industry."

## Strict Drink-Driving Punishments Across The World

In the United Arab Emirates, the offence of drink-driving is punished not by a fine - but by 80 lashes.

In South Africa, drivers caught behind the wheel after having more than 0.005 grams of alcohol per 100 millilitres of blood face a 10-year jail sentence, fines of up to £6,600 or both.

Manchester City midfielder and devout Muslim Yaya Toure was famously landed with what was thought to be the UK's biggest ever drinking fine of £54,000 in 2016.

The teetotal player was fined one week's wages and banned from driving after unwittingly drinking brandy mixed with Coke while he was at a party.

Drink-driving in Taiwan is punishable by up to two years in prison and a fine of $6,700 if the offender avoids an accident. In the case of an accident the sentence jumps to seven years and causing death incurs a 10-year sentence.

Norway calculates drink-driving fines on the basis of 1.5 times the monthly salary of the criminal in question. In 2003 a car importer was fined the equivalent of £18,365.662 for drink-driving through Oslo in his Rolls-Royce.

**Better Than The Police**
**-/-/-/-/-/-**
**Straightline International's Puerto Rico search**

## India's Police Search vs. Court Search

The differences between police searches and court searches are glaring.

Local police department searches focus on arrests made at that police station only. The prosecution of cases from the local police are heard at a Magistrate Court or District Court. Each Magistrate Court hears cases from several or more local police stations. Therefore magistrate court cases cover a wider area than local police and are preferable.

City police department searches focus on arrests made in that city only. Since magistrate courts cover only a slice of a city (or District) city police searches are favorable over a magistrate court search as they cover a wider area.

District Court cases cover all cities in the District.

## More Hits

They would include all cases of the type most favorable to U.S. pre-employment screening standards. District court cases cover a wider area than city police thereby making this the most preferred search.



Meet Steven Brownstein
On LinkedIn





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# 5 Questions Wth AmercanChecked CEO Julie Hakman

***Background screening company focuses on people***

by Adam Daigle

Julie Hakman is president and CEO of AmericanChecked. The Native American-owned business, which specializes in pre-employment background screening, was founded in 2005 and was named to the Inner City 100, which ranks the fastest-growing, inner-city businesses in America


by revenue growth. The company has 50 employees in Tulsa.

1. Your company was awarded again for being among the fastest-growing, inner-city businesses in the country. What has the last year been like for you?

It's been an incredible year for AmericanChecked. We've expanded our integrated services and have partnered with companies that are some of the best of the best and complement our services within the industry. We've expanded our already impressive footprint in the niche market of gaming and have also added new national retail clients. Looking ahead to 2018, we will be introducing several new products and services that we're very excited about.

2. Were you involved in starting the company in 2005? What were those early days like and how did you all find success establishing the company in the business of background checks?

I have been here since the very beginning. Many of the AmericanChecked staff members, including the leadership team, have worked together in the background screening industry for decades. The principals of AmericanChecked knew from experience what to do, how to do it and, most importantly, how to ensure every customer has a direct, focused relationship with our team. Our motto is "Make their day," and it is one that we embrace every day both with our clients and with our team members. We've come a long way since 2005 when there were just a few of us making sales and processing orders to the team of FCRA -certified experts in the industry.

3. What is one rewarding aspect of being in the business of background screening that has kept you and others with the company?

I often say, "At the end of the day, it truly is about people," and I really believe that. It is rewarding coming into work every day knowing that our customers trust us to help them with one of the biggest challenges of any company — hiring a strong, qualified workforce. The team at AmericanChecked is the finest group of people that I ever had the privilege of working with, and they go above and beyond to ensure that our clients' have exactly what they need when they need it. The culture of making someone's day is what separates AmericanChecked from other companies. Our focus on customer service is second to none.

4. Your bio indicates you're from California but went to the University of Oklahoma. How did you land in Oklahoma and what's made you stay?

I am proud to say that my family is originally from Oklahoma and, while I grew up in California, summers and holidays were spent in Oklahoma with my grandparents. I've been a Sooner fan for as long as I can remember and graduating from the University of Oklahoma was a lifetime goal and achievement. Job opportunities then brought me back to Oklahoma and, when I later decided to open my own business, I knew that Oklahoma was where I wanted it to be. I'm a Southern California girl with Oklahoma in my heart.

5. Being in the business for as long as you have, what is a simple thing people can do to get through a background check without any issues?

A background check is about two things — determining an applicant's feasibility for a job and validating information provided by the applicant. Our responsibility as a background screener is to present employers with the necessary information for them to determine if an applicant is suited for a position and to ensure the information we supply is accurate and truthful. AmericanChecked believes there is a job for every American and encourages every applicant to be truthful when applying for a job.



## Dubai Court On The Web

Dubai has a very advanced court IT process. Dubai's Website offers more services than most U.S. courts.

If you have the time look over their Website at: www.dubaicourts.gov.ae It is quite impressive









# When Background Checks Go Wrong

by Steven Melendez

After spending several years on a waiting list for a subsidized apartment in Tennessee, "Jack" says he was turned away by a leasing agent when incorrect information turned up in a routine background check.

"She's like, 'You have a sex offender charge on your record,' and I was shocked," says Jack, who requested that we not use his real name to avoid having it further associated with the erroneous allegation. "I never have been charged with that."

The agent showed Jack a copy of the report, which referred to a man with a similar name and birthdate, he says. The report also included a photo of the alleged sex offender, who the leasing agent acknowledged clearly wasn't him. (Among other things, the man pictured had conspicuous face tattoos.)

But Jack still lost his spot on the waitlist—he's currently staying with a relative—and had a separate housing application also declined because of the mistaken information. As he tries to correct the record and clear up the confusion, every day is a new day of limbo.

Vidhi Joshi, an attorney at the Legal Aid Society of Middle Tennessee and the Cumberlands who is representing Jack, filed a formal dispute with the screening company that included the alleged offender's picture but hasn't yet received a response. She has also requested a copy of the report used for the second rental application, which was issued by a different background check firm, she says. (Joshi declined to identify the firms involved, since their responses are still pending).

Jack's story is just one of what fair credit advocates say is a growing number of cases where incorrect information on criminal and other background checks is making it difficult for innocent people to find work and housing. Such checks are routinely required for employment and rental applications, and conducted with varying levels of diligence by hundreds of companies around the country, but they only work properly when the information they contain is accurate.

And, increasingly, that's not the case.

"We have gone from back in the early part of the century seeing a couple hundred [cases] about criminal records a year up to more than a thousand a year," says Sharon Dietrich, litigation director at Community Legal Services of Philadelphia and head of the legal aid group's employment unit.

Digitizing data like court records has made background checks significantly cheaper and faster than in years gone by: In 2012, a Society for Human Resource Management survey found that more than two-thirds of organizations polled conducted criminal background checks on job candidates.

"I think employers are scared not to do it because they feel like they may be found liable for negligent hiring," says Dietrich.

But regulation has not necessarily kept pace. Even some jurisdictions that have passed so-called "ban the box" legislation, which forbids employers from requiring potential hires to indicate on job applications whether they've been convicted of a crime, still allow criminal history checks later in the application process.

Companies typically use a third-party background screening service to verify the work and education histories of potential hires, and often to check a candidate's credit history and search for any criminal convictions that might serve as a red flag, says Mike Aitken, vice president of government affairs at SHRM.

According to a May report from business intelligence firm IBISWorld, the $2 billion background check industry is mostly composed of small, local firms, which have benefited from easy internet access to more and more public records. Fear of liability for employee misconduct and post-9/11 security concerns have also contributed to rapid growth in the industry in recent years, according to the National Association of Professional Background Screeners, an industry group which counts more than 850 background screening companies as members.

And while the majority of checks are likely accurate, Dietrich says she's seen a "good number" of cases where background reports include information about people with similar names to her clients. In one case, she says, a client with a common name received a report with 65 pages of criminal history data about unrelated people with similar names.

"I have even seen cases where a female's record is attributed to a male or vice versa, simply because they don't use gender information, even though they have it," she says.

Even job applicants who do have criminal histories can still be unfairly harmed by slipshod background checks. Often, convictions legally expunged by a court still show up on reports. Crimes can also be misclassified, such as when misdemeanors are erroneously labeled as felonies, Dietrich says.

One problem is over-reliance on commercial databases, which can contain incomplete information or return hits based on false matches, says Larry Lambeth, the president of screening firm Employment Screening Services.

Lambeth is also the founder of Concerned CRAs, an association of consumer reporting agencies, as screening companies are known under federal law, voluntarily adhering to certain ethical standards. The group requires its members to consult original documents, like court records, and compare information like birthdates and addresses to verify data from databases actually corresponds to the subject of a background check.

"If you use a database for his criminal records, if you find a hit, we require that you pull a criminal record from the courthouse and find the identifiers and ensure it's the right person," he says.

But not all background screeners conduct such rigorous research, and not all clients are willing to pay for it, he says. And even well-intentioned screeners can have difficulty verifying records in jurisdictions where privacy-minded courts redact personal information like addresses and dates of birth, says Melissa Sorenson, executive director of the National Association of Professional Background Screeners.

"It's extending the time frame of getting people to work," she says, since it takes screeners longer to complete reports for employers. The organization generally tries to work with state and local regulators to make sure background screeners have access to the data they need to do their jobs, she says.

Under the federal Fair Credit Reporting Act, applicants do have the legal right to receive copies of their background checks and to contest any inaccuracies with the agencies that did the screening. But in practice, critics say the process can be arduous even for experts, let alone for individuals looking to correct their own records. Dietrich says she's had a screening firm resist providing her with an address to send mail on behalf of a client.

"You have to know even where to look—look for a little link at the bottom [of a firm's website] that says 'consumers,' and maybe that's where you'll find the dispute procedures," says Dietrich. And those procedures often require documentation like proof of address that not everyone can easily provide, she says.

"Some people can do that, some people can't, especially my clients who tend to be low-income and on the move," she says.

Even in cases where data is obtained directly from government sources, it can still be incorrect or out of date: Former U.S. Attorney General Eric Holder, now a partner at law firm Covington & Burling, wrote letters on behalf of Uber to local legislators earlier this year, urging them not to require ride-hailing services to vet their drivers against the Federal Bureau of Investigation's fingerprint database.

Critics have long said that the FBI database, which many states use to vet childcare workers, health care professionals, and others in regulated occupations, often contains wrong, misleading, or incomplete data. The database contains arrest records from law enforcement agencies around the country but only includes final case outcome data roughly half the time, according to a 2013 report from the National Employment Law Project. That means that arrests that resulted in an acquittal, dropped charges, or even expunged records can essentially appear as unresolved.

And updating outdated or simply incorrect data in the FBI's files can be laborious and can leave jobseekers out of work while they reach out to multiple agencies to get the information fixed, says Maurice Emsellem, director of the NELP's Access and Opportunity Program

**Continues next page**

## When Background Checks Go Wrong
continued

"Basically, you have to go back to the state that created the record to get it fixed," he says. "The FBI won't fix it in the FBI system."

And while reforms to the FBI background check system have been proposed as part of bipartisan criminal justice reform legislation, they've yet to make it through Congress.

Nor, says Dietrich, have regulators addressed issues that have arisen around private background checks in the more than 45 years since the Fair Credit Reporting Act became law, such as how background screeners should handle record matching issues in computerized databases or how they should deal with potentially expunged cases.

"The world of regulation of these companies is not what it might be," she says.

Meanwhile, the promise of future regulation is cold comfort for home-seekers like Jack, whose lives are being immediately damaged by bad data in a data-obsessed world. "He has suffered from homelessness," Joshi says. "It's had a pretty big impact."

## The Background Investigator Goes To South Africa

In a continuing series, The Background Investigator, sens its attorneys to various countries around the world to explore the justice systems and bring back to you their findings. This month Fred Frankel visited South Africa. Here is his report:

Obtaining Criminal Records in South Africa
by Fred Frankel, Esq.

In South Africa, I met with the Clerk in the Cape Town and Johannesburg courts.

Their systems track the cases locally.

All cases must start at and retain a record at the lower courts.

Therefore, if you know of a case, the local Court would have the record in their system.

For outside each locality the clerks have access to getting information from other Courts.

The National office of the Criminal Records and Fingerprinting office has all arrests and criminal matter for the whole Country.

The searches there are very thorough for nationwide searches.

## Turkey's Judicial Courts

The lowest civil courts in Turkey are named the civil or peace courts and are to be found in every district, then there are the civil courts of first instance for other civil cases than those judged by the peace courts.

The criminal courts are penal courts of first instance for minor cases and central criminal courts for major cases that imply a penalty of over five years of prison.

## New Suit Says Cook County Court Hinders Access to Filings

A legal news service is su ing one of the nation's busiest courts for allegedly hampering access to newly filed civil cases.

The Courthouse News Service made the allegations against the Circuit Court of Cook County in a lawsuit filed last week in Chicago federal court. It says rights to free expression under the First Amendment incorporate rights to timely public access to civil suits.

It names Cook County court clerk Dorothy Brown as a defendant. A message left at her office Monday wasn't returned.

The nationwide news service says a large percentage of Cook County lawsuits are accessible soon after they're filed. But it says others are withheld for days or weeks as they are processed. It contrasts that with how federal lawsuits are typically accessible online within minutes.

Skagit County, WA Superior Court To Offer Documents Online

Recently, the court began using the online system Odyssey to manage documents and make them available online, said Skagit County Clerk Mavis Betz.

She said the service is targeted at law firms and real estate title companies that often pull hundreds of dollars worth of documents a year.

The service will cost $250 to $600 a year, based on the size of the organization.

Members of the public who don't want to pay for access to the online service will still be able to get documents at the clerk's office as they have in the past, she said.

They will have access to the same documents available online, she said.

Betz said the fees for the Odyssey service are based on the average amount organizations pay per year for documents.

"It's the best deal for the most amount of people," she said. "I have some attorneys who spend $1,000 a year, (and some) who spend $50."

Documents printed at the clerk's office will still cost 25 cents per page.

Previously, documents were available for purchase on the Secretary of State's website at $1.25 per document.

## The Case Of The Missing Tarrant Court Cases

There is a problem in Tarrant,TX county courts, and it's difficult to determine just how big it is.

In recent weeks, Star-Telegram reporter Max Baker has reported on a number of court cases that have disappeared — many involving high-profile litigants. More specifically, the cases cannot be found by searching digital court records.

The Tarrant County district clerk and his office can find the files.

But you? You're out of luck.

Another problem: a "glitch" in the computer system automatically boots confidential and sensitive cases out of the searchable, public-facing digital archive system.

Tarrant County District Clerk Tom Wilder has started working on the problems. Wilder says a software fix — which should come this month — will fix that.

The lack of access — and the inability to determine how many records cannot be found — raises serious questions about lawsuits throughout the civil and family courts.



**Johannesburg, South Africa Court**

# Background Check Alphabet Soup Creates Nightmares

by William J. Simmons

A Philadelphia employer conducting background screening may soon have to navigate no less than six federal, state and local laws. Other jurisdictions also have background-check related laws, creating an even larger headache for multistate employers.

Law firms conducting background checks on their own workforces and lawyers who advise employers on hiring must recognize the pitfalls the patchwork of laws cause. This article describes key traps caused by the "alphabet soup" of Pennsylvania background check laws:

The federal Fair Credit Reporting Act (FCRA);
The Pennsylvania Criminal History Record Information Act (CHRIA);
The Pennsylvania Human Relations Act (PHRA);
The Philadelphia Fair Criminal Record Screening Standards Ordinance (FCRSS);
The Philadelphia ordinance that added credit check prohibitions to the Philadelphia Fair Practices Ordinance (FPO); and
The Philadelphia ordinance banning inquiries about applicants' salary histories (SHO—for salary history ordinance).

The FCRA

The FCRA regulates employers who use a consumer reporting agency to conduct background checks. The FCRA is not limited strictly to "credit" checks. It also covers education and employment verifications and criminal record searches performed by a consumer reporting agency. The key initial requirement for most employers is informed consent. The employer must obtain written authorization for the report. It also must "clearly and conspicuously" disclose in a "document consisting solely of the disclosure" that a consumer report will be obtained for employment purposes.

If the employer wants to reject a candidate based on the report, however, it must provide "pre-adverse action" and "adverse action" notices:

The employer must provide a copy of the consumer report and a proscribed notice of federal rights before any final decision is made based on the report; and
If the employer finally determines to reject the candidate based on the consumer report, the employer must provide written notice that the decision was made "in whole or in part" on the report in a letter with certain mandated language in 15 U.S.C. Section 1681b(b)(3).
Lawsuits over the last five years have raised compliance questions based on stretched readings of the otherwise-simple-sounding law, such as:

What is the proper content of a FCRA disclosure? Neither the law nor the regulators have provided a "safe harbor" form. Recent class action cases have alleged millions of dollars of statutory damages based claims that an employer's disclosure form allegedly contained a few sentences that purportedly did not "solely" relate to the fact that a consumer report would be obtained. The U.S. Court of Appeals for the Ninth Circuit held that even a single sentence of "release" language in a disclosure willfully violated the law.

What is the possible adverse action that triggers the duty to provide a pre-adverse action notice? Some plaintiffs now allege that even an internal decision to mark a candidate ineligible is itself an adverse action (not just, for instance, when the candidate is informed will not get the job). Others challenge the use of consumer reporting agencies to deliver pre-adverse action notices or help them adjudicate report results. The claim is that the adverse action occurs when the agency applies employer guidelines to interpret negative results on the report.

The CHRIA

The CHRIA requires that employers only deny applicants jobs based on misdemeanor and felony convictions if those convictions "relate to the applicant's suitability for employment in the position for which he has applied." The CHRIA also mandates written notification when rejecting an applicant based on criminal records.

Importantly, CHRIA also applies to background checks not regulated by FCRA, such as where the employer checks criminal record histories itself through the Pennsylvania State Police or court records, rather than via a consumer reporting agency.

Litigation has raised questions about the CHRIA's interpretation such as:

Does the law apply to current employees or just applicants? What about applicants who start work conditioned on their still-to-come background check results? The law's plain text only refers to applicants. Some litigants have tried to apply the law to employees by inference or by crafting "public policy termination" claims.

What does it mean for a conviction to "relate" broadly to the "suitability" for a position? The law offers no firm guidance or safe harbor, so the analysis varies based on the factual circumstances of each case.

If an employment decision is based on the applicant's self-disclosure of criminal history, or that the applicant falsified statements in an employment application, does the law apply? Courts have mostly agreed that information sourced directly from the candidate does not constitute "criminal record history information" as defined by the law (meaning the law would not apply) and that falsification is outside of the law's ambit. But litigants continue to battle over those issues.

The PHRA

Individuals with negative credit or criminal histories are not specifically enumerated as protected classes under the PHRA. However, the PHRC takes the stance that excluding individuals from employment based on credit or criminal history may cause an unlawful disparate impact on certain protected categories of workers (employers may be aware of a similar view espoused by the U.S. EEOC).

The contours of the "disparate impact" theory are beyond this article. But the takeaway is employers must take special precautions before deciding to use criminal or credit history to restrict employment. Otherwise, expensive and probing companywide investigations by a government agency about background check decision-making may follow. "Bright line" exclusionary rules, without assessing each individual's particular circumstances, are disfavored. Instead, the PHRC encourages employers to assess many factors, such as: The circumstances, number and seriousness of the disqualified individual's prior offense(s); the duties and responsibilities of the job; the time that has elapsed subsequent to the conviction, and evidence of rehabilitation. The PHRC also treats more favorably employers who ask criminal record history questions later in the hiring process, showing they gave the individual every chance to gain favor before the conviction history was revealed.

The FCRSS

The FCRSS regulates practically each step of the background check process for Philadelphia employers:

Employers must post a notice of the law on their website and premises;
Any statement about criminal background checks in application materials must include language that consideration of the background check will be tailored to the job;
Employers cannot ask criminal record history questions on the employment application or whether an applicant would submit to a background check if hired (a disclaimer directing Philadelphia applicants not to answer will not work to comply);
Employers must wait to conduct background checks on applicants until after a conditional offer is made;
Employers may not rely on non-pending arrests;
Employers may only consider criminal convictions that occurred fewer than seven years from the inquiry excluding periods of actual incarceration;
Employers must consider six factors before deciding not to hire a job applicant because of criminal records; and
Employers must provide a copy of the criminal background check to the applicant and give them ten business days to explain or provide evidence the derogatory information is inaccurate.

The FPO

The Philadelphia credit checks ordinance makes it unlawful for employers to consider a job applicant's or employee's credit for employment decisions. This includes information about debt, credit worthiness, credit score, payment history, bank account balances, bankruptcies, judgments, liens, or items under collection. There are exemptions, so employers must determine whether all jobs they use credit in screening for fit within the exemptions.

Where an exemption applies, the employer must still tell the applicant or employee the information that caused any adverse action. Much like the FCRA, the employer must give the applicant an opportunity to explain the information before any final adverse action.

## Background Check Nightmares, continued

The SHO

Philadelphia's salary history ban ordinance is not yet in effect due to federal court litigation over its constitutionality. But should the ordinance go into effect, it flatly prohibits employers from asking about the prior compensation of job applicants. It also prohibits retaliation against applicants for asserting their rights. Although the ordinance does not specifically address employment verifications that may disclose salary history, conservative employers will want to advise their consumer reporting agencies not to provide any prior compensation information as part of background checks.

## Using The CPIC Database For Pre-Employment Purposes

Can you or can't you? That is not the question. Rather, the question is - should you?

- Fact -Only criminal record information concerning indictable and hybrid offences is held by CPIC.
- Fact - The names of persons who have been charged but never convicted cannot be accessed from the CPIC database (with some exceptions).
- Fact - Information stored in local and provincial criminal records systems may or may not be found in the CPIC database. Since there is no legislation in place that requires local police to submit criminal information to CPIC (with the exception of the Young Offenders Act), the criminal records of the central system do not reflect the totality of records that exist.
- Fact - Local or provincial reporting systems contain various record information relating to summary offences (misdemeanors) and provincial statutes not found in CPIC.

According to Les Rosen, NAPBS Chairperson and FCRA-compliance authority,

"There are some counties in certain states that are available on a database. However, employers should never use a criminal database for employment decisions, and should always make sure that a screening company is utilizing the most hands-on means available to obtain criminal records, which is usually an on-site search at the courthouse.

There are a number of disadvantages to a database search.

First, the database may not be absolutely current.

Secondly, not all counties have criminal records on the database.

Third, databases are notorious for being inaccurate.

Fourth, if an applicant's name does appear, the actual records must still be pulled from the courthouse.

Denying employment based just upon a name in a database without reviewing the actual court file would violate a number of laws and rights of applicants. Employers who rely on databases for employment decisions are opening themselves up to serious lawsuits.

The bottom line is that an employer who relies upon such a database, and still hires a person with a criminal record resulting in some claim of damages, may not have the legal protection they thought they had.

There would be a considerable legal question as to whether having used a database would provide evidence of due diligence. In other words, databases may well not demonstrate that an employer took reasonable care."

Based on the knowledge of these facts provided by The John Howard Society of Alberta and of the opinions expressed by Les Rosen, indeed, rather than could I use the CPIC database, a question you need ask yourself is should I?

## Employment Screening Resources (ESR) Creates Infographic For California Ban the Box Law

by Thomas Ahearn

Employment Screening Resources® (ESR) has created a California Ban the Box Law Infographic to help employers understand Assembly Bill 1008, a law prohibiting private employers from asking about the criminal history of applicants before a conditional job offer that takes effect January 1, 2018. To access the infographic, complete this form.

California Governor Jerry Brown signed AB 1008 in October 2017 and the law applies to employers in the state with five or more employees. In 2013, California passed Ban the Box legislation – AB 218 – which applied to public jobs. The "Ban the Box" law removes the box on job applications applicants are asked to check if they have a criminal record and delays such inquiries until later in the hiring process.

"Originally, Ban the Box laws were concerned with the initial the application process. However, many of these laws, such as the new California law, have morphed into 'Fair Chance' laws that also impose processes for how criminal information is utilized. In other words, it is often no longer limited to just the application process," says ESR founder and CEO Attorney Lester Rosen, author of 'The Safe Hiring Manual.'

The California Ban the Box Law Infographic helps employers understand what practices with criminal records are considered unlawful under AB 1008 and teaches them how to perform an "Individualized Assessment" to consider the nature and gravity of the offense or conduct, the time that has passed since the offense or conduct and completion of the sentence, and the nature of the job held or sought.

The Ban the Box infographic explains what employers should do if they make a preliminary decision that the criminal records of applicants disqualifies them from employment, how applicants have at least five (5) business days to respond to the preliminary decision, and what actions employers need to take after making a final decision to deny applicants a job solely or in part because of their conviction history.

The infographic also covers exemptions where AB 1008 does not apply, potential issues with overlapping city and county Ban the Box laws – such as those in Los Angeles and San Francisco – not giving a clear state-wide solution, and tips for employers on updating applications and training hiring managers. The infographic is available by completing a form at http://www2.esrcheck.com/l/67412/2017-12-04/b8fxt7.

Rosen says another critical aspect for California employers is that AB 1008 does not preempt local Ban the Box laws, so employers need to pay attention to Ban the Box laws in Los Angeles and San Francisco that can differ along with the statewide law. To make matters more complicated, California did not give employers any incentives to hire ex-offenders by providing protection from lawsuits for negligent hiring.

"Local governments in Los Angeles and San Francisco cannot legally give employers protection if they hire ex-offenders and the California legislature chose not to promote and encourage hiring ex-offenders by adding some degree of protection from lawsuits," says Rosen, who adds that some question if Ban the Box laws will have the unintentional consequence of making it more difficult for ex-offenders to find jobs.

Currently, 30 states and more than 150 cities and counties have Ban the Box laws that remove the criminal history question from applications, according to the National Employment Law Project (NELP). A study released by the NELP in 2011 estimated that approximately 65 million people in the United States have criminal records – more than one in four American adults – showing the need for Ban the Box laws

# The Background Investigator Goes To Colombia

In a continuing series, The Background Investigator, is sending its attorneys to various countries around the world to explore the justice systems and bring back to you their findings. This month Fred Frankel visited Bogota, Colombia. Here is his report:

Obtaining Criminal Records in Bogota
by Fred Frankel, Esq.

There are 3 criminal court in Bogota. Each Court has its own separate computer system for keeping records. There is also the DAS and Attorney General's office where records are kept on criminal cases.

The Attorney General has no system from which records can be searched. (Additionally due to recent political events in Bogota getting anyone to see you there is extremely difficult.)

The Departamento Administrativo de Seguridad (DAS) is the central Police Station.

They have nationwide search capability and issue certificates.

They only will give the certificates and deal with the individual person.

I met with the Director and there is still the possibility of obtaining the certificates with the proper authorizations and finger print cards.

For all Colombia searches the ID number is very important.

Of the 3 courts, the Supreme Court is the easiest to get the information from.

It is the highest level court for criminal matters and civil matters alike.

They have public terminals there and of the 2 clerks I met with both were helpful.

In the Tribunal Court and Court of Justice there are also public terminals.

The clerks I met with at those courts were not as helpfulas at the Supreme Court..

Because of the uncooperativeness of the clerks in obtaining information, it should prove especially difficult to do so by phone.






# The Background Check Joke That Wasn't So Funny

This girl does a background check on every single guy she dates.

Sound a bit drastic? Indeed, it is drastic and if you had to run a background check on every guy you went out with it really would take the fun out of dating.

It would kind of make you feel like not bothering at all. Still, this girl has a good reason for doing so.

Her friend did one for the first time on a guy she liked as a joke, just to see what would come up. And what came up shook her to the core.

It was by no means funny. The guy was a convicted rapist.

So you see, she does have a good reason to do background checks but it is sad when you think about it.

SPECIAL ANNOUNCEMENT!

NEW PRODUCT

## Courts Of Saskatchewan

**The Provincial Court**

The Provincial Court deals with a variety of legal matters. They are generally grouped as follows:

Adult Criminal Court
Includes charges under the Criminal Code of Canada and The Controlled Drug and Substances Act. Deals with first appearances on all criminal matters.

Family Services Court
Deals with child protection hearings initiated by the Ministry of Social Services. (In Regina, Saskatoon and Prince Albert, child protection matters are handled by the Court of Queen's Bench.)

Municipal (Bylaw) Court
In Regina and Saskatoon, deals with violations under city bylaws, including parking tickets, noise infractions and domestic animal violations. In other court locations, bylaw matters are combined with regular court matters.

Youth Justice
Deals with young people between the ages of 12 and 17 years who are charged with committing a criminal offence under the Youth Criminal Justice Act.

Civil - Small Claims Court
Deals with legal disputes of $20,000 or less. Often includes claims for debts or damages, recovery of personal property and consumer complaints.

**Traffic Court**

In Regina and Saskatoon, deals with traffic offences, including speeding and other moving (and non-moving) violations. Also deals with offences under provincial statutes, including liquor and wildlife violations.

Traffic Court does not handle parking tickets. In other court locations, traffic matters are combined with regular court matters.

# Considerations for Employers As Medical Marijuana Approaches

by Joseph A. McNelis III

Gov. Tom Wolf signed the Pennsylvania Medical Marijuana Act in April 2016.

What Does the Medical Marijuana Act Say About Employment?

35 P.S. Section 10231.2103 of the act, titled "protections for patients and caregivers," contains a specific provision applicable to employers. Section 2103(b) contains an anti-discrimination provision, but makes clear that an employer need not accommodate an employee using or being under the influence of marijuana on the employer's premises.

Section 2103(b)(1) states, in pertinent part: "No employer may discharge, threaten, refuse to hire or otherwise discriminate or retaliate against an employee … solely on the basis of such employee's status as an individual who is certified to use medical marijuana." Section 2 goes on to state, however, that, "nothing in this act shall require an employer to make any accommodation of the use of medical marijuana on the property or premises of any place of employment." Lastly, the act states that it shall not require an employer to, "commit any act that would put the employer or any person acting on its behalf in violation of federal law."

What Do Section 2103 and Applicable Federal Laws Mean for Employers?

Hiring and Firing

Because the decision to hire or fire an employee may implicate the employee's right to use medical or recreational cannabis, employers must be aware of the applicable law. State court decisions from the early part of this decade emphasized marijuana's illegal status under federal law and found in favor of employers on these issues. However, more recent cases highlight the applicability of state medical marijuana laws and the need for compliance by employers.

In Emerald Steel Fabricators v. Bureau of Labor & Industry, 230 P.3d 518 (Ore. 2010), the employer discharged an individual after he disclosed that he was a registered user of medical cannabis, and the employee filed suit under the state's disability discrimination statute. The Oregon Supreme Court held that the employer did not act unlawfully in terminating the employee, holding that because federal law prohibited the use of cannabis, and the employer discharged the employee for engaging in illegal activity, the Oregon disability statute did not apply. Similarly, the Colorado Supreme Court held that, although the use of medical cannabis was lawful under state law, an employer could terminate an employee who uses medical cannabis program because it was still unlawful to do so under federal law, see Coats v. Dish Network, 350 P.3d 849 (Colo. 2015).

Recent decisions from courts in the Northeast have signaled a potential swing of the pendulum. In March, the Supreme Judicial Court of Massachusetts held that a plaintiff who was discharged after testing positive on a pre-employment drug test stated a prima facie case of discrimination because she was a "handicapped person" under the state's disability statute, and her use of medical marijuana recommended by her doctor was a "reasonable accommodation," as in Barbuto v. Advantage Sales and Marketing, No. SJC-12226 (Mass. March 9). Similarly, a Rhode Island trial court ruled that federal law did not pre-empt Rhode Island's medical marijuana statute and that the employer's discharge of an employee for her medical marijuana use was a violation of both the state's medical marijuana and civil rights statutes in Callaghan v. Darlington Fabrics, No. PC -2014-5680 (R.I. Super. Ct. May 23, 2017). Notably, the Rhode Island statute contains employment-related provisions which mirror 35 P.S. Section 10231.103.

There is some uncertainty in how Pennsylvania courts would determine whether an employment decision was made "solely on the basis" of an employee's status as a medical marijuana user. Thus, employer should examine and document hiring and adverse action decisions to ensure there is a basis other than an employee's status as a lawful user of cannabis, such as safety or an inability to effectively complete the employee's essential job duties.

Employee Working Conditions and Reasonable Accommodations

Employers must also be mindful of the Americans with Disabilities Act (ADA), 42 U.S.C. Sections 12101. The ADA generally prohibits employers from discriminating against employees with disabilities and requires employers to make accommodations for employees with a disability, so long as the accommodation does not impose an "undue hardship." Because individuals certified under the act will do so in order to treat a "serious medical condition, see 35 P.S. Section 10231.103, they will usually qualify as being "disabled" under the ADA.

After determining an employee has a qualified disability, employers would be wise to engage in an initial interactive process to determine whether it is feasible to make accommodations for the employee to lawfully use cannabis away from the workplace and still perform their job. Before taking any action, the employer should ensure that it ties its decision to the hardship in accommodating the employee, the employee's inability to complete the job, or a decline in the employee's performance.

Zero Tolerance and Drug Testing Policies

Another important consideration for employers is the desire to maintain a safe and drug-free workplace. The act neither requires an employer to allow the use of cannabis on their premises nor prohibits employers from implementing a legitimate drug testing policy. Indeed, the act provides that, "nothing in this act shall require an employer to make any accommodation of the use of medical marijuana on the property or premises of any place of employment." Furthermore, the federal government requires contractors in certain industries, such as transportation, to submit to drug testing, a requirement which likely would not be superseded by state law.

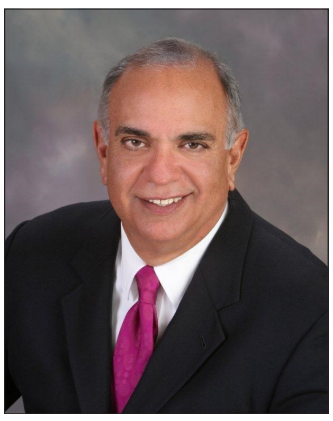
There is a recognized need for employers to maintain a safe and drug-free workplace, and employers should not abandon a legitimate drug testing policy that has those goals in mind. However, because the act states that employers cannot take an adverse employment action "solely" due to an employee's status as a medical marijuana user, employers should examine their existing drug testing policies, and particularly any "zero tolerance" policy. In doing so, employers should set clear expectations for employees and state the legitimate purpose of such testing. As noted above, any decisions made based on a positive drug test for marijuana must be preceded by an examination of the employee's status under the act, whether a reasonable accommodation is available, and whether the employee can perform the essential functions of their job.

While medical marijuana presents new and unique challenges for employers, general best practices will help to fend off legal claims and place the employer in the best position should litigation arise. In all cases, employers should engage in a deliberative and documented process which connects employment decisions to the important interests of employee conduct, job performance, and workplace safety.

# Les Rosen's Corner

## A monthly column

**By Lester Rosen, Attorney at Law**



## A Tale of Two References- One Makes You Liable for Damages and the Other Does Not

In a 2008 federal appeals case, two past medical employers gave past employment information for the same anesthesiologist. After the anesthesiologist, Dr. Robert Berry, moved on to yet another hospital, he botched a routine 15 minute procedure, leaving a patient in a permanent vegetative state due to Berry's own addiction to drugs.

The new hospital and its insurance company settled with the victim and in turn sued the previous two medical organizations for misrepresentations in the past employment information given to the new hospital. The allegation was based upon misrepresentations since the new hospital claimed it hired Berry because the defendants did not give accurate information by withholding information about misconduct and drug use.

The first defendant was a medical group that was fully aware that Berry had a drug abuse issue. After giving Berry a second chance, Berry continued to misuse drugs. Berry was terminated for that reason.

Against that backdrop, when asked for a recommendation by the new hospital, members of the medical group made statements suggesting Berry was an excellent clinician, would be an asset to any anesthesia service and that he was recommended highly as an anesthesiologist.

The second medical provider was a hospital where Berry had practiced. Instead of saying anything positive or negative, the hospital simply provided dates of employment and occupation. However, the hospital also claimed the reason it did not go into detail was that "there was a large volume of inquiries." Even though the hospital gave in-depth recommendations to 13 other physicians, it appeared that the hospital did not want to say anything about Dr. Berry.

The first hospital failed to disclose that Berry had on-duty drug use, and that his undocumented and suspicious withdrawal of Demerol had "violated the standard of care," or provide other negative information.

In the decision, the appeals court had no difficulty finding that the medical group was clearly liable, under the theory that once a party volunteers information, it has a duty of care to insure the information is correct. Otherwise, it amounts to a misrepresentation by material omission. The court clarified that a party does not incur liability every time it casually makes an incorrect statement. However, the court noted that:

"But if an employer makes a misleading statement in a referral letter about the performance of its former employees, the former employer may be liable for its statements if the facts and circumstances warrant. Here, defendants (medical group) were recommending an anesthesiologist, who had the lives of patients in his hands every day. Policy considerations dictate that the defendants had a duty to avoid misrepresentations in their referral letters if they mislead plaintiffs into thinking that Dr. Berry was an "excellent" anesthesiologist, where they had information that he was a drug addict."

The situation with the first hospital, however, was more complicated. The first hospital knew that Berry was a potential danger, but yet chose to say nothing, hiding behind a claim that they were too busy to provide more details.

The Court noted that it found no Louisiana case, or cases outside of Louisiana, that imposed a requirement that a past employer reveal negative past information, absent a situation where the past employer made some sort of affirmative misrepresentation. In other words, the first hospital did not have a legal duty to voluntarily step up and give negative information, as long as it limited its report to just factual employment data such as dates and job title.

The court noted that,

"And although the (first hospital) might have had an ethical obligation to disclose their knowledge of Dr. Berry's drug problems, they were also rightly concerned about a possible defamation claim if they communicated negative information about Dr. Berry."

The Court noted that if such an obligation were imposed upon employers, there would not only be privacy concerns, but it would create a burden if employers had to investigate each time if negative matters about a past employee was the type that had to be disclosed. The bottom line: if an employer limits itself to just dates of employment and job title, it has no obligation to warn of future dangerousness, provided the employer did not falsely mislead the new employer.

That is why so many employers choose to not say anything either way. However, contacting past employers is still one of the most vital aspects of due diligence. It can be as important as doing criminal checks. Some employers make a costly mistake by not checking past employment because of the issues raised in this case and the expectation that past employers will not give any information but dates of employment and job title.

That is why so many employers choose to not say anything either way. A practice has developed essentially that if you do not have something good to say, then don't say anything at all.

However, contacting past employers is still one of the most vital aspects of due diligence. Employers make a costly mistake by not checking past employment because of the issues raised in this case and the expectation that past employers will not give any information but dates of employment and job title.

Just documenting the fact that an effort was made will demonstrate due diligence. Verification of dates of employment and job titles are also critical because an employer must be concerned about unexplained gaps in the employment history. Although there can be many reasons for a gap in employment, if an applicant cannot account for the past seven to ten years, that can be a red flag.

It is also critical to know where a person has been because of the way criminal records are maintained in the United States. Contrary to popular belief, there is not a national criminal database available to most private employers. Searches must be conducted at each relevant courthouse, and there are over 10,000 courthouses in America. However, if an employer knows where an applicant has been as a result of past employment checks, it increases the accuracy of a criminal search, and decreases the possibility that an applicant has served time for a serious offense.

The case is Kadlec Medical vs. Lakeview, 527 F.3d 412 (5th Cir. 2008)

## Debt Kills Love Like A Criminal Record

A recent survey by CreditCards.com found that women would sever a relationship with a lover who couldn't pay routine bills as quickly as she'd cut off a guy who revealed he had a criminal record.

Specifically, 70 percent of women said either a criminal record or crushing debt was a relationship dealbreaker. Men, on the other hand, are far more tolerant of a lover's runaway debt. Only 37 percent would call off a relationship if they found their female friend couldn't meet all her bills.

However, 57 percent of women and 48 percent of men say that a partner with debt -- any debt -- is a "turn-off." A whopping (and somewhat difficult to fathom) 68 percent said the same attitude on money is the "most important factor in a relationship."

When asked if they'd want to know their partner's credit score before getting seriously involved, 57 percent of women and 47 percent of men said yes. On the bright side, only 16 percent of Americans would dump a partner who lost his or her job.

And there might be hope if your partner disagrees with your approach to money. Fully seven in 10 -- both men and women -- said it was OK to insist that a partner change their spending habits. Of course that may explain another survey finding: 73 percent say that couples argue most about money.

## Categories Of Canada's Criminal Offences

The main categories of criminal offences in Canada are summary conviction offences and indictable offences.

A summary offence is a criminal act that can be proceeded with summarily, without the right to a jury trial and/or indictment (required for an indictable offence).

An indictable offence is an offence which can only be tried on an indictment after a preliminary hearing to determine whether there is a prima facie case to answer or by a grand jury (in contrast to a summary offence). In trials for indictable offences, the accused normally has the right to a jury trial, unless he or she waives that right.

Generally speaking summary offences are less serious and indictable offences are more serious. Many offences can be prosecuted as either a summary offence or an indictable offence — the Crown prosecutor makes this choice.

## A Note From Phyllis Nadel

# Felons More Likely To Re-offend

A convicted felon sentenced to probation for a violent, property or drug felony is more likely to re-offend within two years if he or she leaves court with an official "convicted felon" label and its barriers to employment and civil rights, according to a landmark study of nearly 96,000 probationers by Florida State University criminologists.

Comprising the first-ever analysis of the effects of a felony convict label, or lack thereof, on recidivism (re-conviction) among adult offenders, the FSU research is described in a paper published in the just-released August edition of the journal Criminology.

Those findings from FSU's College of Criminology and Criminal Justice are expected to resonate across the state of Florida, where the law gives judges the discretion to withhold adjudication of guilt -- and with it the label -- for convicted felons sentenced to probation.

"When Florida judges withhold adjudication of guilt, as they have in about half of such cases in recent years, probationers lawfully avoid the convicted felon label for that offense, preserving both their civil rights and the ability to pursue employment and other legitimate activities without impediment," said Ted Chiricos, the William Julius Wilson Professor of Criminology at FSU. Chiricos is the lead author of the paper, "The Labeling of Convicted Felons and Its Consequences for Recidivism," which is co-authored by FSU Associate Professor of criminology William Bales and two recent recipients of doctoral degrees in criminology from FSU.

While probationers formally labeled as convicted felons re-offend at higher rates -- regardless of race, sex or prior convictions -- than those not labeled, the study found that recidivism rates are even higher among those who are labeled and white, compared to labeled blacks or Hispanics; labeled and older than 30 when first convicted compared to labeled younger offenders with prior convictions before age 30; and for labeled women as opposed to labeled men.

"Our research demonstrates empirically that harsher sanctions are actually counterproductive in terms of making recidivism -- and the victim, social and economic costs associated with it -- more likely," Chiricos said.

The research offers ample evidence to support that contention. Its analysis of labeling effects examined the recidivism experience of 95,919 persons (71,548 men and 24,371 women) sentenced to probation in Florida courts between 2000 and 2002 after a guilty verdict or plea for a violent property or drug felony. Judges had withheld adjudication in about 60 percent of the sample; the balance had adjudication formally applied, which served to certify the felony convict label. The study looked only at the number of probationers who committed new offenses within two years of completing their original sentence, not at technical violations of the terms of probation.

During the two-year follow-up period, 19 percent of the total sample -- including both labeled and unlabeled felony probationers -- re-offended. However, adjudication of guilt increased the odds of recidivism for women by 19 percent compared to men, and for whites by 16 percent compared to minority offenders.

Chiricos noted that the negative effects of the stronger sanction are especially pronounced for first-time offenders who are older as well as for those who are white or female. Those somewhat unexpected findings appear indicative of the even greater toll and criminal stigma of the convicted felon label for those with what criminology theory calls "a greater stake in conformity to societal expectations," he said.

"Based on evidence in the records of more than 95,000 individuals tracked for two years, it's clear that judges who withhold adjudication of guilt when sentencing felons to probation also are practicing good public policy," Chiricos said. "Minimizing harm when administering justice benefits both the offender and the community to which he or she returns."

In addition to Chiricos and Bales, co-authors of the FSU College of Criminology and Criminal paper are recent FSU Ph.D. recipients Kelle Barrick, currently a research analyst in the college's Center for Criminology and Public Policy, and Stephanie Bontrager, now a senior research analyst at Tallahassee's Justice Research Center.

Registered users can access the FSU paper via the online version of Criminology's August 2007 edition at http://www.blackwell-synergy.com/toc/crim/45/3.

"We hope this study serves to better inform policy and its practitioners in this critical area," Chiricos said. "After all, anyone found guilty of a felony and sentenced to probation has already experienced a clear expression of disapproval from his or her community, but when the added sanction of labeling is avoided, they can still re-enter and participate in that community of law-abiding citizens. If labeling makes participation more difficult or impossible, probationers are significantly more likely to gravitate back to criminal associations and activities, and ultimately we will all pay the price."

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## What Is Needed For A UK Civil Search

For civil searches in England and Wales:

Need the Name, Address, Town and County to be searched. Each County is a separate search.

The registry has records for the Isle of Man from 1995, Scotland from 1990, Northern Ireland from 1993, Jersey from 1994 and the Irish Republic from 1998.

The judgments are from three sections.

The County Courts which includes administrative orders and child support agency orders.

Second, the High Court Judgments and finally the fines from local area justices.





Judgments only remain in the registry for up to seven years from the date of judgment.

The information obtained will include the case number, details of payments or lack of payment and the claimant's information.

## Havana Provincial Court

78604252

Teniente Rey No. 605, e/ Prado y Zulueta, La Habana Vieja

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