

RE-ENTRY TASK FORCE
FINAL RECOMMENDATION PRESENTED TO THE
COLORADO COMMISSION ON CRIMINAL AND JUVENILE JUSTICE
August 11, 2017

FY17-RE #05. Provide statutory guidance on public housing decisions.

Recommendation:

Promote community safety and economic growth by:

- Preventing public housing authorities from taking adverse action against individuals on the basis of arrests that did not result in a conviction, or convictions that have been pardoned, sealed or expunged.
- Requiring public housing authorities to consider other convictions using the same criteria the state currently applies for licensure and employment decisions.

Discussion:

Obtaining housing is a lifelong challenge for those with a criminal record, and a significant hurdle facing individuals returning from incarceration.¹ This is of widespread concern, as nearly one in three Americans of working age have some form of criminal record.² In Colorado alone, over 190,000 people were arrested in 2015.³

The inability of large numbers of people to obtain housing adversely affects the public's safety and welfare. On an individual level, stable housing is a key factor that enables people to avoid future arrests and incarceration.⁴ More broadly, the community as a whole is negatively impacted by restrictions that concentrate individuals in low-rent, distressed neighborhoods.⁵ Numerous studies have shown that the housing related consequences of a criminal record may

¹ U.S. Dept. of Housing & Urban Dev. (2016, April 4). *Office of General Counsel Guidance on Application of Fair Housing Standards to the Use of Criminal Records by Providers of Housing and Real-Estate Related Transactions*. Washington, DC (see pp. 1-2 at portal.hud.gov/hudportal/documents/huddoc?id=hud_ogcguidappfhastandcr.pdf); *The Piton Foundation* (2007, Spring). Study portrays struggles people face after prison. *The Piton Perspective*. Denver, CO (at cdpsdocs.state.co.us/ccij/Resources/Ref/PitonPerspective-Spr2007.pdf); Tran-Leung, M.C. (2015, February), *When Discretion Means Denial: A National Perspective on Criminal Records Barriers to Federally Subsidized Housing*. Chicago, IL: The Shriver Center (see pp. 1-3 at povertylaw.org/files/docs/WDMD-final.pdf); Maureen Cain, Policy Director, Colorado Criminal Defense Institute (Aug. 24, 2016), presentation to the CCJJ Collateral Consequences Working Group; and Richard Morales, Deputy Executive Dir., Latino Coalition for Community Leadership, (Aug. 10, 2016) presentation to the CCJJ Collateral Consequences Working Group.

² Bureau of Justice Statistics (2014, January), *Survey of State Criminal History Information Systems*, Washington, DC: U.S. Dept. of Justice (see Table 1 on p. 14 at ncjrs.gov/pdffiles1/bjs/grants/244563.pdf); and McGinty, J. C. (2015, Aug. 7), How many Americans have a police record?, *The Wall Street Journal* (at wsj.com/articles/how-many-americans-have-a-police-record-probably-more-than-you-think-1438939802).

³ Colorado Bureau of Investigation, *Crime in Colorado 2015*, crimeinco.cbi.state.co.us/cic2k15/state_totals/statewide_adult_arrests.php (last visited Feb. 1, 2017).

⁴ Letter from United States Attorney General Eric Holder, Jr., to Colorado Attorney General John Suthers (Apr. 18, 2011); *Office of General Counsel Guidance*, *supra* note 1, at p. 1; and National Research Council. (2008). *Parole, Desistance from Crime, and Community Integration*. Committee on Community Supervision and Desistance from Crime. Committee on Law and Justice, Division of Behavioral and Social Sciences and Education. Washington, DC: The National Academies Press (see pp. 23-24 at cdpsdocs.state.co.us/ccij/Resources/Ref/NCR2007.pdf).

⁵ *Parole*, *supra* note 5, at p. 54-55; and Roberts, J. (2011). Why misdemeanors matter: Defining effective advocacy in the lower criminal courts. *U.C. Davis Law Review*, 45(2), 277-372 (see pp. 300-301 at lawreview.law.ucdavis.edu/issues/45/2/Articles/45-2_Jenny_Roberts.pdf).

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disparately impact individuals and communities of color.⁶ It is thus necessary to ensure that Colorado's record-based restrictions on public housing are both fair to individuals and productive to the safety and welfare of society.

Because criminal record exclusions may have a disparate impact based on race and national origin, they are regulated under the federal Fair Housing Act.⁷ A housing provider violates the Fair Housing Act when the provider's policy or practice has an unjustified discriminatory effect, even when the provider has no intent to discriminate.⁸

Arrests alone are not proof of criminal activity.⁹ Housing providers who impose exclusions based solely on an arrest without conviction cannot prove that the exclusion actually assists in protecting resident safety or property.¹⁰ Policies and practices that impose exclusions based on conviction records must be necessary to achieve a substantial, legitimate, nondiscriminatory interest.¹¹ Guidance from the federal Department of Housing and Urban Development states that conviction based exclusions should account for the nature and severity of the conviction, the time that has passed since the conviction, and whether the conviction demonstrates a risk to resident safety or property.¹²

Colorado currently places no restrictions on public housing authorities' ability to withhold or terminate housing based on an individual's criminal record.¹³ State law does, however,

⁶ Carson, E. A. (2015, September). *Prisoners in 2014*. Washington, DC: U.S. Dept. of Justice, Bureau of Justice Statistics (reporting on p. 15 that as of December 31, 2014, black men are imprisoned in state and federal facilities at a rate of 2,724 per 100,000, Hispanic men are imprisoned at a rate of 1,091 per 100,000, and white men are imprisoned at a rate of 465 per 100,000; similar disparities exist for women) (at bjs.gov/content/pub/pdf/p14.pdf); and *Office of General Counsel Guidance*, *supra* note 1, at p. 2.

⁷ *Office of General Counsel Guidance*, *supra* note 1, at p. 2; and U.S. Dept. of Housing & Urban Dev. (2015, November 2), *Guidance for Public Housing Agencies (PHAs) and Owners of Federally-Assisted Housing on Excluding the Use of Arrest Records in Housing Decisions* (see p. 5 at portal.hud.gov/hudportal/documents/huddoc?id=PIH2015-19.pdf).

⁸ *Office of General Counsel Guidance*, *supra* note 1, at 2.

⁹ *Id.* at 5.

¹⁰ *Id.*

¹¹ *Id.* at 6.

¹² *Id.* at 6-7.

¹³ In Oregon, "a landlord may not consider a previous arrest of the applicant if the arrest did not result in a conviction" unless the arrest resulted in charges that have not been dismissed. Only certain types of convictions can be considered. Oregon Rev. Stat. § 90.303. Several municipalities have similar laws. Both Champaign and Urbana, Illinois, prohibit housing discrimination on the basis of an arrest record. Champaign, IL, Code Ch. 17, Art. V, § 17-71 (at municode.com/library/il/champaign/codes/code_of_ordinances?nodeId=MUCO_CH17HURI_ARTVDIHOCOSP); Urbana, IL Code Ch. 12, Art. III, §§ 12-37, 12-64 (at municode.com/library/il/urbana/codes/code_of_ordinances?nodeId=COOR_CH12HURI_ARTIIDI); Newark, New Jersey prohibits landlords and real estate brokers from inquiring about or taking adverse action on the basis of a non-pending arrest that did not lead to conviction, and records that have been erased or expunged. City of Newark, NJ, (2012, September), Legislation File #12-1630, Version 1 (at newark.legistar.com/LegislationDetail.aspx?ID=1159554&GUID=6E9D1D83-C8D7-4671-931F-EE7C8B2F33FD&FullText=1, last visited May 23, 2017); San Francisco, California, does not permit affordable housing providers to consider most arrests that did not lead to a conviction, convictions that have been dismissed or expunged, or convictions more than seven years old. San Francisco, CA, Police Code, Article 49, § 4906 (at [sf-](#)

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currently regulate their creation, powers, and tenant selection.¹⁴ Additionally, the Department of Local Affairs, Division of Housing, is statutorily tasked with receiving and administering funding to some local housing authorities.¹⁵

This recommendation includes one non-statutory element:

1. Provide guidance to public housing authorities.

Housing decisions are made by dozens of public housing authorities across the state. To achieve consistent, fair, and productive results, they should have guidance on how to evaluate the impact of an applicant's or tenant's criminal history.

CCJJ recommends that the Division of Housing develop a written statement of best practices regarding the use of criminal history records by public housing authorities. The statement should provide clear guidance on how an applicant's or tenant's criminal record may impact housing decisions, and should be available to the public on the Division of Housing's website.

This recommendation includes two statutory elements:

- 1. Amend section 29-4-210 (rentals and tenant selection).**
- 2. Amend section 24-34-502 (unfair housing practices prohibited).**

Proposed Statutory Language

This recommendation gives meaning to Colorado's current record sealing laws, and applies existing Fair Housing Act guidance. It would prevent housing authorities from taking adverse action against an individual based on arrests that did not result in conviction, sealed records, and expunged records. Under all of those circumstances, either the individual has not been convicted of a crime, or a judge has already determined that the record in question should not be available to the public.¹⁶ Housing authorities would apply the same considerations to other convictions that the state government is required to apply in the context of licensure and employment.¹⁷

The proposed provisions would be enforceable by the Colorado Department of Regulatory Agencies, Civil Rights Division.¹⁸ The civil rights commission could, after following existing

hrc.org/sites/default/files/ARTICLE%2049_%20Final.pdf); Seattle, Washington, has passed a resolution recommending that landlords not exclude residents on the basis of arrests not resulting in convictions. City of Seattle, Office of the City Clerk (2016, June), Resolution 31669, Version 3 at seattle.legistar.com/LegislationDetail.aspx?ID=2737445&GUID=4E0573F5-8990-47D2-BE8D-85BE81C1E83B (last visited May 23, 2017).

¹⁴ §§ 29-4-201 to -232, C.R.S. 2016.

¹⁵ § 24-32-705(1)(i), -705(1)(n), C.R.S. 2016.

¹⁶ With the exception of certain controlled substance and human trafficking related offenses, the sealing of a record reflects that a judge has already determined that the harm to the individual's privacy outweighs the public's interest in the availability of the record. §§ 24-72-702(1)(b)(II)(B), -704(1)(c), -705, -706, -708(3), C.R.S. 2016.

¹⁷ See § 24-5-101(4), C.R.S. 2016.

¹⁸ § 24-34-306, C.R.S. 2016.

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notice and hearing procedures, issue a cease and desist order if it found a housing authority was engaging in prohibited practices.¹⁹ It could also order damages, penalties, injunctions, or other equitable remedies as provided by current law.²⁰ The recommendation would also allow aggrieved individuals to initiate a civil action seeking similar remedies.²¹

Consistent with existing law, this recommendation aims to ensure record-based restrictions on public housing are both fair to individuals and productive to the safety and welfare of Colorado society.

1. Amend section 29-4-210 by adding subsection (1)(e).

(1) In the operation or management of housing projects, any housing authority at all times shall observe the following duties with respect to rentals and tenant selection:

(e) It shall not deny or terminate dwelling accommodations, or take adverse action against any person, on the basis of any arrest or charge for which a person has not been convicted for a criminal offense and the criminal case is not actively pending, a conviction for which the person has been pardoned, a conviction for which records have been sealed or expunged, or a conviction for which a court has issued an order of collateral relief specific to dwelling accommodations. If the housing authority determines that a person has had any other criminal conviction, the housing authority shall consider the following factors when determining whether the conviction disqualifies the person for dwelling accommodations:

- (I) The nature of the conviction;
- (II) Whether there is a direct relationship between the conviction and a risk to resident safety or property;
- (III) Any information produced by the person or produced on his or her behalf regarding his or her rehabilitation and good conduct; and
- (IV) The time that has elapsed since the conviction.

2. Amend section 24-34-502 by adding subsection (1)(I).

(1) It shall be an unfair housing practice and unlawful and hereby prohibited:

(I) For any housing authority, as defined in section 29-4-203(1), to fail to comply with the provisions of section 29-4-210(1)(e).

¹⁹ § 24-34-306(9), C.R.S. 2016.

²⁰ § 24-34-508(1), C.R.S. 2016.

²¹ §§ 24-34-306(11), -306(14), -306(15), 24-34-505.6, C.R.S. 2016.