

MEMORANDUM

To: Michael Humphreys, Commissioner, Pennsylvania Insurance Department
Mark Fowler, Commissioner, Alabama Department of Insurance

From: Shannon Ross, CEO of The Community; Consultant at Marquette University
Jo-Ann Wallace, President/CEO, NLADA Mutual Insurance Corporation, RRG

Cc: Jennifer Cook, Senior Health and Life Policy Counsel

Date: February 5, 2025

Re: Access to Life Insurance for People who have Criminal Records

Thank you for allowing us to provide input over the last year as you so thoughtfully considered and created a Survey of Life Insurer Underwriting Guidelines as Applied to Justice Impacted Individuals (Life Insurer Survey). Both of us gave formal comments since the public dialogue began at your NAIC Standing Committee on Race and Insurance (SCORI) Life Workstream meetings. We now provide additional comments responding to the information provided by the American Council of Life Insurers (ACLI) on November 26, 2024. We hope you will consider our comments when deciding your next steps for the Life Insurer Survey. We understand that a group of NAIC consumer representatives will separately address the reasons for conducting the survey, so we focus here on the effects criminal convictions and incarcerations have on morbidity rates.

Insurers appropriately use actuarial principles to interpret and analyze data, according to professional standards. However, if they are primarily relying on the literature referenced in the ACLI brief: [*Data Sources Supporting Higher Mortality or Morbidity Risks Associated with Prior Incarceration*](#), they are greatly overestimating mortality or morbidity risks for many of the 1 in 3 Americans who have a criminal record, risking making unfair decisions and unnecessarily limiting the life insurance market.

A more nuanced perspective on the actual correlations between convictions, incarceration, and morbidity risk could support new business opportunities for insurers, and minimize the discriminatory outcomes that too often occur when using criminal justice system data. It is in that context that we explain some of the limitations of these sources and the value of the draft Life Insurer Survey.

Many Charges and Convictions Do Not Result in Incarceration

The sources referenced in the brief each identify links between prior incarceration and mortality and morbidity risk. Several causal mechanisms are suggested by these analyses to explain this relationship, including the prevalence of infectious diseases, physical

injuries, and mental health issues in incarcerated populations, and delays in diagnosis and fragmented healthcare during and after incarceration.

These are consequences of *incarceration*, an experience that can be damaging to health. However, they are not consequences of a criminal *charge or conviction*. Many people who are convicted of a crime do not spend any time in prison or jail, as “7.7 million living Americans have at some point been imprisoned, about 12.1 million have been convicted of a felony without being imprisoned for it, and about 45 million have been convicted of at least one misdemeanor”.¹

None of the literature listed in the brief demonstrates, or seeks to demonstrate, any link between charges or convictions and mortality risk. Consequently, it provides no basis to believe that insurers should consider prior convictions in underwriting, or that collecting this information from applicants supports any predictive function. It is more likely that the effects of incarceration are distinct from those of conviction, as suggested by analysis finding that people who are not incarcerated as part of their sentence have better recidivism outcomes than similarly situated people who were.²

This is not to suggest that data about a person’s criminal convictions could never be an appropriate factor for insurers to collect or use in underwriting, but to demonstrate that much more information is necessary to determine in which circumstances that is likely to be the case, and how that data can properly inform risk classification. The Life Insurer Survey designed by the SCORI Life Workstream provides a basis for developing that understanding and will yield data that has, to our knowledge, not been systematically collected from insurers before.

The brief explains that insurers account for the “nature of the crime, time since conviction, parole status, employment, and other relevant factors” in underwriting. This correctly recognizes that criminal records vary dramatically between individuals, and that those differences are likely to have different effects on a person’s morbidity and mortality risks. Actuaries establish reasonable risk relationships by interpreting data about these factors and their outcomes. The accuracy of their analysis depends on both the extent of data available to them and whether the criminal records utilized are accurate. The following discussion briefly describes some of these factors and the types of data that would be needed to support accurate risk classification.

¹ Terry-Ann Craigie, Ames Grawert, Cameron Kimble, and Joseph E. Stiglitz (2020) *Conviction, Imprisonment, and Lost Earnings: How Involvement with the Criminal Justice System Deepens Inequality*, Brennan Center for Justice, New York University School of Law

² Caudy M.S., Tillyer M.S., Tillyer R. (2018). *Jail Versus Probation: A Gender-Specific Test of Differential Effectiveness and Moderators of Sanction Effects*. *Criminal Justice and Behavior*. 5(7): 949-968.

Incarceration is Not a Proxy for Risk

The causes of increased risk after incarceration, such as health problems, identified by the literature included in the brief are both associated with an increased likelihood that a person will become incarcerated at some point, and made more likely by incarceration. It is not clear then, that incarceration *itself* is a cause of increased mortality risk, or why that would be the case. Rather, incarceration appears to function as a less precise and racially biased proxy for these other risk factors.

This problem aside, there are significant differences between individual's experiences of incarceration that are likely to affect their relative mortality risks. As described by the literature, the length of a person's incarceration has a documented relationship with risk, while time since incarceration is a clear mitigating factor. Other differences, such as in the setting or conditions of confinement³, are likely to also affect morbidity and mortality risk. However, the availability and robustness of data about these differences is not clear.

Many Convictions Are Not Connected to Morbidity or Mortality

Although the sources cited by the brief are focused exclusively on incarceration, we are aware there is a relationship between convictions for certain crimes and mortality. There is, for example, data that finds that excess mortality risk exists for people with a recent history of frequent or major driving violations.⁴ However, differences exist both within categories of crime⁵ and across them. There is no reason to believe, for example, that there would be the same link between driving violations and mortality, as there would be with property crimes.

Like with incarceration, the length of time that has passed since an individual's conviction is likely to have a mitigating effect on any increased risk associated with that conviction. The likelihood of being arrested for a new crime in the future decreases quickly after a person's arrest, and "approximates" that of an individual with no prior convictions after around six or seven years.⁶ This not only demonstrates that past convictions have diminishing usefulness in predicting potentially risky behavior, it is also suggestive of improvements in a person's social outcomes more broadly, which would be likely to have positive effects on their health.

³ Brinkley-Rubinstein L, Sivaraman J, Rosen DL, et al. (2019) *Association of Restrictive Housing During Incarceration With Mortality After Release*. JAMA Netw Open. 2(10):e1912516.

⁴ Scott Rushing and Tim Rozar (2012) *An Analysis of Motor Vehicle Records and All-Cause Mortality*, RGA Reinsurance Company

⁵ The same analysis found that the mortality risk for people who had minor violations was actually lower than for those with a clean record.

⁶ Kurlychek, M.C., Brame, R., and Bushway, S.D. (2006), *Scarlet Letters And Recidivism: Does An Old Criminal Record Predict Future Offending?*. Criminology & Public Policy, 5: 483-504.

While we do not discuss instances of wrongful conviction at trial or the frequent coercion of guilty pleas here, we note their existence as an additional limitation of criminal history data as a predictor of risk.

The Value of Arrest and Charge Records is Unclear

While data on the outcome of charges and arrests is limited, the data that does exist suggests that most people who are accused of a crime are not found guilty. Roughly three quarters of criminal charges filed annually in state courts are misdemeanors,⁷ and analysis of available data by the U.S. Department Justice found that only a third of misdemeanor charges result in a conviction.⁸ The remainder are felony charges, less than two-thirds of which result in conviction.^{9,10} Many people who are arrested are never charged.

These individuals were not exposed to the incarceration that in certain circumstances can create health problems, and they are legally innocent of conduct that insurers might potentially link to higher mortality risk. Absent data demonstrating a clear causal relationship between prior arrest or charge and mortality or morbidity, this information has no clear utility for risk classification. Since an arrest record may not contain information about case disposition (conviction, dismissal, etc.), there is unlikely to be any practical purpose for collecting this data.

Criminal History Information is Not in Context and Commonly Unreliable

The draft Life Insurer Survey also contains important questions about the source of criminal history information, in response to known inaccuracies of many commercial background screener data and consequent significant litigation under the Fair Credit Reporting Act, and common failures to eliminate sealed or expunged information from them. It would be valuable to have more information about the extent of these inaccuracies, and about opportunities that applicants have to correct them and/or provide mitigating information. Actuaries and underwriters have extensive expertise and high levels of professional judgement, which they can be expected to apply to the evaluation of mitigating information if that information is available to them. This type of information is

⁷ Stevenson, M., & Mayson, S. (2018). *The Scale of Misdemeanor Justice*. Boston University Law Review, 98.

⁸ Tom Rich and Kevin M. Scott (2022), *Data on Adjudication of Misdemeanor Offenses: Results from a Feasibility Study*, Bureau of Justice Statistics, U.S. Department of Justice.

⁹ Thomas H. Cohen and Tracey Kyckelhahn (2010) *State Court Processing Statistics, 2006 Felony Defendants in Large Urban Counties, 2006*, Bureau of Justice Statistics, U.S. Department of Justice

¹⁰ Conviction rates are far higher for federal charges, but this accounts for only a tiny fraction of criminal charges filed nationally. In 2023, the total number of federal criminal case filings was 66,035. See: Administrative Office of the U.S. Courts, *Judicial Caseload Indicators - Federal Judicial Caseload Statistics 2024*, U.S. Courts.

demonstrably relevant to risk analysis.¹¹ The draft life insurer survey would help to clarify to what extent this is the case and identify potential opportunities for education for insurance professionals that would support their ability to interpret and understand criminal records that were not designed for risk analysis.

Conclusion

For these reasons we strongly believe that the draft Life Insurer Survey is an important tool for understanding to what extent the use of criminal history information is consistent with NAIC's mission to "ensure fair, competitive, and healthy insurance markets to protect consumers." The survey questions, and the responses that are received, would be relevant and important for millions of Americans, and we ask that the survey be completed and distributed soon.

¹¹ For example, one of the sources cited by the brief identifies drug overdose as the leading cause of death after release from incarceration. However, for those successfully reentering under community supervision, this is much less likely to be a problem, since evidence of complete desistance from drug use is generally a requirement of probation or supervised release.