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Mr. Richard A. Hertling
Deputy Assistant Attorney General
Office of Legal Policy
4234 Robert F. Kennedy Building
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530

Re: Employment Screening for Criminal Records (OLP Docket No. 100)
Attorney General's Recommendations to Congress

Dear Mr. Hertling:

Please consider the following comments regarding recommendations for reform to Congress. (70 Fed.Reg. 32849, June 6, 2005).

The Social Justice Law Project ("SJLP") represents low income persons in class and impact litigation directed to alleviating the employment and housing problems facing such persons, particularly individuals with arrest and conviction records. We have a deep interest in the Attorney General's recommendations because SJLP represents the plaintiffs in several class actions against the California Department of Justice regarding the dissemination of state criminal history information ("arrest records" or "rap sheets") for non criminal justice and, to a limited extent, criminal justice purposes. The cases, *Central Valley Chapter of 7th Step v. Younger, Gresher v. Deukmejian,* and *Hooper v. Deukmejian* resulted in published appellate decisions and very extensive injunctive and declaratory relief. See *Central Valley Chapter of 7th Step Foundation v. Younger* (1989) 214 Cal.App.3d 145 (describing some of injunctive relief granted and affirming all injunctive relief granted); *Central Valley v. Younger* (1979) 95 Cal.App.3d 212; *Hooper v. Deukmejian* (1981) 122 Cal.App.3d 987 (reversing trial court's denial of relief). SJLP also represents plaintiffs in litigation against other state agencies regarding policies that unfairly hinder or prevent persons with conviction records from obtaining employment. See, e.g., Gresher v. Anderson (2005) 126 Cal.App.4th __ (voiding policies followed by California Department of Social Services in disqualifying ex-offenders from employment); Doe v. Saenz (voiding automatic disqualification policy followed by Department of Social Services; on appeal by State to California Court of Appeal); Glesmann v. Saenz (voiding policy automatically disqualifying

persons ever convicted of burglary from community care employment; on appeal by the State to California Court of Appeal).

Based on the extensive discovery conducted in the above cases and the representation of numerous individuals harmed by arrest record dissemination practices we make the following suggestions.

1. Non conviction data should not be disseminated for non criminal justice purposes except when a compelling need has been demonstrated and the data is limited in scope: Under the *Central Valley* injunctions California does not disseminate non conviction data for most non criminal justice purposes. Exceptions are made for peace officer employment and limited exceptions (only certain types of arrests) are made for certain classes of sensitive employment. This scheme has worked well in California. The Courts in both *Central Valley* and *Hooper* rejected the Department of Justice's contentions that the burden of deleting non conviction data (*Central Valley*) and a certain class of conviction data (*Hooper*) from rap sheets disseminated for criminal justice purposes justified the Department's policies.

2. Arrest entries without complete disposition information should only be disseminated for non criminal justice purposes if it is established that the arrest is still pending. Again this is the standard followed in California.

3. Nothing in the recommendations should suggest that Congress override State laws or practices that provide more protections to job seekers regarding dissemination of criminal history information or consideration and use of criminal history information for non criminal justice purposes. The recommendations should further the interests of federalism and experimentation by allowing states to choose for themselves the best practices in this area.

4. Conviction information should be limited to convictions that are directly relevant to the particular class of employment or licensing at issue and should be time limited. Case law establishes this as the constitutional standard in California.

5. Automatic disqualifications should be not be employed or limited to very unusual situations. In almost every instance this Program has come across, automatic disqualification provisions have served no valid state interest and have harmed individuals. In most instances, there is no need for an automatic disqualification because a person with a directly related offense and questionable character will be eliminated on a discretionary basis. The only situations in which automatic disqualification provisions have "teeth" is when the individual does *not* pose any threat to any valid state interests. This program represents a woman who was convicted of participating in a robbery (without a weapon) more than three decades ago shortly after she turned 19. She was placed on probation which she quickly completed and has had no has no convictions in the past 30 years. Despite this, she is automatically disqualified from a wide range of jobs in California. Automatic disqualifications should only be allowed where there is some basis to believe that discretionary exclusions will not fulfill the State's legitimate needs.

6. An individual should be provided a copy of his rap sheet either before or concurrent with providing the rap sheet to the requesting entity. Providing an individual with an opportunity to request his rap sheet and then to contest rap sheet information *after* it has been disseminated to

the employing or licensing entity in many cases is meaningless. The job or position may have been taken. Therefore, the individual should be provided with a copy of the rap sheet before it is sent to the entity or, at the latest, concurrent with the sending of the rap sheet to the entity. California statutory law requires this procedure in limited instances. Such a provision insures that the person with the most interest in correcting error is afforded at least some opportunity to do so before an employment opportunity is destroyed. At the very least, if employment or any other benefit is denied, the denying entity must provide the individual with detailed notice and a copy of the rap sheet. This is hardly a substantial burden–similar requirements are already in place for credit reports.

Thank you for your consideration in this matter.

Sincerely,

Peter Sheeehan
Attorney at Law