August 5, 2005

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: Attorney General's Recommendations to Congress on
Criminal Background Checks (OLP Docket No. 100)

Dear Mr. Hertling:

We are writing in response to Department of Justice's request for public comment on the nation's polices related to criminal background checks conducted for non-criminal justice purposes. (70 Fed. Reg. 32849, June 6, 2005).

We are submitting these comments on behalf of the Sargent Shriver National Center on Poverty Law. The Shriver Center champions law and policy promoting equal opportunity and support for low-income individuals, families, and communities so that they can escape poverty permanently.

We have a special interest in the Attorney General's report and recommendations to Congress because we see on a daily basis the results of 30 years of legislation and rhetoric about being "tough on crime." Now people with criminal records are not viewed as having paid their debt to society when they leave prison or jail. Instead the public in general and employers and landlords in particular view people with criminal records as lepers, people to be shunned. Criminal records bar people from many opportunities and often doom them to a life of poverty and homelessness. Depending on their state of residency and the jurisdiction in which they were convicted (See, for example, Margaret Colgate Love, "Relief from the Collateral Consequences of Criminal Convictions," July 2005, available from the National HIRE Network, www.sentencingproject.org.) their records may bar them from public and/or private employment, professional licenses, housing, education, public benefits, and a host of other important activities and services, with negative ramifications not only for them but also for their families and their communities.

The Shriver Center worked along with dozens of other advocacy organizations and collaborations for enactment and implementation of state laws lessening the burden of criminal records. For example, the Illinois General Assembly has passed and the Governor has signed into law several measures allowing sealing and expungement of criminal records and creating a formal process for certifying rehabilitation and good conduct of former offenders, all with the purpose of increasing employment and other opportunities for them. We now welcome the opportunity to suggest national policies governing criminal background checks conducted for non-criminal justice purposes.

Section 6403(d) of the Intelligence Reform and Terrorism Prevention Act of 2004 [Pub. L. 108-458] broadly mandates the Attorney General to "make recommendations to Congress for improving, standardizing, and consolidating the existing statutory authorization, programs, and procedures for the conduct of criminal history record checks for non-criminal justice purposes." In addition to 14 specific policy themes identified by Congress, the Department is authorized to make recommendations related to "any other factors that the Attorney General determines to be relevant to the subject of the report." (Section 6403(d)(15)).

Below we will address the 14 policy themes, to the extent our experience prepares us to comment. But first, in response to the invitation to advise the Attorney General as he examines other factors relevant to the subject of the report, we suggest that the Attorney General call for a broad, careful, and thoughtful examination of all the ways, both legally mandated and commonly practiced, in which criminal records now bar ex-offenders from so much of mainstream American life and make recommendations that rationalize the use of criminal background information. We suggest a re-examination of every barrier created by criminal records and its repeal unless the specific barrier is found to be rationally related to sound criminology, psychology, and public policy. When outright repeal is not warranted, each policy should be examined for likely overbreadth and narrowed accordingly. In all cases we suggest that those arguing for retention of the barrier have the burden of establishing its rationality, efficacy, and fairness. President Bush recognized the need for eliminating barriers in his 2004 State of the Union address when he said, "We know from experience that if [former prisoners] can't find work, or a home, or help, they are much more likely to commit more crimes and return to prison . . .. America is the land of the second chance, and when the gates of the prison open, the path ahead should lead to a better life."

Our specific policy recommendations, cross-referencing Section 6403(d) of the Intelligence Reform and Terrorism Prevention Act are set out below.

Section 6403(d)(1) requires the Attorney General to consider "the effectiveness and efficiency of utilizing commercially available databases as a supplement to IAFIS criminal history information checks." We strongly urge the Attorney General to not use commercially available databases. Operating without reliability standards or uniformity protocols, these databases are not sources of current and reliable data. For example, they often combine information about similarly named person and fail to update the procedural status of prosecutions.

Section 6403(d)(2) requires the Attorney General to consider security concerns about these commercially available databases with regard to law enforcement or intelligence officials. We think the Attorney General should also be concerned about impact of these databases on the security of other persons, such as those fleeing danger from domestic or sexual violence.

Section 6403(d)(3) directs the Attorney General to consider the effectiveness of using State databases. We suggest that state databases are far preferable to commercial databases but face technology challenges as well as tensions between their law enforcement purposes and their non-criminal justice purposes. Federal funds would help the states maintain parallel databases for these two purposes, e.g., the Illinois State Police make information about all convictions available to law enforcement but delete information about convictions that have been expunged or sealed from the information provided to employers.

Section 6403(d)(4)—No Comment.

Section 6403(d)(5) requires the Attorney General to consider privacy rights and other employee protections. We suggest that the Attorney General recommend policies that:

- require the person or organization requesting access to criminal record information (for example, an employer, a potential employer, a potential landlord, a charity screening volunteers, a government agency screening potential foster parents) to secure a specific written authorization for release of criminal background information from the person whose criminal record;
- require the criminal records obtained to be shared with their subject in all circumstances, regardless of whether the records were used to deny employment, tenancy, etc.
- require destruction of the fingerprint submissions after the records are searched;
- require procedures for appeal by the person whose records were obtained to challenge the correctness of the records and the legality of the action based on those records; and
- create a cause of action by the persons whose records were misused against the misuser.

Section 6403(d)(6) –No comment.

Section 6403(d)(7) requires the Attorney General to make recommendations regarding restrictions on employer charges for background checks. We suggest that the Attorney General recommend policies that prohibit shifting the costs of background checks to employees, applicants, etc. Checking backgrounds is a cost of doing business and should not be shifted to employees or applicants. Doing so will unfairly burden low-income people who seek employment, housing, etc., and make it impossible for them to even seek employment or housing.

Section 6403(d)(8) requires the Attorney general to make recommendations regarding which requirements should apply to the handling of incomplete records. We assume that "incomplete" records mainly are records of arrests that show no dispositions. Because arrests themselves are legally meaningless, we suggest that no arrest information be included in records unless that arrest has resulted in a conviction. We also suggest that the Attorney General recommend policies that assure that records are complete for all the procedural stages of prosecution, that is, that records contain correct information on outcomes of appeals, post conviction petitions, habeas petitions, and clemency and pardon petitions, and that records that are ordered sealed or expunged not be included in the records provided to employers, etc.

Section 6403(d)(9) requires the Attorney General to make recommendations regarding the circumstances under which the criminal history information should be disseminated to the employer. We urge the Attorney General to recommend that Congress limit, not expand, the authority of private employers to request and review national records. Expanding the authority of private employers to request and review FBI criminal records absent state laws creates a significant potential for error and abuse by employers, which will unfairly penalize the nation's workers. Thus, the employer's role should be limited to receiving the standard results of a "fitness determination" from the appropriate agency that reviews the FBI criminal records pursuant to state or federal employment and licensing laws.

Section 6403(d)(10)—See our comments on Section 6403(d)(5) above.

Section 6403(d)(11)—See our comments regarding not shifting the costs of criminal records checks to the subject, above at Section 6403(d) (7).

Section 6403(d)(12) requires the Attorney General to make recommendations regarding response time for background check requests. We suggest that the Attorney General recommend a very short turnaround time for such requests. If employers, landlords, public agencies, etc., must wait many weeks or months for the information, they will make decisions against the applicant without it.

Section 6403(d)(13) requires the Attorney General to make recommendations regarding infrastructure. We suggest that the Attorney General recommend that the infrastructure be capable of screening for and correcting for information erroneously connected to a person due to identity theft and similar names.

Section 6403(d)(14) requires the Attorney General to make recommendations regarding the role of the States. We suggest that the Attorney General pay particular attention to honoring decisions about criminal records content that are being made by the states, such as Illinois' decision to allowing sealing and expungement of certain records.

Please contact me at 312.368.3327 or mstapleton@povertylaw.org if you need additional information or have any questions.

Thank you for the opportunity to comment. As you are well aware, having a stake in society—a job, a home, a family, a life worth living-- keeps people from re-offending, and eliminating or lowering barriers due to criminal records gives ex-offenders that stake. As we say at the Shriver Center, we should be "smart on crime," not "tough," not "soft," but "smart."

Very truly yours,

Margaret Stapleton
Senior attorney