



**Testimony of
Ronald P. Hawley
Executive Director
SEARCH, The National Consortium for Justice Information and Statistics
Committee on the Judiciary
Subcommittee on Crime, Terrorism, and Homeland Security
Employer Access to Criminal Background Checks:
The Need for Efficiency and Accuracy
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INTRODUCTION

On behalf of SEARCH, the National Consortium for Justice Information and Statistics ("SEARCH"). I want to thank you Mr. Chairman and members of the subcommittee for this opportunity to testify regarding The Attorney General's Report on Criminal History Background Checks.

SEARCH is a nonprofit membership organization created by and for the States and is dedicated to improving the criminal justice system and the quality of justice through better information management, effective application of information and identification technology, and responsible law and policy. SEARCH is governed by a Membership Group comprised of one gubernatorial appointee from each of the 50 States, the District of Columbia, Puerto Rico and the Virgin Islands. Each state pays dues in support of the work of SEARCH. Members are primarily State-level justice officials responsible for operational decisions and policymaking concerning the management of criminal justice information, particularly criminal history information.

Since our founding in 1969, when the federal Law Enforcement Assistance Administration created Project SEARCH to explore the feasibility, practicality and cost-effectiveness of developing a computerized criminal history records system and of electronically exchanging these records across state lines we have steadfastly sought to balance the individual's right to privacy with society's need for criminal history information. In 1970, SEARCH first published findings and recommendations regarding the security, privacy and confidentiality of information contained in computerized criminal history files. Subsequent revisions led to a comprehensive rethinking of criminal justice information policy in the form of a publication known as Technical Report No. 13. By any measure, the standards in Technical Report No. 13 had an important impact upon law and policy with respect to criminal justice information. The standards served in large measure as a basis for the Law Enforcement Assistance Administration's development of comprehensive regulations for criminal history record information adopted in March 1976 as 28 C.F.R. Part 20.

The SEARCH Membership Group has not taken a position on the Attorney General's Report. However, we find it to be an exceptionally comprehensive discussion of meaningful issues and it asks the right questions. Most of these issues and questions are not new to the SEARCH Membership. Our testimony today focuses on several concepts and strategies which would contribute significantly to an improved national system for conducting national criminal history record checks for national security, employment, and licensing, as well as the screening of prospective volunteers who have access to the young infirm or elderly.

SEARCH has a long history of involvement with criminal record background checks, not only how these checks are administered by our members but also contributing to the formulation of national and state policies that guide the scope and use of criminal record background screening. I will mention but a few recent relevant activities. In 2005, SEARCH published the Report of the National Task Force on the Commercial Sale of Criminal Justice Record Information. We believe this report is the first-ever comprehensive look at the role that commercial background screening companies play in the collection, maintenance, sale and dissemination of criminal history record information for employment screening and other important risk management purposes. In 2006, we concluded the work of the National Task Force on the Criminal Backgrounding of America. The Task Force Report, as well as other SEARCH activities, helped to inform the Attorney General's Report on Criminal History Background Checks and are referenced in the Attorney General's Report. This past February SEARCH hosted an all day conference entitled Expanding Access to Criminal History Information and Improving Criminal Record Backgrounding which brought together and gave varied interest groups the opportunity to further what we believe is an essential national discussion. Because this discussion can only move toward final resolution through congressional action, I commend the Chair and this committee for holding these hearings.

The Need for Continuing Congressional Leadership and Support

The Attorney General's Report and much of my testimony today will refer to the national system, administered by the FBI, for exchanging criminal history record information known as the Interstate Identification Index, or III. Similarly, both the Attorney General's Report and my testimony will refer to the National Crime Prevention and Privacy Compact and "Compact Council" established under the Crime

Identification Technology Act of 1998 (PL 105-251).

It should be noted that although today we are talking about the Interstate Identification Index in the context of noncriminal justice purpose background checks, it is this same system, the III, upon which detectives depend when conducting criminal investigations, prosecutors rely when making charging decisions, judges rely when passing sentences, corrections officials depend on when classifying inmates and it is the III that supports an array of other criminal justice system tasks. It is the same system that is used in part to screen prospective hazardous materials drivers and a host of other homeland security related applications. In short, anything that impacts the Interstate Identification Index, either positively or negatively, may effect the functioning of our state and federal criminal justice systems as well as the national system for conducting criminal record background checks for homeland security, employment, licensing and other authorized purposes.

Ideally, any undertaking to improve the national criminal history record check system should build upon the existing infrastructure governed by the National Crime Prevention and Privacy Compact. The Compact governs the use of the Interstate Identification Index (III) System for conducting national criminal history record searches for noncriminal justice purposes, such as background screening for employment, licensing and volunteering. The States and the Federal Government have invested a great deal of expense and effort over a period of more than 25 years to implement the III system, which provided access to more than 60 million criminal history records as of March 2007.

Much of the growth of the III system can be credited to the Congress's creation and continuing support of the National Criminal History Improvement Program (NCHIP), an umbrella program that implements provisions of the Crime Identification Technology Act of 1998, the Brady Handgun Violence Prevention Act, the National Child Protection Act of 1993 and several others. Since the inception of NCHIP in 1995, the number of automated criminal history records held by state criminal record repositories and available for sharing between the States and the FBI under III increased by an estimated 98 percent. As of March 2007, 95 percent of the criminal history record information in the FBI administered database was contributed by State and local law enforcement, courts and other local justice entities, typically through a State-level criminal record repository.

We believe that the framework for discussion of how best to conduct criminal history background checks would not today be taking place but for the Congress's initiation and continuing support of various grant programs and especially NCHIP which has nurtured the extraordinary success of the cooperative partnership between the States and the Criminal Justice Information Services Division of the FBI that is III, the Interstate Identification Index.

With the ongoing need to replace technology, enhance technology and process an ever growing statutorily mandated criminal background check workload, homeland security related workload, as well as efficiently addressing continued growth of criminal justice applications, we believe that NCHIP and related grant programs must be sustained and expanded.

Background Checks Today – State Repositories, Fingerprints and the FBI

As the Attorney General discusses in his report access to criminal history records is far from universal and constrained by such issues as who has statutory authorization, inconsistent costs, privacy concerns, and whether the search of a criminal records database is based on matching biometric identifiers (e.g., fingerprints) or merely names. Beyond, or perhaps supplemental to accessing official records is the data available for purchase from commercial information providers. It is useful to recognize that at both the state and national levels criminal record background screening relies on databases that were originally established to serve the needs of the criminal justice community. As previously noted, those needs remain in place although at the federal level and in many states it is now common to find that the volume of inquiries for background checks surpasses the criminal justice related volume.

More than 1200 state laws, often referred to as Public Law 92-544 statutes have been approved by the Attorney General as sufficient to provide access to the national criminal records database as part of a background screening process. Typically, a request for a national search for a noncriminal justice purpose authorized by a State statute is submitted to the State's criminal history record repository and begins with a fingerprint-based search of the repository's criminal history record database. Commonly, an FBI search follows if the State repository fails to identify the applicant as having a State record. In other instances, the applicant fingerprints are submitted to the FBI independent of whether an identification and record have surfaced at the State level. In these instances, both the State level and national level information is forwarded to the adjudicating entity. Either of these approaches provides a more comprehensive search than a search conducted by the FBI alone, since State databases are more complete than the centralized database of State offenders maintained by the FBI. The Attorney General's report recognizes the importance of the state held records and urges that under any scenario those records be accessed. We recommend that any improvement to conducting criminal history background checks retain a check of the state held records. In addition to providing the most reliable search, the fees charged by State repositories for such searches provide funds that the States rely upon to support their criminal history record systems, which are the foundation not only for employment and licensing decisions but also for an array of critical criminal justice decisions such as charging, bond setting, sentencing and others.

We would be opposed to the development of any system that fails to take advantage of state-maintained records. These records have been shown to be more complete than those maintained by the FBI. State-maintained databases contain arrests that may not be included in the FBI's files, and are more apt to include dispositions of arrest charges. This is the primary reason why the FBI and State officials agreed 25

years ago to begin the phased implementation of the III system, which is designed ultimately to make State repository records available for all national search purposes instead of FBI records.

FBI-held offender records continue to be the primary database used for national noncriminal justice search purposes. Many of the records provided as a result of such searches lack disposition information. In some instances, such as requests through the National Instant Criminal Record Background Check System (NICS), the burden of providing this missing disposition information falls primarily upon the State repositories, which do not receive compensation for this activity other than from their own legislatures.

To the extent that the national system that may be authorized by the Congress permits additional noncriminal justice entities to bypass the State repositories and apply directly to the FBI or to some other national-level organization, the problem of missing dispositions will worsen and the burden on State repositories will increase. Any resulting loss of funds that repositories receive for conducting noncriminal justice background checks would seriously impede their ability to collect, search and forward criminal records to the FBI, resulting in the steady erosion of the quality of criminal records maintained by the FBI. Meanwhile, the FBI's workload would increase significantly. Sizing for the FBI's Integrated Automated Fingerprint Identification System was based, in part, on the well-recognized fact that two-thirds of arrested individuals have previous criminal histories; identification of these individuals at the State level would spare the FBI from having to conduct a repetitive search.

For these reasons, we urge the Committee to recommend that appropriate federal funding be provided to compensate State repositories if they are expected to contribute services to a national check system that deprives the States of existing fees.

A 2005 SEARCH survey of the state criminal record repositories indicated that the greatest obstacle to increased State participation in programs to provide national searches for noncriminal justice purposes is the fact that current Federal law does not permit the repositories to make criminal history records, or parts of them, available to private noncriminal justice entities, such as volunteer agencies covered by the National Child Protection Act or non-governmental entities authorized under State statutes enacted pursuant to Public Law 92-544. Instead, the States must designate State agencies to make fitness determinations and forward them to the applicant noncriminal justice agencies.

We urge the Committee to recommend that the States and the FBI be authorized, as an option, to make criminal history records disseminated by the FBI or accessed by a State from the FBI available to nongovernmental agencies, such as private employers and agencies that deal with children, the elderly and disabled persons. We believe these agencies are able to make their own fitness determinations concerning their applicants as an alternative to State agencies that may not be familiar with all of the circumstances concerning applicants' duties and the environments in which they will be employed or may volunteer. This recommendation is not intended to abrogate governmental determinations relating to regulatory responsibilities associated with licensing or certification for various positions.

We recognize that some private noncriminal justice agencies may need training or instructions to help them interpret and understand criminal history records. We recommend that such agencies be required to enter into user agreements that contain such requirements as training, security and perhaps making the criminal history records reviewed during applicant processing available to the applicants themselves to help ensure that they are accurate and complete. Applicants should be given the opportunity to correct erroneous information and to appeal adverse decisions. We believe that this approach recognizes and is consistent with privacy protections and consumer rights. Such agreements should also require compliance audits and provide penalties for noncompliance.

Criminal history records vary in presentation format, content and intelligibility from state-to-state and between states and the FBI. "Rap Sheet" literacy can at times be a challenge for even those who routinely review criminal record information. To address this problem SEARCH, NLETS – the International Justice and Public Safety Sharing Network (an organization founded by the States), the Criminal Justice Information Services (CJIS) Division of the FBI, and the CJIS Division's Advisory Policy Board have banded together in a Joint Task Force which has formalized the specifications for a standardized criminal history record. The FBI, Kentucky, Wisconsin and Maine have implemented the specification and other states are moving in this direction. Given the wide ranging benefits that would be derived from national implementation, such as ease of understanding the criminal history record and the ability to create summary and chronologically merged information, we urge the committee to support funding to expand adoption of the standardized "Rap Sheet" through funding for programming and training.

Background Checks Today – Name Based Checks

The Attorney General's Report discusses the expansion of access to criminal history record information. As previously noted, official State and FBI files can only be accessed when authorizing statutory authority is in place. These statutes typically require the submission of fingerprints and fees which vary widely from state-to-state. Policy makers, based on an April 2006 SEARCH survey, in at least 25 states make name-only searches of criminal history information available to the public through a website maintained by the criminal records repository in 15 states or the state court system in 10 states. In addition some of these states accept mailed-in, telephone and in-person requests. In states that offer this service it is common to find that the volume of name-based inquiries is ten-fold or greater than the number of noncriminal justice purpose fingerprint transactions.

The National Task Force on the Commercial Sale of Criminal Justice Record Information found it difficult to quantify the number of criminal record related transactions processed industry-wide. "In addition to a few

large companies there are hundreds, perhaps even thousands, of local and regional companies." Further, there are wide differences in the number and scope of records maintained or accessed by companies.

We believe that the criminal history record databases maintained by the FBI and the State repositories should continue to be the basis for national criminal history searches for noncriminal justice purposes. While some employers or volunteer organizations may wish to conduct name-based criminal record searches from the States or commercial databases compiled by private vendors, we believe that the databases that from the basis of a national system should be based on positive identification – fingerprint-based identification.

In his testimony to Congress in May 2000, former Assistant FBI Director David Loesch shared the results of an analysis conducted by the Bureau of the 6.9 million records submitted for employment and licensing purposes in Fiscal Year 1997. According to Loesch, 8.7 percent or just over 600,000 of the prints produced "hits." Loesch further noted that 11.7 percent of the "hits" or 70,200 civil fingerprint cards reflected different names than those listed in the applicants' criminal history records. These individuals would have been missed entirely by name-only background checks. This and other studies have repeatedly substantiated that background checks based on names rather than positive identification consistently miss a substantial number of criminal records while erroneously associating applicants with criminal record information that does not relate to them.

Criminal information databases maintained by private vendors are also not as complete as the official records maintained by State and Federal criminal record managers. Official records are populated with information from all segments of the criminal justice process, from arrest, trial, adjudication and correctional activity. Information in private databases is often collected from only one or two of the justice process components, such as courts or corrections. Further, access to records that are sealed or expunged from official databases is often provided in commercial databases, interfering with public policy efforts to give former offenders an opportunity to rebuild their lives. However, it is worthwhile to note that these databases would be the preferred choice in some circumstances and may also contain information not available in the governmentally administered records sets. For example, an employer may be very interested in vehicle related offenses committed by applicants for driving positions yet this kind of information is rarely included on the "Rap Sheet."

A full discussion of the privacy protections built into the Fair Credit Reporting Act is not within the scope of this hearing. However, while the FCRA provides comprehensive protections that are imposed on commercial providers, it should be noted that governmentally provided information varies significantly on the restrictions that are applied. For example, in the case of the courts, they are often more open than that available from the private sector – even when both sets of information are name based.

Conclusion

In our post 9/11 world we concur with the Attorney General's Report that there is a need to improve access for the private sector to criminal record information. Better access however does not necessarily mean universal unfettered access to all information for all employers and all positions. We know a great deal about recidivism rates but far less about evaluating the predictive value of a specific conviction over time when it comes to assessing public safety risk, integrity, or performance in a particular job. And after all isn't that the purposes of the criminal record background check?

The Attorney General's Report recognizes that there must be a balance between appropriate access and privacy rights if we are to have an effective policy. The Report breaks some new ground in this area. While the SEARCH Membership has not taken a position on the privacy related recommendations in the Report the Committee should be aware that every state has a process which affords an opportunity to review a record and correct inaccuracies on that record.

We are confident that the concepts, processes and procedures described above would contribute significantly to a noncriminal justice background check system that provides the public with maximum safety benefits while ensuring the viability of all justice entities that contribute criminal record data. Once again, we appreciate the opportunity to provide these comments, and we urge you to contact us if we can provide additional information concerning this vitally important matter.