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# SENATE COMMITTEE ON PUBLIC SAFETY

Senator Nancy Skinner, Chair

2017 - 2018 Regular

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**Bill No:** AB 2133                      **Hearing Date:** June 19, 2018  
**Author:** Weber  
**Version:** March 22, 2018  
**Urgency:** No                                      **Fiscal:** Yes  
**Consultant:** MK

**Subject:** *Criminal Justice: State Summary Criminal History Records*

## HISTORY

**Source:** California Attorneys for Criminal Justice

**Prior Legislation:** None

**Support:** American Civil Liberties Union; California Public Defenders Association; Los Angeles Regional Reentry Partnership; San Francisco Public Defender

**Opposition:** None

**Assembly Floor Vote:** 77 - 0

## PURPOSE

*The purpose of this bill is to clarify in what situations a criminal defense attorney may be provided with information from the Department of Justice's (DOJ) summary criminal history database and eliminates the requirement that a criminal defense attorney have some separate legal authorization to obtain information that information.*

*Existing law* requires DOJ to maintain state summary criminal history information. (Penal Code § 11105 (a).)

*Existing law* requires DOJ to furnish state summary criminal history information to specified entities, including if needed in the course of their duties, provided that when information is furnished to assist an agency, officer, or official of state or local government, a public utility, or any other entity in fulfilling employment, certification, or licensing duties, specified restrictions listed in the Labor Code are followed. (Penal Code § 11105 (b).)

*Existing law* provides that DOJ shall furnish summary criminal history to the following entities if the information is needed in the course of their duties:

- a) Courts of the state;
- b) Peace officers of the state, as defined;

- c) District Attorneys of the state;
- d) Prosecuting city attorneys or city prosecutors of a city within the state;
- e) City attorneys pursuing civil gang injunctions or drug abatement actions, as defined;
- f) Probation officers of the state;
- g) Parole officers of the state;
- h) Public defenders or attorneys of record in a proceeding for a certificate of rehabilitation and pardon;
- i) Public defenders or attorneys of record if they are authorized access by statute or decisional law;
- j) An agency, officer, or official of the state if the information is required to implement a statute or regulation;
- k) A city or county, city and county, or an officer or official thereof if access is needed in order to assist the fulfilling of employment, certification, or licensing duties is access is specifically authorized by the city council or other governing body, or if required to implement a statute or regulation;
- l) The person who's information is reflected in the criminal history information;
- m) A person or entity when access is expressly authorized by statute if the criminal history information is required to implement a statute or regulation;
- n) Health officers of a city, county, city and county, or district when in the performance of their official duties;
- o) A managing or supervising correctional officer of a county jail or other county correctional facility;
- p) A humane society, or society for the prevention of cruelty to animals for purposes of appointing humane officers;
- q) Local child support agencies, provided certain information is deleted or purged;
- r) County child welfare agency personnel who have delegated authority as probation officers, as specified;
- s) The court of a tribe, as specified;
- t) Child welfare agency of a tribe, as specified;
- u) An officer providing conservatorship investigations;

- v) A court investigator providing investigations or reviews in conservatorships, as specified;
- w) A person authorized to conduct a guardianship investigation, as specified;
- x) A humane officer for the performance of his or her duties;
- y) A public agency that is an entity formed by the regional transportation planning authority as defined, for the purpose of oversight and enforcement policies; and,
- z) A state entity or its designee that receives federal tax information. (Pen. Code § 11105(b)(1)-(26).)

*Existing law* allows DOJ to furnish state summary criminal history information to specified entities and, when specifically authorized, federal-level criminal history information upon a showing of a compelling need, provided that when information is furnished to assist an agency, officer, or official of state or local government, a public utility, or any other entity in fulfilling employment, certification, or licensing duties, specified restrictions listed in the Labor Code are followed. (Penal Code § 11105 (c).)

*Existing law* allows DOJ to charge a fee to reimburse department costs, and a surcharge to fund system maintenance and improvements, whenever state summary criminal history information is furnished as the result of an application and is to be used for employment, licensing, or certification purposes. Allows, notwithstanding any other law, any person or entity required to pay a fee to DOJ for information received under this provision to charge the applicant a fee sufficient to reimburse the person or entity for this expense. (Pen. Code § 11105 (e).)

*Existing law* authorizes, notwithstanding any other law, a human resource agency or an employer to request from DOJ records of all convictions or any arrest pending adjudication involving the offenses specified of a person who applies for a license, employment, or volunteer position, in which he or she would have supervisory or disciplinary power over a minor or any person under his or her care. Requires DOJ to furnish the information to the requesting employer and also send a copy of the information to the applicant. (Penal Code § 11105.3 (a).)

*Existing law* requires a local criminal justice agency to furnish local summary criminal history information to any of a list the specified entities, and authorizing the local criminal justice agency to furnish this information to any of a list of specified entities upon a showing of a compelling need, provided that when information is furnished to assist an agency, officer, or official of state or local government, a public utility, or any other entity in fulfilling employment, certification, or licensing duties, specified restrictions listed in the Labor Code are followed. (Penal Code § 13300.)

*Existing law* allows a testifying witness's credibility to be attacked by evidence of a prior felony conviction. (Evidence Code § 788.)

*Existing law* allows a testifying witness's credibility to be attacked by evidence of prior acts tending to show a lack of honesty or veracity. (Evidence Code § 786; *People v. Wheeler* (1992) 4 Cal. 4th 284, 296.)

*This bill* clarifies that criminal defense attorneys representing defendants or juvenile delinquents on appeal and in postconviction proceedings are representing persons in a criminal case for purposes of obtaining information from the DOJ summary criminal history database.

*This bill* eliminates the requirement that criminal defense attorneys have separate statutory or judicial authorization in order to receive information from the DOJ summary criminal history database.

## COMMENTS

### 1. Need for This Bill

According to the author:

The California Department of Justice operates a database of criminal history of individuals. Access to this database is largely controlled by Penal Code section 11105. This section delineates a litany of individuals with access to the summary criminal history database.

Subdivision (b)(9) addresses access by criminal defense attorneys in the following way:

***(9) A public defender or attorney of record when representing a person in a criminal case, or a parole, mandatory supervision pursuant to paragraph (5) of subdivision (h) of Section 1170, or postrelease community supervision revocation or revocation extension proceeding, and if authorized access by statutory or decisional law.***

This language does not in and of itself provide statutory authority for criminal defense attorneys to access the database. Instead, (b)(9) suggests that further statutory authority is required (...authorized by statutory or decisional law.”)

As a result, criminal defense attorneys, who are under a legal and ethical obligation to provide zealous advocacy of their clients, are not able to access the database, which could provide key information. For example, oftentimes critical prosecutorial witnesses have a long history of criminal offenses which may be relevant for a number of reasons. However, a criminal defense attorney cannot timely determine the criminal history without statutory access to the database. Instead, criminal defense attorneys must rely on the prosecutors to provide the information

### 2. Criminal Record Information

Under existing law, the Department of Justice maintains state summary criminal history information and is authorized to furnish criminal history information to assist an agency, officer or official of state or local government in fulfilling specified duties and to other specified entities and individuals for employment, licensing and certification purposes including.

While public defenders or the attorney of record are listed as people who can get criminal history information however, there is limiting language at the end of the subdivision pertaining to public

defenders and defense attorneys which requires some additional authorization in “statutory or decisional law.” (Penal Code, § 11105 (b)(9).) None of the other 25 subdivisions that grant access to a variety of state, local, and private entities contain this ambiguous limiting language. This bill would clarify that Penal Code Section 11105, subdivision (b)(9), on its own, provides public defenders and criminal defense attorneys with the right to receive information from the DOJ database.

In most criminal cases, there is good reason for public defenders and criminal defense attorneys to be provided with information contained in the DOJ database. For example, evidence that a testifying witness has been convicted of a felony is generally admissible to attack the credibility of that witness (Evidence Code § 788), and misconduct bearing on a witness’s propensity for honesty or veracity are likewise admissible, even where it falls short of felony conduct. (Evidence Code § 786; *People v. Wheeler* (1992) 4 Cal. 4th 284, 296.) Furthermore, the United States Supreme Court has made it clear that criminal defense attorneys are entitled to information that may cast doubt on the credibility of a prosecution witness. (*See Giglio v. United States* (1972) 405 U.S. 150).

Although this information is legally required to be disclosed to the defense, often times defense attorneys receive this information late in the criminal proceedings, resulting in insufficient time to effectively investigate, review, and prepare for the cross-examination of witnesses. Specifically, the author has cited a recent, high-stakes trial in which a criminal defense attorney received evidence of more than 60 arrests and convictions for prosecution witnesses, all of which needed to be investigated in the course of a couple of days prior to trial. Apparently, the limiting language of Penal Code Section 11105 subdivision (b)(9) was at least partially to blame for the late disclosure because the prosecuting attorney was either unwilling, or believed he was unable to turn over the information until days before the trial was scheduled to begin. According to the sponsor of the bill, there are numerous prosecutors who feel that they either should not or cannot turn over criminal history database information. This bill would make it clear that public defenders and criminal defense attorneys can receive information to which they are legally entitled, and help prevent the possibility that they may be unable to adequately represent their clients.

### **3. Argument in Support**

According to the sponsor of this bill, *California Attorneys for Criminal Justice*:

Criminal defense attorneys are required to provide zealous advocacy on behalf of their clients. This includes the duty to conduct thorough investigation of the facts surrounding a case including witnesses. Attorneys often receive a list of individuals who may be called to testify. Without clear statutory authority to access the California Summary Criminal Justice Information database attorneys must seek out alternative avenues to obtain the information. Prosecutors regularly obtain the rap sheets of witnesses. However, without clear statutory language many prosecutors refuse to provide the document to attorneys as they prepare their cases for trial. As a result, criminal defense attorneys commonly file special discovery motions to seek a court order for access. This process is not only an expenditure of resources, but also results in lost time that could otherwise be spent on other aspects of client representation.

It is important to note that many prosecutors who believe they are not permitted to share the 'rap sheets' of witnesses, will instead provide an internally produced memo summarizing only portions of the report. However, too often this memo is delayed or provided right before trial with no opportunity for the defense attorney to conduct thorough investigation. Therefore, AB 2133 will also accelerate the timeliness of obtaining this information.

Criminal defense attorneys have grappled with this issue for many years. AB 2113 will resolve this ongoing problem in an efficient and effective manner that will not only enhance our criminal justice system but will also save resources for prosecutors and defense attorneys.

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