



U.S. Department of Justice

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May 14, 1986

EXPRESS MAIL

Hon. William W. Wilkins, Jr.
Chairman, The United States
Sentencing Commission
1331 Pennsylvania Avenue, N.W., Suite 1400
Washington, DC 20004

Dear Judge Wilkins:

This is in response to your letter dated May 2, 1986 (copy enclosed for ease of reference), and sets forth some thoughts concerning the use of prior records in sentencing.

-- Available to the U. S. Attorney's Office in the District of Massachusetts at the time of sentencing is a presentence report prepared by the U. S. Probation Department which details the defendant's prior known record. This record information contains the dates of all known arrests or convictions, adult and juvenile, the court involved, the offense charged, the sentence, a brief description of the offense and whether or not the defendant was represented by counsel. This record is compiled from information provided by the Massachusetts Criminal History Systems Board (Massachusetts Probation Department), other state probation departments and the FBI Identification Division.

-- As a general rule, the defendant's prior record which is contained in the presentence report is reliable. However, gaps do occur. Information is solicited from those states in which the defendant has told the probation department he has resided or been arrested. There have been instances where a defendant did not reveal his prior contact with a particular state and a prior conviction has escaped detection. The FBI criminal history of a defendant is not always complete since it depends upon the various police departments and courts throughout the United States to provide it with information. Since such police departments and courts are not penalized for failing to provide relevant information, they sometimes do not do so.

In many instances, the version of the prior offense for which a defendant was arrested or convicted shows a lack of uniformity, since the source material for the version varies, i.e., the defendant, local police reports, court records, etc. It would be helpful if the source of the information was noted.

Finally, the seriousness of the prior offense cannot always be clearly discerned because of the diversity of statutes and sentencing procedures among the various states.

Ordinarily, if the probation officer or investigative agent or Assistant U. S. Attorney takes the time to follow through, it is possible to distinguish between prior misdemeanors and felonies, and between adult and juvenile adjudications.

-- Great weight is not normally given to minor arrests not resulting in convictions or a conviction for a relatively minor offense followed by a lengthy period of lawful conduct. As concerns juvenile convictions and incarcerations, it is useful to determine whether the incarceration was to assist the offender or to punish for past conduct in assigning weight to such factors.

-- Prior record information which we emphasize includes related convictions; whether the defendant has previously been on probation or parole and whether he was on probation or parole at the time of the present offense; frequency of offenses (a pattern of recidivism); recent custody; nature of prior offenses (violent, victim or victimless, etc.); and the defendant's attitude toward his prior convictions.

-- Because of the differences existing among states as to what constitutes a felony or a misdemeanor, the distinction between the two should be avoided for sentencing purposes. The focus should be on the nature or seriousness of the prior offense. A larceny of \$150 should receive the same weight for federal purposes whether it was committed in Wisconsin or Georgia or Colorado. As a fallback guide, statutory maximums (which also vary from state to state) would be a more acceptable standard than the actual sentence imposed since the maximum normally bears some relation to the seriousness of the crime, whereas the sentence imposed is totally discretionary and great disparity can exist.

-- Although the passage of time should have some effect on the weight placed upon a prior conviction, it is important in the sentencing process to consider most prior convictions. Such convictions can be demonstrative of a long-existing personality disorder, a prior drug problem or the like. (This effect should

of course vary depending upon the nature of the old offense and its relation to the current offense.) I personally am of the view that a longer period than ten years record-free should be required before a prior conviction is viewed as so "ancient" as to be disregarded. Fifteen years seems to me a more appropriate figure.

The starting point in the decay period should be the supervision release date.

-- Prior juvenile offenses should be considered, but the weight given should differ from adult convictions since the juvenile system is different. The age of the defendant at the time of the juvenile conviction as well as the circumstances of the offense would be important considerations in the weighing process. It must be kept in mind, however, that the defendant, now an adult offender, did receive a prior break by being treated as a juvenile.

"Status" juvenile offenses such as truancy, runaway, and stubborn child, which would not be offenses if committed by an adult, should not be considered.

I would be content to adhere to a ten-year "decay" period for juvenile offenses (as opposed to a longer period for adult offenses).

-- Likewise, prior arrests should be considered. Arrests result in no conviction for many reasons other than innocence. Among others, some reasons for dismissals are plea-bargaining, the victim of the crime being unwilling to testify, pre-trial diversion, legal technicalities, and, unfortunately, a defendant's influence in a local court system, or ability to intimidate witnesses. It would be important, therefore, to know the underlying facts of the arrest and what led to the decision not to prosecute. A shorter "decay" period might be appropriate for arrests than for convictions.

-- Another relevant factor in the sentencing process is that as one continues to commit crimes, the punishment should become more severe. Recidivists and career criminals should know that they will be incarcerated and for increasingly longer periods of time. Also, as one continues to commit the same type of offense, a greater sentence of incarceration may be necessary for purposes of specific deterrence.

I hope that the foregoing is of assistance to the Commission in developing sentencing guidelines. I look forward to appearing before you on May 22 to answer any questions you may have.

Very truly yours,

William F. Weld

WILLIAM F. WELD
United States Attorney