

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
PROBATION OFFICE

MICHAEL J. LUCIANO
CHIEF PROBATION OFFICER

May 14, 1986

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Honorable William W. Wilkins, Jr.
Chairman
United States Sentencing Commission
1331 Pennsylvania Avenue, N.W., Suite 1400
Washington, D.C. 20004

Dear Commissioner Wilkins:

Reference is made to your letter of April 29, 1986. In regard to your specific questions, for all adult arrests yielding convictions, records are centralized in New York State through fingerprints. However, to obtain detailed information as to the original allegations at the very least a trip to the Police Headquarters is necessary for the five counties of New York if a local arrest is involved. When more detailed information is needed, either in regard to the allegation or to the legal history of the case, trips to the Courts in each county are often necessary. Within the City, each county has a lower Court and a higher Court and outside of New York City, in addition to the County Court which handles felonies, there are many smaller jurisdictions which handle misdemeanors. The Probation Offices in the State are also divided by county and again by higher and lower Court within the five counties that comprise New York City.

Generally, there is no need to go to various law enforcement agencies in cases which resulted in convictions, although in rural areas and small jurisdictions, this is sometimes useful. (For example, in the case of a 1976 drunk-driving arrest which went before a Town Justice where the arresting agency was the State Police, it may be the State Police who have the better records.)

New York State has centralized records for their prisons which handle felony convictions. In New York City, there are central records for individuals institutionalized for misdemeanor offenses, but elsewhere in New York State the records are less centralized.

There are no centralized records available in regard to juvenile arrests and convictions, and for all practical purposes the only information available at all in regard to such matters is through the Probation Department in each County. Arrests occurring after the individual reached his 16th birthday are treated as adult arrests.

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Accurate records are generally available and accessible on all criminal charges and arrests for adults which lead to convictions. The available records indicate clearly whether the offense was a misdemeanor or a felony. Recently, cases which result in dismissal or acquittal have been removed from the computerized central State filing system and access to such information is denied at both the Court and centralized police level. There is no problem in regard to determining whether or not a defendant was represented by counsel, inasmuch as such representation has been mandated in New York State for many years. Information is generally available on Probation sentences as to dates of termination and violations where revocations have resulted. On all felony sentences, accurate information is usually available and accessible as to the date and method of release from custody and the date of termination. Information is also readily available as to the dates of revocations, but information as to the details of the violations are usually available only if they occurred within the last few years.

In this District, there are no native American Indian reservations. We do have regular need to check criminal records in Mexico, Central America, South America, Great Britain, Europe, the Mid East, parts of Africa (Ghana, Nigeria, South Africa, Morrocco) India, Pakistan, Nepal, Thailand, the People's Republic of China, Hong Kong, Taiwan, South Korea and Japan. Response time, the amount of information provided and the usefulness of the information varies greatly, not only from country to country, but also depending on what method is used (that is, whether the request went to Interpol, the State Department, the Embassy of the country involved, etc.). Sometimes the significance of the case or the defendant to the country involved is a major determining factor as to whether or not useful information is provided. Interpreting and using the information once it has been provided is usually not a problem.

In regard to the issues raised in your April 25, 1986 letter, it is my opinion that it is the statutory maximum of the offense of conviction which should determine whether an offense is a misdemeanor or a felony. I know of no practical way of giving differential weights to more or less serious offenses. Although I have mixed feelings on the subject of including a decay factor, if one is included I believe that it should be ten years from the release from supervision to the beginning of the instant offense. I would apply a similar standard for juvenile offenses, but restrict those to be considered to only those offenses which would be offenses had the individual been an adult. I would suggest similar standards for military convictions in that only those convictions should count which would be for offenses prosecutable in State or Federal Courts had not the individual been in the military. All foreign convictions should count if the offense behavior would have been prosecutable had the individual committed the offense in the United States. As I have no experience with tribal convictions, I would not wish to offer an opinion on that subject.

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I am quite comfortable with the current Parole Commission standards for weighing the fact that the defendant was on Probation or Parole at the time of the offense and the level of sentence aggravation for the number of convictions and periods of incarceration the defendant has. Although I feel very strongly that juvenile arrests and adult arrests which did not lead to conviction should be a part of the sentencing process*, since information in regard to these matters is often not available, it is difficult to include them in a guideline situation. However, I suggest that standards could be developed for use of such information when it is available as well as for the use of "ancient" prior record information if that has particular relevance to the sentence at hand.

Very truly yours,



JOEL WEBER
U.S. Probation Officer

*See Page Three A

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I would like to offer three examples of situations where the use of dismissed cases would be relevant in determining sentence. All three are actual examples.

Example #1: Defendant A was arrested for selling \$30.00 worth of Cocaine to a New York City Police Officer acting in an undercover capacity. He entered a plea of guilty to this offense on 1/29/86. On 3/1/86, he was arrested with others for openly hawking Cocaine. That case was dismissed when laboratory analysis revealed that the vials containing a substance which appeared to be Cocaine in fact contained no controlled substance. The arresting officer on the 3/1/86 matter indicated that the defendant had told him that he had purchased the Cocaine at that location and had not been selling it. The defendant had made a similar claim before the Court prior to entering his plea of Guilty on 1/29/86. The 3/1/86 arrest was dismissed prior to the date Defendant A was scheduled to be sentenced. During the course of the pre-sentence investigation, he denied current involvement with either the sale or abuse of drugs.

Example #2: John Gotti who has been frequently publicly identified as the reputed head of the largest organized crime family in the New York City area is currently facing Racketeering charges in the Eastern District of New York. During March 1986, prior to jury selection in the Federal Court, Gotti went to trial on local assault and robbery charges. The alleged victim in that case first did not appear in Court and then stated that he could no longer identify any of his attackers. The charges against Gotti were dismissed. It seemed quite apparent to anyone watching interviews with the alleged victim on television that he had been intimidated. In fact, on 5/13/86, the Honorable Eugene Nickerson in the Eastern District of New York revoked Gotti's bail, in part based upon testimony at a hearing which convinced the Court that the witness/victim in the assault and robbery case had been intimidated.

Example #3: On March 15, 1977, Leroy "Nicky" Barnes was arrested by federal authorities in New York and charged with the distribution of massive amounts of Heroin. Prior to his conviction later that year, a story regarding Barnes appeared in the magazine section of the New York Times with a picture of Barnes occupying the front page of that magazine section. He was described in that article as "Mr. Untouchable", in part because during the seven years prior to his federal arrest, he had seven cases against him either dismissed or result in acquittals. If the Court had only been allowed to consider prior convictions and periods of imprisonment or incarceration stemming from those countable convictions and the period for decay was judged to be from the time of last release to the present arrest, then Barnes would have had guidelines based upon no prior criminal record. In fact, prior to 1965, Barnes had six convictions, and during early 1966 he was convicted on Heroin charges and sentenced to fifteen to twenty years confinement. Although this was later overturned on appeal, Barnes was in custody from early 1966 to mid 1970. It should also be noted that while on Probation or Parole prior to 1965, Barnes had a number of revocations which lead to his return to prison. Some of these were for technical matters, and some of these were for new convictions. In the opinion of the undersigned, revocations which lead to incarceration or imprisonment of more than thirty (30) days should be counted as convictions.

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