NEW MEXICO LAW REVIEW

Volume 9
Issue 2 *Summer 1979*

Summer 1979

A Comment on State v. Montoya and the Use of Arrest Records in Sentencing

Carol Jean Stafford Pennock

A COMMENT ON *STATE v. MONTOYA* AND THE USE OF ARREST RECORDS IN SENTENCING

INTRODUCTION

In *State v. Montoya,*[1] the Court of Appeals of the State of New Mexico held that a defendant's arrest record, including arrests which did not result in conviction, may be included in the presentence report, and may be considered by the sentencing judge in deciding whether to impose or defer sentence. The defendant challenged the consideration of the arrest record on due process grounds.[2]

Many federal and state courts have discussed the procedural requirements of due process in sentencing, and there is a trend toward increasing consideration of procedural due process in sentencing.[3] Against this background, a few courts have specifically addressed the questions of including arrests not resulting in conviction in presentence reports and considering such arrests in imposing sentence.[4] A slight majority of state courts exclude records of arrests not resulting in conviction from consideration in imposing sentence.[5]

This comment will focus on three important questions raised by the use of arrest records in sentencing: 1) Are records of prior arrests which did not result in conviction relevant to the sentence that should be imposed for a subsequent conviction? 2) Are such records a reliable indicator of a defendant's pattern of conduct? 3) Does the inclusion of arrest records in presentence reports or the consideration of arrest records in imposing sentence violate a defendant's right to due process?

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1. 91 N.M. 425, 575 P.2d 609 (Ct. App.), *cert. denied,* 91 N.M. 491, 576 P.2d 297 (1978).

2. The defendant's due process challenge was most clearly stated in the Petition for Writ of Certiorari at 4:

> [M]erely by arresting Mr. Montoya, the police affected his sentence on a conviction for other charges, and Mr. Montoya is being punished for those other arrests, on which a conviction was never returned. This decision puts tremendous power in the hands of the police to affect sentencing, without the defendant being culpable for the arrests. Such a procedure violates due process of law and the presumption of innocence on those other arrests.

3. *E.g.,* Gardner v. Florida, 430 U.S. 349 (1977).

4. *E.g.,* Townsend v. Burke, 334 U.S. 736 (1948); Williams v. New York, 337 U.S. 241 (1949); see note 61 *infra* and text accompanying it.

5. *See* Annot., 96 A.L.R.2d 793 (1964).

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The defendant was convicted of residential burglary,[6] and the trial and sentencing judge ordered a presentence report.[7] The presentence report included four felony convictions, a number of convictions for minor offenses, and arrests for both major and minor offenses of which the defendant was never convicted.[8] At the sentencing hearing, the defendant contested several of the arrests, and objected to consideration of any arrests not resulting in conviction.[9] The defendant was sentenced to two to ten years in prison without deferral or probation of sentence.[10]

The defendant filed a Motion for Reconsideration of Sentence which was denied. At the motion hearing, the judge explicitly stated that he had taken everything in the presentence report into account both in determining sentence and in denying the motion to reconsider.[11]

The defendant filed a Docketing Statement in the Court of Appeals for the State of New Mexico raising three issues.[12] Two of the issues involved pretrial proceedings. The third issue raised was "whether the Defendant was denied due process and presumption of innocence under the State and Federal Constitutions by the inclusion of arrests not resulting in conviction in the presentence report."[13] The case was assigned to the Summary Calendar of the court of appeals.[14] The defendant was allowed ten days in which to file a Memorandum in Opposition to Summary Affirmance. The court did not order a transcript of the court proceedings, nor were the parties permitted to brief the facts or issues of the case.[15]

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6. 91 N.M. at 426, 575 P.2d at 610.
7. Order in the District Court at 1.
8. 91 N.M. at 427-428, 575 P.2d at 611-12.
9. Motion for Rehearing at 1.
10. Memorandum in Opposition to Summary Affirmance at 1.
11. *Id.*
12. Docketing Statement at 4-5.
13. *Id.* at 5.
14. 91 N.M. at 426, 575 P.2d at 610.
15. Petition for Writ of Certiorari at 7; New Mexico Rules of Appellate Procedure for Criminal Cases (1978):

> Rule 207. Calendar assignments
> Based upon the docketing statement and record proper, the court shall assign the case to either the general, limited, legal, or summary calendar. The clerk shall promptly notify the parties and the clerk of the district court of the assignment.
>
> (d) If placed on the "summary" calendar:
> (1) a transcript of proceedings shall not be filed unless ordered by the appellate court; (2) the clerk's notice shall state the basis for proposed summary disposition; (3) the parties shall have 10 days from date of the clerk's notice to

The court of appeals ordered summary affirmance and published an opinion on the sentencing issue. The court held that the arrest record, including arrests which did not result in convictions, was properly included in the presentence report.[16] This holding relied on a statute which provides for inclusion of such information as the court requests in presentence reports[17] and the U.S. Supreme Court case of *Williams v. New York.*[18] The court also held that the arrests not leading to convictions were properly considered by the sentencing judge because they were relevant to the defendant's pattern of conduct.[19] This holding relied predominantly on Rule 56 of the New Mexico Rules of Criminal Procedure,[20] which governs the predisposition report procedure, *State v. Madrigal,*[21] and *State v. Serrano.*[22] The court stated that this legislation and the case law precedent provided for adequate due process.[23]

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show cause by memorandum why the proposed summary disposition should or should not be made; the memorandum shall comply with Rule 304 and shall be filed in triplicate; (4) no oral argument shall be allowed concerning the proposed summary disposition; (5) if there is no summary disposition, the case will be reassigned to the appropriate calendar.

16. 91 N.M. at 428, 575 P.2d at 612.

17. N.M. Stat. Ann. §41-17-23 (Repl., 1972) [now N.M. Stat. Ann. §31-21-9 (1978)] cited in 91 N.M. at 426, 575 P.2d at 610.

18. 337 U.S. 241 (1949); cited in 91 N.M. at 426, 575 P.2d at 610.

19. 91 N.M. at 428, 575 P.2d at 611-12.

20. New Mexico Rules of Criminal Procedure (1978):
Rule 56. Predisposition report procedure.
(a) Ordering the Report. The court may order a predisposition report at any stage of the proceedings.
(b) Inspection. The report shall be available for inspection by only the parties and attorneys by the date specified by the district court, and in any event, no later than two working days prior to any hearing at which a sentence may be imposed by the court.
(c) Hearing. Before a sentence is imposed, the parties shall have an opportunity to be heard on any matter concerning the report. The court, in its discretion, may allow the parties to present evidence regarding the contents of the report.

21. 85 N.M. 496, 513 P.2d 1278 (Ct. App.), *cert. denied,* 85 N.M. 483, 513 P.2d 1265 (1973).

22. 76 N.M. 655, 417 P.2d 795 (1966).

23. Following summary affirmance, the defendant filed a Motion For Rehearing. The Motion alleged that the court of appeal's opinion was in error because of both mistakes in fact and mistakes in law, precipitated by ordering summary affirmance without review of the record of the court proceedings or briefs on facts and issues by the parties. Motion for Rehearing at 1-2. The Motion urged the court to withdraw its opinion and place the case on a briefing calendar, arguing that if the issues were important enough to merit a published opinion, they were surely important enough to merit full review. The motion was denied. Motion for Rehearing at 3 (the court's order appears on the final page of the Motion). Defendant finally filed a Petition for Writ of Certiorari in the Supreme Court of the State of New Mexico. The petition raised two questions. First, was the defendant denied due process of law by allowing the sentencing judge to consider arrests not resulting in convictions in imposing sentence when the defendant denied the charges on which several of the arrests

BACKGROUND

Any discussion of sentencing procedures should consider the purpose of presentence reports and sentencing hearings. In *Williams v. New York,*[24] the Supreme Court said that because reformation and rehabilitation are the goals of sentencing, each sentence must be individualized. This requires the sentencing judge to consider a broad range of information not limited to the issue of guilt of a particular offense.[25] This goal of individualized sentencing was recently reiterated by the Supreme Court when it struck down an Ohio statute as unconstitutional because it limited the range of mitigating circumstances that could be considered by the sentencing judge in capital cases.[26] The Court pointed out that sentencing judges traditionally take a wide range of factors into account, and the concept of individualized sentencing in criminal cases has long been accepted though not constitutionally required.[27]

The federal courts have discussed the due process requirements of sentencing in terms of "fair" procedures. One of the earliest Supreme Court cases addressing the due process requirements of sentencing is *Townsend v. Burke.*[28] In *Townsend,* the defendant pled guilty to burglary and robbery. The presentence report showed charges of which the defendant had been found "not guilty" and charges which had been dropped. The defendant was not represented by counsel at sentencing. The sentencing judge thought the charges resulted in convictions, and sentenced the defendant accordingly. On review, the Supreme Court concluded that the prisoner had been sentenced on the basis of assumptions concerning his record which were materially untrue, and that if the defendant had been represented by counsel, the counsel could have corrected the mistake.[29] The Court held that in this particular fact situation, the defendant had been deprived of due process.[30]

The following year, in the landmark case of *Williams v. New York,*[31] the due process procedural requirements established by

were made? Second, did the court of appeals abuse its discretion by publishing an opinion of summary affirmance on the first issue without considering the court record or briefs by the parties? Petition for Writ of Certiorari at 1. The petition was denied. 91 N.M. 491, 576 P.2d 297 (1978). Shortly thereafter, the defendant was released from prison on parole, and it was not thought worthwhile to pursue the legal issue. Correspondance with Assistant Appellate Defender Mark Shapiro, Feb. 28, 1979.

24. 337 U.S. 241 (1949).
25. *Id.* at 245.
26. Lockett v. Ohio, 438 U.S. 586 (1978).
27. *Id.* at 602.
28. 334 U.S. 736 (1948).
29. *Id.* at 740-41.
30. *Id.*
31. 337 U.S. 241 (1949).

Townsend were very narrowly construed. In *Williams*, a jury had found the defendant guilty of murder and recommended a sentence of life imprisonment.[32] The judge considered a presentence report which included a list of thirty burglaries in which the defendant had been implicated but not convicted, and hearsay reports of "a morbid sexuality."[33] The defendant was represented by counsel at sentencing, but counsel did not contest the accuracy of the report nor request a chance to refute the report by cross-examination or any other method.[34] The sentencing judge imposed the death penalty explicitly in light of information in the presentence report.[35] The Supreme Court held that due process had not been violated by consideration of "out-of-court information"[36] and that the evidence to be considered in sentencing was within the discretion of the judge.[37] *Townsend* has since been construed as holding that the right to counsel applies to sentencing proceedings.[38]

More recent Supreme Court cases have extended the procedural requirements of due process in sentencing by distinguishing *Williams* from the subsequent cases. In *Specht v. Patterson*,[39] the defendant was found guilty of a sex crime carrying a maximum sentence of ten years under the applicable Colorado statute. At sentencing, the defendant was sentenced to life imprisonment under the Colorado Sex Offenders Act which provided for indeterminate sentencing up to life imprisonment. The presentence report included a psychiatric report obtained after conviction. The Supreme Court held that due process required that the defendant be allowed to obtain counsel and confront witnesses at the sentencing hearing.[40] *Williams* was distinguished on the grounds that in *Williams* the defendant's sentencing was part of a continuous proceeding which included a trial. In *Specht*, however, the Sex Offenders Act essentially required a new finding of fact. It was necessary to have a psychiatric evaluation that

32. *Id.*
33. *Id.* at 244.
34. *Id.*
35. *Id.* at 241.
36. *Id.* at 252.
37. *Id.* at 251-52.
38. Mempa v. Rhay, 389 U.S. 128 (1967). In this case the Court clarified or extended the right to counsel at sentencing. In *Mempa*, defendant's sentence had been deferred, subject to probation. When defendant violated the terms of his probation, he was sentenced without the assistance of counsel. The Court said, ". . . *Townsend v. Burke, supra,* illustrates the critical nature of sentencing in a criminal case and might well be considered to support by itself a holding that the right to counsel applies at sentencing." 389 U.S. at 134. The Court went on to hold that in light of *Gideon v. Wainwright*, 372 U.S. 335 (1963), and *Townsend*, due process required that the defendant be allowed to exercise the right to counsel at sentencing. 389 U.S. at 133-37.
39. 386 U.S. 605 (1967).
40. *Id.* at 609-10, citing Gerchman v. Maroney, 355 F.2d 302, 312 (3rd Cir. 1966).

the defendant constituted a threat of harm to the public or was mentally ill.[41] In *U.S. v. Tucker,*[42] the sentencing judge had considered three prior felony convictions in determining the defendant's sentence. After sentencing, two of the prior convictions were overturned by the retroactive effect of *Gideon v. Wainwright.*[43] The Supreme Court vacated the sentence, explaining that while the sentencing judge has wide discretion to conduct an inquiry that is largely unlimited and broad in scope, this particular sentence was founded upon "misinformation of constitutional magnitude."[44]

Gardner v. Florida[45] is the most recent Supreme Court case extending procedural rights in sentencing.[46] The facts of *Gardner* are very similar to *Williams.* A jury found the defendant guilty of murder and recommended life imprisonment. The sentencing judge considered a presentence report, part of which was not disclosed to the defendant or defense counsel, and sentenced the defendant to death. The defendant was represented by counsel at the sentencing hearing, but counsel did not request disclosure of the presentence report. Six Justices agreed that the sentence was invalid, but they could not agree on an opinion. The disagreement of the Justices centered on the death penalty.[47] Justice Stevens (joined by Stewart & Powell, JJ.) distinguished *Williams* on the grounds that in *Williams* the presentence report had been disclosed in the open court room,[48] but said, ". . . it is now clear that the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause."[49]

41. *Id.* at 607-8.

42. 404 U.S. 443 (1972).

43. *Id.* at 446-47.

44. *Id.* at 447. For a discussion of this case, see: 77 Columbia L. Rev. 1099 (1977); Comment, *Due Process at Sentencing: Implementing the Rule of United States v. Tucker,* 125 U. Penn. L. Rev. 1111 (1977).

45. 430 U.S. 349 (1977).

46. Lockett v. Ohio, 438 U.S. 586 (1978) and Bell v. Ohio, 438 U.S. 637 (1978) are more recent cases discussing due process in sentencing, but they deal with the limited issue of statutes requiring mandatory application of a death sentence.

47. Chief Justice Burger concurred in the judgment. 430 U.S. at 362. Justice White concurred in the judgment, but based his opinion on the Eighth Amendment rather than due process. *Id.* at 362. Justice Blackmun concurred in the judgment. *Id.* at 364. Justice Brennan objected to the death sentence as cruel and unusual punishment, and dissented to the remand because of the possibility that further proceedings could lead to its imposition. *Id.* at 365. Justice Marshall dissented on the grounds that the entire Florida procedure for sentencing to death was unconstitutional. *Id.* at 365-67. Justice Rehnquist expressed the opinion that the lower court decision should be affirmed, arguing that the Eighth Amendment is not applicable to sentencing procedures, and that the particular procedures used had never before been held to violate due process. *Id.* at 371.

48. *Id.* at 356.

49. *Id.* at 358. For differing views of *Gardner, see:* 63 Va. L. Rev. 175 (1977); 5 Ohio North. L. Rev. 175 (1975). *See also:* U.S. v. Wondrack, 578 F.2d 808 (9th Cir. 1978); U.S. v. Fatico, 579 F.2d 707 (2nd Cir. 1978); U.S. v. Bowdach, 561 F.2d 1160 (5th Cir. 1977).

The New Mexico courts have not developed these federal standards, but have instead discussed sentencing procedures in terms of judicial discretion. The case law establishes broad discretion in the sentencing judge, with a presumption in favor of correct use of judicial discretion. In *State v. Serrano,*[50] the sentencing judge relied entirely on a presentence report to deny a suspension or probation of sentence, refusing to hear testimony offered by defense witnesses. Affirming the sentence, the court stated, "The court is at liberty to make any inquiry it feels might assist it in reaching a proper conclusion. . . . Abuse of discretion cannot be presumed but must be affirmatively established."[51] The courts deciding *State v. Helm*[52] and *State v. Jameson*[53] held that the sentencing judge could consider the defendant's criminal record in imposing sentence, but neither case defined the contents of a criminal record. The decision in *State v. Heywood*[54] indicated that it was within the discretion of the sentencing judge to consider a charge of sale of heroin that had been dropped as part of a plea agreement in denying deferment of sentence on a plea of guilty to possession of heroin. In *State v. Madrigal*[55] it was held not to be an abuse of judicial discretion for a sentencing judge to sentence a defendant to imprisonment when a presentence report by a probation officer and a diagnostic report by a psychiatrist both recommended probation on condition of attendance in a treatment program. The court said that "[j]udicial discretion is abused if the action taken is arbitrary or capricious."[56] *Montoya* is the first case in which the court had to address specifically the inclusion of arrests not resulting in convictions in presentence reports or the consideration of arrests not resulting in convictions in sentencing.

ANALYSIS

The holding in *Montoya* is that "[a] defendant is not deprived of due process if the sentencing judge considers accurate arrest information relevant to the question of punishment."[57] The court focused on three aspects of this rule: whether consideration of the arrest record was relevant to sentencing, whether the arrest record repre-

50. 76 N.M. 655, 417 P.2d 795 (1966).
51. *Id.* at 658-659, 417 P.2d at 797 (citations omitted).
52. 79 N.M. 305, 442 P.2d 795 (1968).
53. 83 N.M. 392, 492 P.2d 1009 (Ct. App. 1972).
54. 85 N.M. 147, 509 P.2d 1342 (Ct. App.), *cert. denied,* 85 N.M. 145, 509 P.2d 1340 (1973).
55. 85 N.M. 496, 513 P.2d 1278 (Ct. App.), *cert. denied,* 85 N.M. 483, 513 P.2d 1265 (1973).
56. *Id.* at 501, 513 P.2d at 1283 (citation omitted).
57. 91 N.M. at 428, 575 P.2d at 612.

sented accurate information, and whether consideration of the arrest record was within the due process requirements established by *Gardner.*[58]

The questions of whether an arrest record is relevant to sentencing and whether an arrest record is a reliable indicator of culpable behavior are intertwined. In *Montoya,* the implication is that the court considered the arrest record reliable because the defendant did not deny being taken into custody by the police on the dates listed in the arrest record. The defendant argued that the arrest record was inaccurate and misleading because he denied the charges that resulted in arrest.[59] The court determined that the sentencing judge was not misled because he was aware that the arrests did not result in convictions, but nonetheless, the arrests not resulting in conviction were properly considered by the sentencing judge as part of the defendant's pattern of conduct.[60] The underlying assumption appears to be that the larger the number of prior police contacts, the more likely it is that the defendant will be involved in future criminal activity if his sentence is deferred or probated; therefore, such information is relevant to sentencing.

In Alaska, the rule that records of arrests not leading to conviction may not be considered by the sentencing judge has been established by both case law and rules of procedure.[61] The rule is based on the view that arrest records are both irrelevant and unreliable. The Alaska Supreme Court said when establishing the rule that:

> Sentencing courts should be wary of relying on a record of police "contacts" or an arrest record in determining an appropriate sentence. The dangers inherent in the use of such records and in giving undue weight to such factors should be readily apparent to the trial judge. More obvious is the fact that absent a conviction, an indictment is absolutely no evidence of guilty conduct.[62]

Alaska's most recent case on point explains the rationale further. The court in *Nukapigak v. State*[63] held that a sentencing judge is entitled to consider verified, meaning corroborated or substantiated, instances of past antisocial behavior in order that the sentence will fit the defendant's behavior and thereby promote rehabilitation. A rec-

58. *Id.* at 427-428, 575 P.2d at 611-12.
59. Petition for Writ of Certiorari at 3.
60. 91 N.M. at 427, 575 P.2d at 611-12.
61. Nukapigak v. State, 562 P.2d 697 (Alaska, 1977); Buchanan v. State, 561 P.2d 1197 (Alaska, 1976); Thurlkill v. State, 551 P.2d 541 (Alaska, 1976), Alaska Rules of Criminal Procedure, Rule 32 (c)(2). *See also:* Griggs v. State, 494 P.2d 795 (Alaska, 1972); Robinson v. State, 492 P.2d 106 (Alaska, 1971).
62. Waters v. State, 483 P.2d 199, 203 (Alaska, 1971).
63. 562 P.2d 697.

ord of police contacts or arrests, however, does not meet the required standard of reliability and is not necessarily relevant to the defendant's behavior. An arrest record may indicate nothing more than a mistake on the part of the police as to the defendant's identification or actions. Charges or arrests not leading to conviction may be considered if corroborated by testimony as to the reasons for the arrest that relate to the defendant's behavior, so long as the testimony includes the disposition of the case. Incidents that the defenant has an opportunity to explain or deny were held to be more relevant than unexplained police contacts.[64]

The California courts have also discussed the use of arrest records in sentencing both in terms of relevancy and reliability, but the resulting rule is not clear. *People v. Calloway,*[65] one of the first California cases dealing with the issue, involved a probation report that included the defendant's prior record which listed all contacts with law enforcement agencies. The defendant appealed his sentence on the grounds that inclusion of police contacts in connection with which he was neither convicted nor charged prejudicially associated him with serious crimes and so infected his probation request as to deny due process.[66] The court affirmed the sentence and denial of probation because the record showed that the sentencing judge did not rely on the presentence report, but based his decision on a diagnostic study provided by the Department of Corrections. The court, however, said that the bare fact that police detained and questioned the defendant regarding possible crimes did not give rise to a reasonable inference that he was a perpetrator. In fact, the court pointed out that since officers were authorized to release a defendant only if satisfied there were insufficient grounds for a criminal complaint, the reasonable inference is that the defendant was not involved in the crimes.[67]

In *People v. Romero,*[68] the defendant's presentence report showed thirty-one entries including ten misdemeanor convictions, ten entries with the notation "no disposition,"[69] and five dismissals. In denying probation, the judge expressly referred to the lengthy record and "excessive criminality"[70] of the defendant. On appeal, the sentence was vacated, based on the rationale of *Calloway.*[71] The

64. *Id.* at 700-02.
65. 37 Cal. App.3d 905, 112 Cal. Rptr. 745 (1974).
66. *Id.* at 907, 112 Cal. Rptr. at 746.
67. *Id.* at 908, 112 Cal. Rptr. at 747.
68. 68 Cal. App.3d 543, 137 Cal. Rptr. 675 (1977).
69. *Id.* at ____, 137 Cal. Rptr. at 678.
70. *Id.* at ____, 137 Cal. Rptr. at 678.
71. *Id.* at ____, 137 Cal. Rptr. at 677-78.

facts in *People v. Phillips*[72] are very similar to those in *Romero*. The defendant's presentence report listed five misdemeanor convictions, and ten arrests with the notations "no disposition shown" or "dismissed for insufficient evidence."[73] In imposing sentence, the judge commented that the defendant had too many arrests without conviction to be purely accidental. The sentence was upheld. The court said that *Calloway* had been misinterpreted to mean that arrests not leading to conviction could not be considered in sentencing, but in fact, *Calloway* meant only that a judge should not consider arrests as convictions and that the sentence should be vacated only if the sentencing judge had been misled.[74] The court distinguished *Romero* by saying that in *Romero* the judge was clearly mistaken as to the record.

A recent California case, *People v. Jackson,* relied on the holding in *Phillips.* The decision in *Jackson* was that police contacts not leading to arrest or conviction may not be included in presentence reports without supporting factual information. The court went on to decide that reversal was not required unless inclusion of such contacts actually misled the court into believing the contacts were convictions.[75]

A long line of Illinois cases dealt with the issue of considering arrest records in sentencing.[76] The earlier cases excluded arrest records on the grounds they were irrelevant. *People v. Riley*[77] was the first case in which the Illinois courts addressed the issue. The defendants pled guilty to charges of murdering a police officer, and were sentenced to death. The sentence was appealed because during a hearing on mitigation and aggravation of the offense the prosecutor read the defendants' prior criminal records, including arrests not resulting in convictions, into the court record. The supreme court affirmed the sentence because it felt the arrest record was trivial in light of the rest of the information available, but the court said inclusion of prior arrests not resulting in convictions was incompetent and immaterial. The court also said:

72. 76 Cal. App.3d 207, 142 Cal. Rptr. 658 (1977).

73. *Id.* at ____, 142 Cal. Rptr. at 660-661.

74. *Id.* at ____, 142 Cal. Rptr. at 662.

75. People v. Jackson, 78 Cal. App.3d 553, 144 Cal. Rptr. 199 (1978).

76. *E.g.* People v. Riley, 376 Ill. 364, 33 N.E.2d 872 (1941); People v. Kirk, 62 Ill. App.3d 49, 378 N.E.2d 795 (1978); People v. Freeman, 60 Ill. App.3d 794, 377 N.E.2d 107 (1978); People v. Guthrie, 60 Ill. App.3d 293, 376 N.E.2d 425 (1978); People v. Boyce, 51 Ill. App.3d 549, 366 N.E.2d 914 (1977); People v. Young, 30 Ill. App.3d 176, 332 N.E.2d 173 (1975); People v. Taylor, 13 Ill. App.3d 974, 301, N.E.2d 319, *rev'd* 383 N.E.2d 258 (1973); People v. Bowlin, 133 Ill. App.2d 837, 272 N.E.2d 282 (1971); People v. Moore, 133 Ill. App.2d 827, 272 N.E.2d 270 (1971); People v. Jackson, 95 Ill. App.2d 193, 238 N.E.2d 196 (1968).

77. 376 Ill. 364, 33 N.E.2d 872 (1941).

> It was unnecessary and unfair on the part of the prosecutor to include these immaterial matters and an error on his part which might very easily bring about a reversal of the judgment in some cases. On a hearing of this kind the prosecutor is under both a legal and moral duty not to offer anything for the consideration of the trial Judge which may be of doubtful competency and materiality.[78]

This decision was followed in a number of cases where the sentencing judge considered prior arrests not resulting in conviction at hearings on mitigation and aggravation.[79] As noted in *Montoya,* however, some Illinois cases distinguish hearings on mitigation and aggravation, at which the judge fixes the length of the defendant's sentence, from hearings on requests for probation.[80] In *People v. Taylor*[81] the court held that by requesting a probation hearing, the defendant permitted the state to introduce evidence not admissible in aggravation and mitigation hearings. Thus, evidence of prior arrests which did not result in conviction would be admissible at probation hearings. This was upheld in *People v. Young.*[82] In *Montoya,* the New Mexico court followed these cases stating:

> If consideration may be given to arrest records in determining whether to suspend the sentence imposed, *People v. Young,* supra, we see no reason why such records may not be considered in determining whether to impose or defer sentence. Thus our decision draws no distinction between considering arrest records in imposing sentence, in suspending a sentence, or in deferring a sentence.[83]

Subsequent to the decision by the New Mexico court, the *Taylor* decision was overruled in *People v. Kennedy.*[84] In that case the Illinois court held that information concerning arrests or charges for other offenses could not be considered at a sentencing hearing for the purpose of determining whether probation should be granted unless special relevance was shown.

Another recent Illinois case appeared to shift the focus from the relevancy of arrest records to their reliability. In *People v. Kirk,*[85] the defendant pled guilty to attempted rape of the seventy-five year

78. *Id.* at ____, 33 N.E.2d at 874.
79. *E.g.* People v. Bowlin, 133 Ill. App.2d 837, 272 N.E.2d 282 (1971); People v. Moore, 133 Ill. App.2d 827, 272 N.E.2d 270 (1971); People v. Jackson, 95 Ill. App.2d 193, 238 N.E.2d 196 (1968).
80. 91 N.M. at 427, 575 P.2d at 611.
81. 13 Ill. App.3d 974, 301 N.E.2d 319, *rev'd* 383 N.E.2d 258 (1973).
82. 30 Ill. App.3d 176, 332 N.E.2d 173 (1975).
83. 91 N.M. at 427, 575 P.2d at 611.
84. 66 Ill. App.3d 35, 383 N.E.2d 255 (1978).
85. 62 Ill. App.3d 49, 378 N.E.2d 795 (1978).

old grandmother of a friend. After being sentenced to five to twenty years in prison, he requested probation. The probation report included reports by three psychiatrists which referred to prior sexual offenses or rapes, apparently none of which had led to conviction, though the report was unclear. The court reversed and remanded for reconsideration of sentence and probation because the presentence report referred to the prior offenses. The court said that the state may introduce a wide variety of evidence, but that evidence of prior criminal conduct may be admitted only after its reliability and accuracy are established by cross-examination of witnesses.[86] The court further stated that, "Whether the hearing involves a request for probation or is solely in aggravation and mitigation of the sentence to be imposed, the State may introduce evidence of defendant's prior criminal conduct not resulting in conviction, but only if the reliability and the accuracy of that evidence can be established."[87]

A number of other states have established rules as to whether prior arrests not resulting in conviction may be considered in sentencing, but the grounds for these rules are not as clearly explained as in the above cases.[88]

The focus of the federal courts has been on the reliability of arrest records, apparently with their relevancy being accepted. In *U.S. v. Rao,*[89] the court compared an arrest record to other evidence of criminal activity. In *Rao,* the presentence report included hearsay

86. *Id.* at ____, 378 N.E.2d at 798.

87. *Id.* at ____, 378 N.E.2d at 799.

88. There are two cases from Georgia holding that consideration of FBI arrest records at sentencing is permissible. Edge v. State, 144 Ga. App. 213, 240 S.E.2d 765 (1977); Leach v. State, 138 Ga. App. 274, 226 S.E.2d 78 (1976). Two Nebraska cases hold that police reports of prior arrests may be considered in sentencing. State v. Robinson, 198 Neb. 785 255 N.W.2d 835 (1977); State v. Lacy, 198 Neb. 567, 254 N.W.2d 83 (1977). A New York court modified a sentence where the sentencing court predicated its sentence of a first offender on the basis of a prior arrest record and unsupported allegations of organized crime connections. People v. Edwards, 48 A.D.2d 906, 369 N.Y.S.2d 493 (1975). An Oklahoma court decreased the sentence of a defendant convicted of driving while under the influence of intoxicating liquor because the sentencing judge questioned the defendant regarding prior arrests, saying the proper inquiry should have been only to prior convictions. Emerson v. State, 327 P.2d 505 (Okl. Crim. Ct. App. 1958). The Oregon courts have held that prior criminal involvement that did not lead to conviction is a proper consideration in sentencing. State v. Flores, 13 Or. App. 556, 511 P.2d 414 (1973); State v Hargon, 2. Or. App. 553, 470 P.2d 383 (1970); State v. Scott, 237 Or. 390, 390 P.2d 328 (1964). Texas limits the prior criminal record included in presentence reports to final convictions by statute. Tex. Code Crim. Proc. Ann. art. 37.07 (Vernon). Washington case law has established broad discretion in the sentencing judge to consider virtually all evidence available in sentencing, including not only prior arrests, but charges of which a defendant has been acquitted. State v. Wilcox, 20 Wash. App. 617, 581 P.2d 596 (1978); State v. Hernandez, 20 Wash. App. 225, 581 P.2d 157 (1978); State v. Blight, 89 Wash.2d 38, 569 P.2d 1129 (1977), State v. Short, 12 Wash. App. 125, 528 P.2d 480 (1974).

89. 296 F. Supp. 1145 (S.D.N.Y. 1969).

information that the defendant was a participant in organized crime. Relying on *Townsend,* the court said that an alleged association with notorious criminals was not the equivalent of an arrest, and even an arrest cannot validly be treated as a conviction for sentencing purposes.[90]

In *U.S. v. Weston,*[91] the Ninth Circuit Court of Appeals considered the reliability of different kinds of information that might be included in a presentence report. The defendant was convicted of receiving, concealing, and facilitating the transportation of heroin. Initially, the sentencing judge indicated he would sentence the defendant to the minimum possible sentence of five years. After reviewing a presentence report that alleged the defendant was a major distributor, the judge imposed the maximum possible sentence of twenty years. The judge commented that he had great respect for the probation service and its reports, and it would be up to the defendant to prove the allegations of the report untrue.[92] The presentence report consisted of an FBI report that relied on the unsworn statement of an unidentified informant. The appellate court cited *Williams* for the proposition that evidence of criminal conduct not resulting in a conviction may be considered in imposing sentence, and said that it would not repudiate that rule.[93] The court recognized, however, a growing trend to limit the type of evidence to be considered in sentencing.[94] The court found that the factual basis for believing the FBI report was almost nil and vacated the sentence. The court stated that the Supreme Court in *Townsend* had held that a sentence cannot be predicated on false information, and that this case extended the rule by deciding that a sentence cannot be predicated on information of so little value as here involved.[95]

Since *Weston,* a number of federal courts have discussed the reliability of evidence of criminal activity offered at sentencing. Although none of the courts have dealt specifically with arrest records, the cases do provide guidelines to which arrest records might be compared. In *U.S. v. Metz,*[96] a sentence was affirmed and *Weston* was distinguished where the sentencing judge had considered pending indictments as evidence of other criminal activity. The court found

90. *Id.* at 1148.
91. 448 F.2d 626 (9th Cir.), *cert. denied* 404 U.S. 1061 (1971).
92. *Id.* at 629.
93. *Id.* at 633.
94. The court cited to the ABA Project on Standards for Criminal Justice, *Standards Relating to Probation* (approved draft), 1970, cited in 448 F.2d at 633, n. 1, which required convictions and charges to be substantiated by official records.
95. 448 F.2d at 634.
96. 470 F.2d 1140 (3rd Cir. 1972), *cert. denied,* 411 U.S. 919 (1973).

that pending indictments were of far greater reliability than unsworn statements.[97]

In *U.S. v. Needles,*[98] the court affirmed a sentence imposed after the judge considered hearsay evidence that had been corroborated by several sources. The court pointed out that each statement in a presentence report need not be established or refuted by presentation of evidence, but that the sentence should not be based on misinformation. Although the court supported the position that the extent of evidence considered should remain within the discretion of the judge, the court encouraged the practice of allowing the defendant to state his version of allegations in a presentence report, and when appropriate, to present evidence in such forms as affidavits, documents, and oral statements.[99] In *U.S. v. Bass,*[100] the sentence was affirmed because hearsay information of criminal activity had been adequately corroborated. The court again focused on the reliability of evidence and stated that:

> with increasing frequency, relief has been provided when the sentencing process created a significant *possibility* that misinformation infected the decision, and prophylactic measures have been developed to guard against that possibility.[101] ... *Williams* holds that as a matter of federal constitutional law, sentencing judges must be permitted to consider at least some hearsay information; it does not hold, either on constitutional or nonconstitutional grounds, that federal sentencing judges must be permitted to consider *all* hearsay information.[102]

In *Moore v. U.S.*[103] the appellate court remanded a case for a sentence hearing because the defendant had not been given an opportunity to present claims that his presentence report had contained false information. The court found that the *Townsend* principle that a defendant should not be sentenced on the basis of information that was materially incorrect, had been extended by *Weston,* and that when the information on which a sentence is founded is at least in part unreliable, due process requires that the defendant be resentenced.[104] In *U.S. v. Wondrack*[105] the court construed *Weston* very narrowly. In *Wondrack,* the judge relied on presentence information

97. *Id.* at 1142.
98. 472 F.2d 652 (2nd Cir. 1973).
99. *Id.* at 658.
100. 535 F.2d 110 (D.C. Cir. 1976).
101. *Id.* at 118.
102. *Id.* at 120.
103. 571 F.2d 179 (3rd Cir. 1978).
104. *Id.* at 183.
105. 578 F.2d 808 (9th Cir. 1978).

that the defendant was a distributor of narcotics when sentencing the defendant for income tax evasion. The presentence report indicated that the defendant had $125,000 of miscellaneous income for which he could not account on his $13,000 salary as a cargo handler for an international airline.[106] The court distinguished *Gardner* by saying that the presentence report had been fully disclosed and that the defendant had an opportunity to rebut the report. The court said that the defendant had failed to meet the *Weston* standard of showing the factual basis of the report to be almost nil.[107]

In one of the most recent cases on the topic, *U.S. v. Fatico*,[108] the court discussed the federal cases at length and attempted to summarize the current federal standard for evidence that may be included in presentence reports. The court upheld a sentence based on a presentence report that included the statement of an unidentified informant where the statement was corroborated by the testimony of coconspirators who had turned state's evidence and a former head of an FBI Organized Crime Section. The informant remained unidentified because he was working inside a crime ring to gain further information.[109] The court said that due process did not limit presentence information to that given by witnesses in open court, but the thrust of *Bass, Needles,* and *Weston* was that the reliability of evidence that is difficult to challenge must be ensured through cross-examination or by otherwise demanding certain guarantees of reliability.[110]

The court in *Montoya* distinguished the inclusion of arrest records in presentence reports from actual consideration of arrest records in imposing sentence, though it found both acceptable. Apparently this distinction was drawn because of the clear statutory authority for inclusion of arrest records in presentence reports.[111] The statute referred to by the court states: "Upon the order of any district or magistrate court, the director shall prepare a presentence report which shall include such information as the court may request."[112]

This is consistent with the interpretation of a similar federal statute. U.S.C. Title 18, § 3577 states: "No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United

106. *Id.* at 810.
107. *Id.* at 809.
108. 579 F.2d 707 (2nd Cir. 1978).
109. *Id.* at 708-09.
110. *Id.* at 711-13.
111. 91 N.M. at 426, 575 P.2d at 610.
112. N.M. Stat. Ann. §31-21-9A (1978), formerly N.M. Stat. Ann. §41-17-23A (Repl. 1972).

States may receive and consider for purposes of imposing an appropriate sentence." In *U.S. v. Garcia,*[113] the defendant challenged his sentence on the grounds that the presentence report contained rumors and hearsay concerning unrelated criminal matters. The court held that U.S.C. Title 18, § 3577 expressly provides that there be no limitation on information received by the sentencing court. Citing *Williams* for support, the court said, "Due process, in our view, does not preclude reliance on hearsay in such a report."[114]

The Tenth Circuit reached the same conclusion in *Smith v. U.S.* but focused more clearly on the distinction between inclusion and consideration of the challenged information.[115] In *Smith,* the presentence report included arrests which had not resulted in conviction. Several charges had been dropped, and one charge resulted in an acquittal. Defendant objected to the inclusion of such information in the presentence report, and pointed out the disposition of the arrests to the sentencing judge. The sentencing judge stated that he accepted the defendant's explanation and did not consider the arrests in imposing sentence. The sentence was appealed on the grounds that inclusion of the arrest record in the presentence report was a manifest injustice, and that the sentence could have been altered or mitigated absent the arrest record and inaccuracies in the presentence report.[116] The appellate court found the contention without merit.[117]

The A.B.A. *Standards Relating to Probation*[118] recommend that a presentence report include the prior criminal record of the defendant,[119] but limit the prior criminal record to charges which have resulted in conviction.[120] The commentary states:

> Arrests, juvenile dispositions short of an adjudication, and the like, can be extremely misleading and damaging if presented to the court as part of a section of the report which deals with past convictions. If such items should be included at all—and the Advisory Committee would not provide for their inclusion—at the very least a detailed effort should be undertaken to assure that the reader of the report cannot possibly mistake an arrest for a conviction.[121]

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113. 544 F.2d 681 (3d Cir. 1976).
114. *Id.* at 684.
115. 551 F.2d 1193 (10th Cir.), *cert. denied* 434 U.S. 830 (1977).
116. *Id.* at 1195.
117. *Id.* at 1195-96.
118. ABA Project on Standards for Criminal Justice, *Standards Relating to Probation* (approved draft), 1970.
119. *Id.* at § 2.3.
120. *Id.* at 37.
121. *Id.*

The question of whether the use of arrest records in sentencing violates the defendant's right to due process is confused and complicated by two factors. First, the federal cases discussing sentencing procedures refer very generally to due process rights and fair procedures.[122] Only a few cases mention more specific constitutional rights such as the presumption of innocence[123] and the right to confrontation.[124] Second, *Gardner* indicates a changing federal standard with increasing concern for defendants' rights in sentencing procedures.[125]

In *Montoya,* the court addressed this question by saying, "Whether or not *Gardner* is read as imposing *new* due process requirements, the discretion of the sentencing judge in New Mexico has always been subject to the requirements of due process."[126] In support of this assertion, the court cites Rule 56 of the New Mexico Rules of Criminal Procedure, *Madrigal,* and *Serrano.*[127] Rule 56 requires disclosure of the presentence report to the defendant, provides that the parties must have an opportunity to be heard on any matter concerning the report, and leaves the presentation of evidence on matters in the report to the discretion of the sentencing judge.[128] This would seem to satisfy a narrow interpretation of *Gardner,* that due process in sentencing is satisfied by disclosure of the presentence report and an opportunity to address the court on inaccuracies in the report.[129] The court's reliance on *Madrigal* and *Serrano* is more difficult to explain. In *Madrigal,* after rejecting recommendations that the defendant be placed on probation subject to attendance in a treatment program, the sentencing judge sentenced the defendant to one to five years in prison unless the defendant could obtain a statement from the victim of his crime to the effect that she no longer wished to pursue the matter. The defendant was unable to obtain the statement because the victim had left the state and could not be located. The court held this was not an abuse of judicial discretion.[130] In *Serrano,* the court held it was not an abuse of judicial discretion for the sentencing judge to refuse to hear testimony of witnesses offered by the defendant on the question of senten-

122. See text accompanying notes 28-49 *supra.*

123. U.S. v. Doyle, 348 F.2d 715 (2nd Cir.), *cert. denied* 382 U.S. 843 (1965); Poteet v. Fauver, 517 F.2d 393 (3rd Cir. 1975).

124. *See:* 337 U.S. at 245; U.S. v. Chewning, 458 F.2d 381 (9th Cir. 1972).

125. See text accompanying notes 45-49 *supra.*

126. 91 N.M. at 427, 575 P.2d at 611.

127. *Id.*

128. See note 20 *supra.*

129. Comment, *Gardner v. Florida: Pre-sentence Reports in Capital Sentencing Procedures,* 5 Ohio North. L. Rev. 175 (1978).

130. 85 N.M. at 501, 513 P.2d at 1283.

cing.[131] Neither case specifically discussed the due process requirements of sentencing.

CONCLUSION

Consideration of irrelevant and unreliable information in sentencing violates a defendant's right to due process. Often however, records of prior arrests not leading to convictions fall within a grey area of questionable relevancy and reliability. Police contacts or arrests that do not lead to conviction may be indicative of a pattern of criminal conduct. On the other hand, they may also be indicative of police harrassment or misidentification. Because of the questionable relevancy and reliability of arrest records, their probative value for purposes of sentencing is relatively low. The fact that the sentencing judge may be misled by inaccurate or unreliable arrest records may outweigh any useful purpose served by such records. Other evidence such as sworn testimony regarding the defendant's pattern of conduct, would be of far greater value and reliability in serving the purpose of individualized sentencing.

A blanket rule excluding arrest records from consideration in sentencing seems warranted, and this is the position taken by a slight majority of state courts.[132] While including arrest records in presentence reports has been held statutorily and constitutionally permissible,[133] inclusion of arrest records does not serve any valid purpose if the arrests are not to be considered by the sentencing judge. Furthermore, such records may be misleading if not accompanied by the disposition of the arrests, and if such arrests are interspersed with records of arrests resulting in convictions. This is not, however, the result reached by the court in *State v. Montoya.* In *Montoya* the New Mexico Court of Appeals held that arrests which did not result in conviction could be included in presentence reports and could be considered by the judge when sentencing.

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131. 76 N.M. at 658-59, 417 P.2d at 796.
132. *See* Annot., 96 A.L.R.2d 768 (1964).
133. See text accompanying notes 111-117 *supra.*