



New York State Defenders Association, Inc.

Public Defense Backup Center

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Obtain Clients' & Witnesses' Criminal Histories – the Earlier, the Better

Public defense lawyers need quick access to complete criminal histories (rap sheets) of clients suspected of, charged with, or convicted of criminal offenses and/or in other proceedings in which they have a right to counsel. Counsel also needs access to potential witnesses' rap sheets.

Why Must Lawyers get Clients' Rap Sheets?

Lawyers need criminal history information to effectively and accurately advise their clients about potential consequences of pending proceedings and advocate for:

- correcting errors in, or sealing, existing histories when warranted;
- diverting the potential case or not lodging formal charges/petitions;
- dismissing or reducing charges/allegations once brought;
- pretrial release¹/(re)unification of families pending proceedings;
- best possible negotiated outcomes;
- relief sought in pretrial motions;
- favorable trial outcomes; and/or
- favorable sentence/disposition outcomes.

Public defense lawyers may face particular barriers to obtaining the information they need. Some methods of obtaining criminal histories may require payment of fees or time-consuming fee-waiver processes. NYSDA is committed to helping ensure that public defense clients and their lawyers get the criminal histories they need. In addition to providing guidance on existing ways to obtain this needed information, NYSDA supports legislative changes to improve public defense access to clients' records.

How Can Lawyers get Clients' Rap Sheets?

If there is an active criminal case, the defendant's attorney, or the defendant if unrepresented, must be given a copy of the defendant's Division of Criminal Justice Services (DCJS) criminal history report when the report is received by the court. *See* Criminal Procedure Law 160.40(2);² *see also*

¹ A local court cannot release a person charged with a felony in the absence of a criminal history unless the prosecutor waives this requirement. *See* CPL 530.20(2)(b). And counsel needs to know the contents of a criminal history to verify its accuracy as well as to point out positive factors such as that a client always appeared when required on prior matters.

² "Criminal Procedure Law § 160.40. Fingerprinting; transmission of report received by police

1. Upon receipt of a report of the division of criminal justice services as provided in section 160.30, the recipient police officer or agency must promptly transmit such report or a copy thereof to the district attorney of the county and two copies thereof to the court in which the action is pending.

2. **Upon receipt of such report the court shall furnish a copy thereof to counsel for the defendant or, if the defendant is not represented by counsel, to the defendant.**" [Emphasis added.]

CPL 530.20(2)(b)(ii), 530.30(2), and 530.40(4). DCJS is required to send the report upon receiving the statutorily-required fingerprint of people accused of criminal offenses.³

Problems with CPL 160.40 compliance include courts refusing to accept the reports and/or reports not being sent to the courts, both problems perhaps due at least in part to reliance on electronic access to rap sheet information. There is no statutory authority for a court to refuse to receive criminal history reports and courts have no authority to frustrate defense counsel's statutorily mandated access to a client's criminal history report. The court must promptly give defense counsel a copy of the report it receives from the police officer or agency. The problem of court noncompliance with 160.40(2) has been acknowledged by DCJS staff who indicate that whenever a complaint is received it is referred to the Office of Court Administration for a call to be made to the court in question. This is an ineffective and inefficient remedy for the overall, long-standing⁴ problem, but may offer individual lawyers and defendants one option. Please contact the Backup Center for assistance and/or to help NYSDA document the breadth of this problem.

Increasing use of electronic criminal history searches has not relieved the police or other agencies of the duty to send in fingerprints of arrested/charged individuals, nor DCJS of its duty to send physical copies of the rap sheet (or report that none exists) when the fingerprints are received. The DCJS website recognizes as much, noting that "[i]f the fingerprint-based rapsheet is not available at arraignment, the court (and defendant or defense attorney via the court) should use the Name Search/Inquiry generated rapsheet obtained through a NYSPIN terminal or electronically from DCJS, for an arraignment involving fingerprintable offenses. The non-fingerprint-based rapsheet should be destroyed upon receipt of the fingerprint-based rapsheet."

www.criminaljustice.ny.gov/stdpractices/jud5a.htm. If the required copies of a criminal history have not been provided to the court, lawyers may want to point out this webpage to the court, emphasizing that counsel has a right to the information. And again, attorneys are asked to contact the Backup Center when these problems arise.

Attorneys confronted by any other problems in obtaining their clients' rap sheets soon after arrest or initial court appearance are also asked to contact the Backup Center.

Clients, or their lawyers, can request the clients' DCJS rap sheets. Directions are available on the DCJS website at <http://criminaljustice.state.ny.us/ojis/recordreview.htm>. To obtain a full report based on fingerprints requires using a private vendor under state contract, as the directions on the website indicate. A fee waiver packet is available; when a waiver is sought, applicants can expect a response via U.S. Mail only after a minimum of seven to ten business days.

³ When someone has been arrested, or after they have been arraigned if they appeared in court based on a summons or appearance ticket, the police or other agency must fingerprint them if they are charged with: a felony; Penal Law misdemeanor; other misdemeanor if a prior conviction would raise that misdemeanor to a felony; or loitering for purposes of prostitution. They may also be fingerprinted if certain questions arise about their identity. *See* CPL 160.10. The fingerprints must be sent to DCJS (*see* CPL 160.20), which is required to send back "all information on file with respect to such defendant's previous record, if any, or stat[e] that the defendant has no previous record..." *See* CPL 160.20. The police or other agency that initiated charges must then provide that record to the court. *See* CPL 160.40(1).

⁴ In 1993, the Hon. Joseph J. Traficanti, Jr., then-Deputy Chief Administrative Judge, Courts Outside New York City, sent a memorandum reminding all judges with criminal jurisdiction outside New York City that "Sections 160.40(2) and 530.20(2)(b)(ii) provide that the defense must receive copies of the rapsheet when the court receives copies." This memo was sent in response to a letter from NYSDA about courts failing to provide rap sheets to defense counsel.

The Legal Action Center in New York City has a publication designed to help individuals obtain their rap sheets. Its plain language may be of assistance to lawyers as well.

www.lac.org/doc_library/lac/publications/YourRapSheet.pdf

The Office of Court Administration (OCA) makes criminal disposition records available for a fee of \$65.⁵ The process can be arduous and expensive -- variations of a person's name or date of birth are not reported, so a client (or witness) who has used more than one name will require multiple search requests. Furthermore, these records are less complete than those kept by DCJS. Erratic reporting of convictions, especially by justice courts, and the absence of violation level offenses and Youthful Offender adjudications, make the OCA Criminal History Record Search (CHRS), an often incomplete and unreliable source of information. *See* www.nycourts.gov/apps/chrs/.⁶

Why do Lawyers Need Access to Others' Criminal Records, and How Can They Get Them?

Attorneys have an ethical, and sometimes statutory,⁷ obligation to determine the criminal records of their own witnesses and of adverse witnesses and to use this in the investigation, preparation, and trial of cases. The records available through OCA's CHRS, described above, provide one method for investigating witnesses' criminal histories. Other ways to obtain information about potential witnesses' criminal record include⁸:

- *checking local courts for conviction records (though some require the date of conviction or even a docket number);*
- *checking the "Inmate Population Information Search" on the Department of Corrections and Community Supervision (DOCCS) website*
<http://nysdoccslookup.doccs.ny.gov/kinqw00>;
- *seeking a judicial subpoena duces tecum for DCJS; and/or*
- *obtaining transcripts of prior guilty pleas.*

Electronic background checks offered by companies such as LexisNexis and others are also potential fee-based sources of criminal history information.

New York's discovery laws require disclosure of prosecution witnesses' conviction record only after a jury has been sworn. Unless and until those laws are reformed – which NYSDA supports – defense lawyers must seek criminal history information in other ways if they are to have it in time for thorough investigation and preparation. And even when criminal history information on prosecution

⁵ Thirty-five dollars of this fee are deposited in the Indigent Legal Services Fund, from which local distributions are made for public defense services by the Indigent Legal Services Board on the recommendation of the Office of Indigent Legal Services. www.nycourts.gov/reports/annual/pdfs/UCSAnnualReport2010.pdf.

⁶ The website notes: "The search results are public records relating to open/pending and convictions of criminal cases originating from County/Supreme, City, Town and Village courts of all 62 counties. Sealed records are not disclosed. Town & Village criminal disposition data is limited."

⁷ *See* CPL 240.44 and 240.45.

⁸ *See*, among other sources, Gary Muldoon, *Handling a Criminal Case in New York* (2011-2012 ed), §§ 8:43, 8:192.

witnesses is disclosed, it may be incomplete; defense attorneys have told us that prosecutors sometimes do not provide full rap sheets, leaving it to the defense to push for more, sometimes revealing undisclosed convictions.

Overcome the obstacles described above may involve running from county to county or court to court to retrieve public information, for which search, copying, and/or certification fees may be imposed. It may involve time-consuming paperwork or computer searches by the attorney or an investigator who must be pulled off other duties. It may involve paying others for criminal history information. And in all instances, it involves county-funded public defense lawyers spending time and money to get what their adversaries have at their fingertips.

Public defense lawyers dealing with such problems are asked to call the Backup Center for assistance and to document criminal history discovery/disclosure issues.

NYSDA Supports Legislation to Make Public Defense Programs "Qualified Agencies" Able to Receive DCJS Rap Sheets.

Bills have been proposed in the Legislature this session to add public defenders, legal aid societies, and assigned counsel administrators to the definition of "qualified agencies" in Executive Law 835(9). This would allow those who represent public defense clients to receive DCJS information, subject to agreed upon terms and conditions, under Executive Law 837(6). Initial "same as" bills (S.7005/A.7857-A) were introduced; the Assembly passed the bill and the Senate referred it to the Finance Committee on April 20, 2012 (S.7005). Negotiations led to introduction of a new bill to accomplish the same goal (A10709). No final outcome had occurred as of this writing.

Making public defense programs qualified agencies will save untold hours and extensive local costs that accrue when public defense lawyers seek information that is available at the push of a button to others in the criminal justice system. It will also make it more likely that public defense lawyers who don't do so now will seek the criminal histories they need, greatly improving defense services at minimal state cost with substantial county savings.

-June 18, 2012