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U.S. PROBATION OFFICE
Box 1817
Fargo, North Dakota 58107-1817

May 12, 1986

Mr. William W. Wilkins, Jr.
Chairman, U.S. Sentencing Commission
1331 Pennsylvania Avenue, NW, Suite 1400
Washington, D.C. 20004

Dear Chairman Wilkins:

This is in response to your letter of April 29, 1986, regarding my appearance before the Sentencing Commission on May 22, to discuss how a defendant's criminal record should affect sentencing. In your letter you ask a number of questions thematically related to arrest record information, i.e., availability, accuracy, details of offense, disposition, etc. Effective sentencing guidelines that promote sentencing equity and fairness depend heavily on the accuracy, completeness and availability of adult and juvenile history and other criminal records. This is no small task given the heterogeneity of the American criminal justice system.

The federal criminal justice system, notwithstanding its considerable resources of court and investigative agencies, is largely dependent upon state repositories of criminal records. Routinely in North Dakota we send requests on all defendants for arrest record information to the North Dakota Bureau of Criminal Investigations or similar state agencies charged with maintaining a repository of arrest record information, as well as to police departments, courts, probation offices, and correctional institutions. Of course, the extent of and the number of inquiries sent depends on a defendant's prior criminal justice involvement. When requesting prior record information from a law enforcement agency, our NCIC number is used to show the authority and investigative necessity for the information.

In a manner of speaking, we employ a shotgun approach, sending a number of requests out because experience has taught us that in many cases responses provide nominal information. For instance, an inquiry sent to the North Dakota Bureau of Criminal Investigations may come back with arrest record data showing an arrest and conviction but no details of the offense. Requests for arrest record information sent to a police department or criminal investigative agency may provide details of the offense, but nothing on disposition. Court records usually provide scanty details of the offense, but do show the offense of conviction, disposition and whether or not the defendant was represented by

counsel. Probation, parole and correctional institution information generates the most complete source of criminal record data on a defendant, however, these records are sometimes incomplete and fail to show fully a defendants arrest history.

Generally speaking in my experience, the quality of criminal records vary significantly from state-to-state and from system-to-system; thus, requests for information about multi-state offenders may be compromised by reliance on data from low-quality systems. There are other difficulties irrespective of the informational source used: descriptions of arrest charges are not as likely to be retained as are descriptions of formal charges; disposition information cannot always be linked to either arrest or formal charges; and data may not be available promptly enough to be used in a presentence report or in computing sentencing guidelines. These problems reflect insufficient intra-governmental coordination, inadequate financial support, gaps in automation and failure to implement programs (such as dispositional monitoring) that improves data quality.

A couple of comments about juvenile records. Much of the recent research on offender risk prediction and classification has indicated a strong causal relationship between delinquency and adult crime. A growing reliance on juvenile data reflects a change in philosophy regarding juvenile offenses and puts special emphasis on the status and availability of juvenile records. The problems associated with using juvenile justice records to enhance adult criminal justice records relates primarily to deficiencies in the quality of juvenile records and their availability both as a matter of law and practice.

North Dakota is one of the few federal jurisdictions in the country that because of federal jurisdiction on Indian reservations in the state handles juvenile or young adult offenders with identifiable juvenile arrests on or off the reservation. Some of the problems I've encountered when attempting to locate and use juvenile records have included: juvenile arrest charges may not be recorded where the charges were informally adjusted and formal charges of delinquency aren't filed; the seriousness and number of arrest charges may not be reflected on the juvenile criminal history record, the euphemism "delinquency" is often used to mask or replace the substantive delinquent act; juvenile record information is often sealed or expunged and is therefore, as a matter of law, unavailable; absence of positive "fingerprint" identification on juvenile records precludes linkage with adult records; and lack of automation limits transfer of juvenile data or the retention of such data in essential criminal information repositories within the state. There appears to be a growing public inclination to hold juveniles criminally culpable with many states, including the federal government, recently strengthening statutes to permit juvenile offenders to be tried as adults in certain circumstances. Nevertheless, given the historical background governing the development and use of juvenile courts, any expected changes will happen slowly, and until they do, there are likely to be limits on the adequacy and availability of juvenile prior records.

Although juvenile records may be difficult to obtain, at least the

juvenile justice system operates somewhat parallel to the adult system. This is not true with arrest and convictions handled on Indian reservations. Most Indian tribes operate their own court systems, and except to the extent demanded by the Indian Civil Rights Act of 1968, the structure and procedure of such courts is determined by the tribes themselves. Many emulate in varying degrees, the Anglo-American system while employing some of their own traditional procedures and sanctions while others are essentially traditional in make up. The use of tribal languages, which still predominate on many reservations, is a significant tie to traditional ways. Legal methods also depend on unspoken practices and norms. As direct Bureau of Indian Affairs control over tribal institutions has waned, the influence of tribal values has increased.

Although most tribes have adopted courts as distinct government institutions, the tribal courts haven't required the authority associated with the concept of separation of powers to declare legislative enactments invalid or to enjoin administrative action found to be illegal. In practice, tribal courts are often subordinate to the political branches of tribal government, primarily the executive branch, the tribal council.

The Indian Civil Rights Act of 1968 provides many of the due process and other limitations imposed by the constitution on state and federal governments. However, and this is a most important point when considering criminal arrest information and convictions involving Indians, the Indian Civil Rights Act does not require counsel for indigent defendants. The legislative history of the Act indicates this omission reflects a deliberate choice by Congress to limit its intrusions into judicial tribal independence. Many of the offenses described in tribal codes are offenses found in any English common law jurisdiction; assault, embezzlement, fraud, forgery, extortion, disorderly conduct, vandalism, liquor violations, fish and game violations, failure to support dependents, compulsory school attendance, etc. The Indian Civil Rights Act prohibits tribes from imposing on anyone punishments exceeding six months imprisonment and a \$500 fine. When tribal courts have exclusive jurisdiction over members residing on the reservation with the enactment of the Major Crimes Act, federal jurisdiction over Indians in Indian country was expanded. The fact that a person is tried for a federal crime does not preclude a subsequent prosecution for a similar or included offense by tribal court. In my experience there have been instances where a tribal arrest was listed in the prior record section of a presentence report that formed the basis for the federal prosecution.

Based on my experience in working on reservations in Arizona and North Dakota, tribal arrest records rarely provide detailed information; jury trials and legal representation are extremely rare with criminal sanctions directly proportional to income or wealth. Those offenders who are well-off usually forfeit bond or pay a fine. Less advantaged offenders are usually given an opportunity to pay off a fine or serve short-stints in tribal jail. Most tribes now depend largely on the same punishments as Anglo society, fines and imprisonment. Given the unique features of tribal court it is my view that tribal convictions should

not be shown in the prior arrest section of a presentence report unless it can be established the defendant was represented by legal counsel admitted to the bar of the state. This is the position of the U.S. Parole Commission and the one that I feel is most correct under the circumstances.

In conclusion, the development of accurate, complete and high quality criminal record data is a key factor in developing sentencing guidelines. While I have personal misgivings about a prospective sentencing model based on a retrospective analysis of a defendant's criminal record as well as other offender characteristics, I recognize the need for a more uniform and systemic approach to sentencing both to maximize the deterrent affect of sanctions applied and to incapacitate those whose criminal records indicate they are serious recidivistic offenders.

I want to thank you and members of the Sentencing Commission for providing me an opportunity to share my thoughts on the use of a defendant's criminal record. I look forward to discussing the matter further on May 22.

Sincerely,


William D. Broome
Chief Probation Officer