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March 7, 1994

The Honorable Richard P. Conaboy
Chairman, United States Sentencing Commission
Federal Judiciary Building
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

Re: Proposed Guideline Amendments
& Issues for Comment-1995 Cycle

Dear Chairman Conaboy:

On behalf of the Practitioners' Advisory Group (hereinafter called "PAG"), I am writing to you to provide the views of our Group concerning the proposed amendments and issues for comment which are before the Commission on the 1995 amendment cycle. As in the past, I thank you for the opportunity to express the views of the PAG on pending amendments and requests for comment. We are also especially grateful in regards to the willingness of the Commission to facilitate our monthly PAG meetings by allowing us to teleconference in members of the PAG who are unable to attend the meetings. We also wish to commend the Commission on the willingness of the leaders of the various Working Groups of the Commission to meet and work closely with liaison members of the PAG on the various Working Groups.

TO AMEND OR NOT TO AMEND THE GUIDELINES

The views of the PAG on this issue have been consistent throughout the period of our existence: we favor change where wisdom and experience call for change and where inter-Circuit conflicts cry out for resolution by the Commission--especially in light of the fact that the Supreme Court has indicated that it is looking to the Commission to resolve most of the problems in applying and interpreting the guidelines. See, United States v. Braxton, 111 S. Ct. 1854 (1991) [Commission has been given the power by Congress to amend guidelines to resolve Circuit

conflicts]. Changes which experience has shown are necessary to promote the purposes of sentencing should be enacted if the Commission is to truly abide by the duties which were entrusted to it by Congress in the enabling legislation.

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COMMENTS ON SPECIFIC AMENDMENT PROPOSALS AND ISSUES FOR COMMENT

The PAG has broken down its comments by following the index to the proposed guideline amendments for public comment (reader friendly version). Thus, our numbered paragraph 1 will be our comment on proposed amendment (or issue for comment) number 1 and so forth. We also are enclosing a disc with this letter on it, in case you wish to print out or edit any of our proposals.

1. Proposed Amendment #1 - HIV Exposure

The PAG supports the general concept of this proposed amendment, but is concerned about how intent will be interpreted. An argument could be made for the position that an individual who engages in casual sexual activity, knowing that he or she is HIV-infected, does so with the expectation and knowledge that the sexual partner is likely to become HIV-infected, and therefore could be deemed to have intended that the partner become so infected. Any new commentary should provide clear guidance regarding how intent is to be determined and indicate that there must be a clear pre-disposed and malicious specific intent on the part of the defendant to cause another to become HIV-infected through sexual activity.

The PAG opposes "**infectious bodily fluid of a person**" being defined expressly as a "**dangerous weapon**" on the grounds that it makes the term overly broad. **Dangerous weapon** is set forth and defined in the Commentary to §1B1.1(d), thereby making it generally applicable throughout the guidelines. To so define **infectious bodily fluid** as a **dangerous weapon** means that any person whose saliva contains an infectious influenza virus could be deemed to be in possession of a **dangerous weapon**, and thereby making it generally applicable to pertinent provisions throughout the guidelines. Even if the term were further narrowed to include "**HIV-infected bodily fluid of a person**" into the definition of a **dangerous weapon**, this still would be overly broad since it would include the bodily fluid of an individual with no knowledge that he or she was HIV-infected, or an individual with knowledge, but whose bodily fluid had no involvement in the particular crime of conviction, e.g., mere possession of a dangerous weapon is a 2 level enhancement under §2B2.1 (Burglary of a Residence or a Structure Other than a Residence).

The PAG supports the amendment of the definitions relating to "serious bodily injury" and "permanent or life-threatening bodily injury" so as to include the "intentional infection by HIV-infected bodily fluid." The PAG emphasizes its position that there must be an intentional infection and that the term "intentional" be incorporated into these two proposed amended definitions. Again, any new commentary should provide clear guidance regarding how intent is to be determined and indicate that there must be a clear pre-disposed and malicious specific intent on the part of the defendant to cause another to become HIV-infected through sexual activity.

The PAG has no opinion as to whether basing enhanced penalties for willful sexual exposure to HIV will have any implications for HIV testing.

2. Proposed Amendment #2 - Minor Assault (§2A2.3)

The PAG believes that §2A2.3 already provides an adequate penalty for violation of 18 U.S.C. § 113(a)(7). No amendment is necessary.

3. Proposed Amendment #3 - Involuntary Manslaughter (§2A1.4)

The PAG believes that §2A1.4 already provides an adequate penalty for violation of 18 U.S.C. § 1112. No amendment is necessary.

4. Proposed Amendment #4 - Kidnapping, Abduction, Unlawful Restraint (§A4.1)

The PAG endorses this amendment and believes that it should be referenced as proposed under Option 2. Although 18 U.S.C. § 1204 is entitled "International Parental Kidnapping," it uses terms like "removes" or "retains" which are significantly less harsh than the terms of the substantive kidnapping statute, 18 U.S.C. § 1201, which contains terms like "seizes," "kidnaps," or "abducts." The heart of 18 U.S.C. § 1204 is "the intent to obstruct the lawful exercise of parental rights." The PAG believes that the underlying conduct of this offense involves interference with a court order - not violent conduct like kidnapping, and therefore is more suitably addressed as obstruction of justice than as kidnapping.

5. Proposed Amendment #5 - Aggravated Sexual Abuse; Sexual Abuse
(§§2A3.1; 2A3.2)

The PAG favors no action at this time. The Commission should complete the study required by § 40112 of the crime bill, disseminate the results, seek comment and only then publish a concrete proposed amendment.

6. Proposed Amendment #6 - Death of the Victim

The PAG favors Option 1 which would amend the Statutory Index to reference the new provisions to guidelines in Chapter Two, Part A, when death results from the underlying offense. Option 1 is favored because by referencing the new provisions to Chapter 2, Part A, the standard of proof for establishing that the death of the victim resulted from the underlying offense will be "beyond a reasonable doubt." Because of the severe potential penalties associated with these types of crimes, the standard of proof must be "beyond a reasonable doubt" instead of "by a preponderance of the evidence."

7. Proposed Amendment #7 - Adequacy of Criminal History Category;
Abusive Sexual Contact (§§4A1.3; 2A3.4)

The PAG favors the proposed amendment which builds on §4A1.3 by specifically listing as a basis for upward departure the fact that the defendant has a prior sentence for conduct similar to the instant sexual offense. As a result, an application note would be added under the Commentary to each of the offenses in Chapter Two, Part A, Subpart Three (Criminal Sexual Abuse), providing for such an upward departure. We oppose changing the offense levels.

8. Proposed Amendment #8 - Offenses Involving Counterfeit Bearer Obligations of the United States; Fraud and Deceit (§§2B5.1; 2F1.1)

The PAG opposes Option 1 because of its automatic enhancement to a level 13 when a dangerous weapon is merely possessed in connection with the §§2B5.1 and 2F1.1 offenses. Enhancement to level 13 would more than double the base offense level of 6 for §2F1.1 when in fact the defendant may have merely possessed a dangerous weapon without necessarily having displayed, brandished or otherwise used it. The present §2F1.1(b)(4) already provides for an automatic enhancement to level 13 "if the offense involved the conscious or reckless risk of serious bodily injury." Since mere possession of a dangerous weapon, with nothing further, is less egregious conduct than required for a subsection (b)(4) offense, it should not be equated and elevated to that same level. If the defendant elevates his or her conduct from mere possession to the conduct included in §2F1.1(b)(4), then adequate penalties are already provided.

The PAG favors Option 2 because it properly provides for an upward departure if warranted. However, PAG believes that any upward departure should be limited to 2 levels for mere possession of a dangerous weapon in both §§2B5.1 and 2F1.1 if the offense does not involve the conscious or reckless risk of serious bodily injury.

The PAG believes that the form of any enhancement for a dangerous weapon should be that used in the current Chapter Two, Part D (Offenses Involving Drugs), particularly in regard to the inclusion of an application note similar to Application Note #3 under the current Commentary to §2D1.1. The current Application Note #3 provides that the enhancement for weapon possession should be applied if the weapon was present, unless it is clearly improbable that the weapon was connected with the offense. It gives as an example that enhancement would not be applied if the defendant, arrested at his residence, had an unloaded hunting rifle in the closet.

9. Proposed Amendment #9 - Unlawful Manufacturing, Importing, Exporting, Trafficking, or Possession: Continuing Criminal Enterprise (§2D1.1)

The PAG favors Option 1, which references this offense to §2D1.1, especially if proposed amendment #36 is approved as proposed by the PAG. Under comments submitted by the PAG as to proposed amendment #36, an enhancement of up to 9 levels under §2D1.1(b)(4) and (7) is proposed for various uses of firearms. The PAG proposal for proposed amendment #36 also advocates a five level enhancement for merely discharging a weapon, whether injury results or not. This would encompass the situation for which the Department of Justice has requested comments as to whether there should be an enhancement for reckless endangerment by firing a weapon into a group of two or more persons when no injury occurs.

10. Proposed Amendment #10 - Providing or Possessing Contraband in Prison (§2P1.2); Drug Offenses Occurring Near Protected Locations (§2D1.2)

Amendment 10 (A).

The PAG does not oppose the enhanced offense level (two levels plus the offense level from §2D1.1) that would be provided by the cross reference in §2P1.2 being expanded to apply to all drug trafficking offenses under 18 U.S.C. § 1791(a)(1); however, the cross reference should not be expanded to cover the offenses under 18 U.S.C. § 1791(a)(2). It is obvious that this cross reference is limited in application and is intended to provide increased punishment for violation of 18 U.S.C. § 1791(a)(1), which is directed at the provider or facilitator of drugs and other controlled substances going to an inmate, rather than for the violation of 18 U.S.C. § 1791(a)(2), which is directed at the inmate who makes, receives, possesses, or obtains the drugs and other controlled substances.

For the same reasons stated above as to the intent and application of the cross reference in §2P1.2, the PAG does not believe that the minimum offense level of 26, provided by the cross reference, should be applied to all methamphetamine offenses. It should be limited to the trafficking violations under 18 U.S.C. § 1791(a)(1) and not the making, receiving, possessing, or obtaining offenses set forth in 18 U.S.C. § 1791(a)(2).

Amendment 10 (B).

In regard to an offense under 21 U.S.C. § 841 that involves distribution of a controlled substance in a federal prison or detention facility, the PAG believes that these offenses should be referenced to §2D1.2, which provides enhanced penalties for controlled substance distribution offenses involving protected locations.

With respect to simple possession of a controlled substance under 21 U.S.C. § 844 that occurs in a federal prison or detention facility, the PAG believes that a 2 level enhancement to §2D2.1 for these possession offenses would be an appropriate enhancement. However, these enhanced offense levels would not reconcile with the offense levels provided for under §2P1.2 (Providing or Possessing Contraband in Prison).

The PAG would recommend reconciling the offense levels under §§2D2.1 and 2P1.2 for simple possession offenses in a federal correctional facility. This could be accomplished by creating two new base offense level categories under §2P1.2 and renumbering two of the existing categories of §2P1.2.

The first new base offense level category under §2P1.2 would be (a) (3) which would include any Schedule I or II opiate, an analogue of these, or cocaine base and which would provide for an offense level of 10. This new base offense level of 10 under §2P1.2 would equate to an offense level of 8 under §2D2.1 for these same drugs, plus its proposed 2 level enhancement for possession in a federal correctional facility.

The second new base offense level category under §2P1.2 would be (a) (4) which would include cocaine, LSD, or PCP and which would provide for an offense level of 8. This new base offense level of 8 under §2P1.2 would equate to an offense level of 6 under §2D2.1 for these same drugs, plus its proposed 2 level enhancement for possession in a federal correctional facility.

The current §2P1.2 base offense level (a) (3) would be renumbered to become (a) (5) and would include controlled substances other than those listed in (a) (3) and (a) (4) above. It would retain its current offense level of 6. This renumbered category equates to an offense level of 4 under §2D2.1 for these same drugs, plus the proposed 2 level enhancement for possession in a federal correctional facility.

The current §2P1.2 base offense level (a) (4) would be renumbered to become (a) (6) and would retain its current offense level of 4. In addition the reference in the current §2P1.2 base offense level category (a) (2) to "LSD, PCP, and narcotic drug" would be deleted because these drugs would be included in the proposed new base offense level categories.

If the Commission agrees to amend the offense level categories of §2P1.2 to make them comparable to those of an enhanced §2D2.1, as proposed by the PAG, then it would be much simpler to merely reference the simple possession of a controlled substance in a federal correctional facility offenses to §2P1.2 rather than to §2D2.1. This would avoid having to amend §2D2.1 to provide for the enhancement and would make the offense more appropriately related to those offenses involving federal prisons and correctional facilities.

11. Proposed Amendment #11 - Drug Offenses Occurring Near Protected Locations (§2D1.2)

The PAG believes the current guideline enhancement is adequate to cover the requirement of Crime Bill § 90102 which directs the Commission to amend the guidelines to provide an appropriate enhancement for a defendant convicted of drug trafficking in protected locations. In light of the fact that it appears that Congress was seemingly unaware of the current enhancement, no additional Commission action is necessary.

The PAG also supports the position of the Federal and Community Defenders that the guidelines should be amended to provide a lower base offense level if an offense is committed in a protected location which has been selected by law enforcement or its agents. Specifically, the PAG supports the specific language set forth in the Additional Issue for Comment which would provide a base offense level of 13.

12. Proposed Amendment #12 - Unlawfully Distributing, Importing, Exporting or Possessing a Listed Chemical (§2D1.11)

The PAG supports the technical amendments to the drug Guidelines. The proposed amendment would conform §2D1.11 to the new terminology to avoid confusion.

13. Proposed Amendment #13 - Unlawful Possession, Manufacture, Distribution, or Importation of Prohibited Flask or Equipment (§2D1.12)

The PAG supports this proposed amendment. We specifically urge the Commission to revise §2D1.12 to provide a three-level reduction in the offense level for cases in which the defendant had reasonable cause to believe, but not actual knowledge or belief, that the equipment was to be used to manufacture a controlled substance.

14. Proposed Amendment #14 - Vulnerable Victim (§3A1.1); Civil Rights (§§2H1.1, 2H1.3, 2H1.4, and 2H1.5)

The PAG supports the general goal of consolidation and simplification embodied in Option 1 of this proposal. The PAG does not take any position on which of the several offense levels should be selected.

15. Proposed Amendment #15 - Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition (§2K2.1)

Consistent with the position of the PAG on the need for Guideline simplification, we support the generic approach reflected in the proposed amendment. We vigorously oppose the Additional Issue for Comment -- the request of the Department of Justice to create a new enhancement for semi-automatic assault weapons.

16. Proposed Amendment #16 - Firearms (\$2K2.1)

The PAG supports Option 1 regarding the offense level for transfer of a firearm to a juvenile. Option 1 would result in a base offense level of 6.

17. Proposed Amendment #17 - Firearms (§2K2.1)

The PAG believes that no action is required. Offenses involving semi-automatic firearms already represent the typical or "heartland" cases.