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U.S. Sentencing Commission
1 Columbus Circle, NE, Suite 2-500
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ATTN: Public Comments

RE: Proposed Guideline Amendments for Sexual Offenses Involving
Intentional Transmission of HIV

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Curtis L. Decker, J.D.

This letter is in response to the Commission's request for public comment under the question of sentencing guideline amendments for persons convicted of offenses involving intentional transmission of Human Immunodeficiency Virus (HIV) through sexual contact.

The National Association of Protection and Advocacy Systems (NAPAS) welcomes this opportunity to comment on the Commission's guideline formulations process. NAPAS is national organization representing federal funded programs that provided professional legal and advocacy services to people with disabilities, including HIV.

For the reasons set forth here, NAPAS opposes the promulgation of a sentencing guideline specifically addressing intentional transmission of HIV infection. Consistent with this view, we believe that the Commission should not amend the guideline definitions of "dangerous weapon," "serious bodily injury" and "permanent or life-threatening bodily injury."

Because of the public health implications of this issue, we stress that in considering the promulgation of a sentencing guideline that is specifically premised on the defendant's disease status (here, HIV infection) the Commission should consider two related issues: First, the Commission should determine whether a new guideline is required to address a sentencing problem that has arisen and which cannot be resolved under existing, general sentencing principles. Second, the Commission should determine whether such a guideline is consistent with public health efforts to control the spread of the disease.

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Neither of these requirements can be satisfied here.

There does not appear to be any current or historical sentencing problem that needs to be addressed by a new, HIV-specific guideline. In fact, with the exception of one reported case in 1988, the prosecution of persons with HIV infection for intentional transmission offenses in the federal courts appears to be, at best, a rarity. There may be several reasons for this apparent lack of cases, not least of them being the reluctance of federal prosecutors to undertake what has traditionally been a responsibility of state and local public health and law enforcement officials. In reality, the federal offenses that might conceivably be appropriate for application of an HIV guideline are very limited. These are primarily the sexual abuse offenses, 18 U.S.C. § 2241-2242. Additionally, the homicide offenses, 18 U.S.C. § 1111-1112, and assault offenses, 18 U.S.C. § 111-112, might possibly apply, although it is not at all that clear under what circumstances HIV transmission might be charged as a crime under these statutes. Accordingly, we take no position on that question.

Assuming that the Commission limits its consideration of this issue to the parameters of the congressional directive, the actual offense behavior is very limited. Congress specified two elements that must be involved in the offense: first, the defendant's knowledge of his or her own HIV status and, second, an intent to transmit HIV through sexual activities.

Congressional concern is thus with a very limited class of cases in which sexual contact is undertaken with the purpose of transmitting HIV. Significantly, the congressional directive does not address offenses in which the defendant is aware of his or her HIV status but acts with reckless disregard or indifference regarding the risk of transmission. Obviously, if Congress was concerned with cases in which the defendant acted with recklessness or indifference about the risk of transmission of HIV, Congress would not have included the phrase "with intent to transmit HIV" in its directive to the Commission.

Given the very limited number of federal crimes in which an HIV-specific guideline would potentially apply, and given the even more narrow offense behavior defined by Congress, an HIV-specific guideline cannot be justified. There is no basis for concluding that current sentencing standards are inadequate and in need of amendment to address this issue. On the contrary, the current guidelines identify grounds for an upward sentence departure as a result of aggravating circumstances, § 5K2.0, and specifically take into account significant physical and

psychological injury, § 5K2.2-3. Although we are not aware of any case in involving HIV transmission in which these guidelines have been applied, they have the advantage of assessing the actual harm that has resulted from the defendant's actions as opposed to imposing an enhancement that is based solely on the defendant's medical status.

The Commission should also consider whether there is any wisdom in increasing incarceration of persons with a life-threatening illness. No one could seriously argue that the current guideline standards, especially given the potential for aggravating circumstance enhancement, will result in sentences that are too lenient. Although many persons with HIV infection continue to live for a significant period of years without symptoms of AIDS, depending on the status of the defendant's health at the time of sentencing, it is statistically likely that in many such cases a sentence imposed under current standards will exceed the

length of the defendant's life.

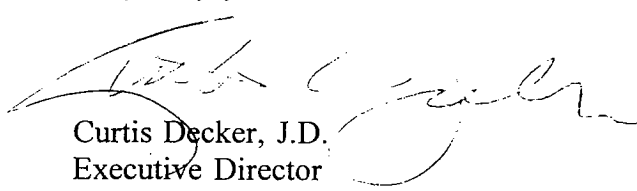
Finally, we turn to the public health implications of this issue. Historically, attempts to address public health issues by criminal sanctions have been unsuccessful, as was made clear in the case of attempting to use criminal laws to address the problem of sexually transmitted disease earlier in this century. With regard to the AIDS epidemic, current public health policy does not support any criminal law intervention. Most significantly, the National Commission on AIDS, which has issued a series of reports and recommendations, has not at any time recommended that criminal sanctions be utilized in any way to respond to the AIDS epidemic. Additionally, the U.S. Public Health Service, Centers for Disease Control and Prevention, has continued to emphasize the need for voluntary, confidential HIV testing, as well as follow-up treatment for those infected. The CDC, like the National Commission on AIDS, does not recommend that criminal laws be utilized to respond to the epidemic. An attempt to use an individual's HIV status as a basis for sentence enhancement would necessarily involve law enforcement intrusion into the defendant's relationship with his or her health care provider and could result in disclosure of otherwise confidential HIV-related information regarding the defendant's HIV status. Such cases weaken public confidence in the confidentiality protections and provide disincentives for persons at risk HIV infection to seek testing and treatment. Even if these guidelines were not applied in an actual case, the fact that the Commission had promulgated an explicit HIV sentence enhancement guideline would further the perception that HIV status itself had been criminalized, again providing a disincentive to persons who would otherwise seek testing and treatment for HIV disease.

In regard to the Commission's solicitation of comments on amending the definitions of "dangerous weapon," "serious bodily injury" and "permanent or life-threatening bodily injury," for the reasons set forth above, there is no need for such a revision. Moreover, such amendments pose additional problems. First, it is not clear in what circumstances such amendments would apply. Congressional concern has been with sexual activities posing a risk of transmission, while amendments to these definitions might apply in cases involving non-sexual assaultive behavior, such as those involving spitting, biting, or similar behavior. Such cases involve circumstances concerning which the degree of risk of HIV transmission cannot be generalized. Additionally, to add HIV, but not other infectious diseases to the definitions, would pose the risk that persons with HIV would be sentenced on an enhanced basis, but persons with other life-threatening infectious illness (for example, hepatitis B virus or multi-drug resistant tuberculosis) would not face an equivalent sentencing standard. In order to ensure sentencing fairness, the Commission would need to undertake a review of infectious diseases, their potential for mortality or other harm, or other conditions before attempting to amend the definitions. Additionally, the Commission would need to specify the circumstances that give rise to the risk of HIV transmission. Thus, although it is HIV itself that might be deemed a "dangerous weapon," HIV is not present in isolation when it is transmitted; it exists in one or more human body fluids. Transmission of HIV occurs only under specific instances of exposure, most typically involving blood to blood contact. Unless the Commission amends the definitions to specify what fluids may transmit HIV and under what circumstances (e.g. duration of exposure, degree of contact to an open wound as opposed to intact skin, specific body fluid involved), a general definitional amendment would not in any way assist the courts in identifying cases in which to impose an enhancement.

Needless to say, any attempt to develop such specific standards would involve a scientific undertaking that is beyond the Commission's expertise. Furthermore, the resulting guideline would single out HIV status, as opposed to any other infectious disease status, that could result in harm to a crime victim.

In conclusion, NAPAS urges the Commission not to enhance the sentences or introduce HIV-specific amendments to existing standards. We have had roughly fourteen years of experience with AIDS epidemic, and there is nothing to suggest that a change in sentencing is now warranted in response to it. We also believe that an HIV specific standard will do little to advance legitimate law enforcement objective, but instead will further stigmatize persons with HIV infection who are already subjected to a widespread discrimination and unfair treatment in our society. The Commission would indeed be wise to avoid addressing a public health issue that is more properly left to public health officials.

Very truly yours,



Curtis Decker, J.D.
Executive Director