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Report to the Congress:

Adequacy of Penalties for the Intentional Exposure of Others through Sexual Activity to the Human Immunodeficiency Virus

(as directed by section 40503(c) of Public Law 103-322)

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UNITED STATES SENTENCING COMMISSION
March 1995



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REPORT TO CONGRESS:
ADEQUACY OF PENALTIES FOR THE INTENTIONAL EXPOSURE OF OTHERS
THROUGH SEXUAL ACTIVITY TO THE HUMAN IMMUNODEFICIENCY VIRUS

I. INTRODUCTION

A. The Statutory Directive

This report to Congress is submitted by the United States Sentencing Commission, an independent agency in the judicial branch of government, in response to a directive in the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 1089 Stat. 1796 (1994). Section 40503(c) of that Act provides: "Not later than 6 months after the date of the enactment of this Act, the United States Sentencing Commission shall conduct a study and prepare and submit to the committees on the Judiciary of the Senate and the House of Representatives a report concerning recommendations for the revision of sentencing guidelines that relate to offenses in which an HIV infected individual engages in sexual activity if the individual knows that he or she is infected with HIV and intends, through such sexual activity, to expose another to HIV."

B. Results of the Study

Based on its empirical analysis of sentencing data and review of relevant case law, the Commission has the following observations and preliminary conclusions:

- Current federal law does not specifically criminalize the knowing, intentional exposure of others to HIV (human immunodeficiency virus) through sexual activity; however, if such conduct occurs within federal jurisdiction and is determined to constitute aggravated assault or attempted murder, or occurs during the course of another crime such as sexual assault, it may be punishable under current law.
- A review of 235 federal sexual abuse cases sentenced in fiscal year 1993 reveals that intentional exposure of others to HIV presently does not pose a significant problem in such offenses. It may, however, present a potential concern in the future, particularly within the context of predatory sexual attacks within the federal prison system.
- During the current guideline amendment cycle, which culminates in the submission to Congress by May 1, 1995, of proposed guideline amendments, the Commission will review public comment (not all of which will have been received by the submission date of this Report) and determine whether specific enhancements should be added in the assault and sexual abuse guidelines to address this conduct. Preliminarily, based on the apparent relative infrequency of intentional exposure of others to HIV through sexual activity, a discretionary upward departure from the guideline range may be the preferred way of accounting for this conduct.

C. Background

Acquired immune deficiency syndrome (AIDS) is the clinical syndrome caused by infection from HIV. This viral infection reduces the ability of the body's immune system to fight off infections and diseases, ultimately resulting in death. The time from initial infection with HIV to diagnosis with AIDS is approximately ten years. Death generally occurs within four years from an AIDS diagnosis. HIV is transmitted through exposure to infectious bodily fluids (primarily semen and blood). Primary routes of administration are through intimate sexual contact, sharing of needles during use of illicit drugs, from mother-to-child perinatally or through breastmilk, and receipt of contaminated blood or blood products.¹

II. OPERATION OF THE SENTENCING GUIDELINES

Given the absence of a specific federal statute punishing the willful exposure of others to HIV, there is no sentencing guideline or policy statement that relates specifically to knowingly and intentionally infecting another human being with HIV. Rarely would offense behavior consistent with the knowing and intentional infection of another to HIV occur within federal jurisdiction, with that behavior generally limited to the special territorial and maritime jurisdiction of the United States. An exception, of course, would be when such behavior occurs within the federal prison system.

If the willful exposure of others to HIV is found to be criminal under existing federal attempted murder or aggravated assault statutes and that conduct occurs within federal jurisdiction, any defendant prosecuted and convicted in federal court of those offenses would be sentenced under guideline 2A2.1 (Assault With Intent To Commit Murder; Attempted Murder) or guideline 2A2.2 (Aggravated Assault). In order for a defendant to be prosecuted for aggravated assault, such conduct would have to be found to involve a dangerous weapon or result in serious bodily injury and otherwise come within the scope of one of the federal aggravated assault statutes. As noted above, federal jurisdiction for aggravated assault and attempted murder generally is limited to the special territorial and maritime jurisdiction of the United States.² Therefore most cases prosecuted involve conduct that occurs on military bases, national parks, or Native-American reservations.

If the willful exposure of others to HIV occurs in connection with a federally prosecuted sexual abuse offense, the sentencing guideline for criminal sexual abuse (§2A3.1) would apply. This guideline contains enhancements for the presence or use of a dangerous weapon and for permanent or life threatening bodily injury. These aggravating factors are not presently defined to cover expressly intentional exposure to HIV-infected bodily fluid. As is true for assaultive offenses

¹ Abe M. Macher, HIV Disease/AIDS: Medical Background, in AIDS and the Law 1, 2-19 (2d ed. 1992).

² See, e.g., 18 U.S.C. §§ 113(b), 1113.

generally, federal jurisdiction for sexual abuse cases is limited to the special territorial and maritime jurisdiction of the United States and federal prisons.³

Intentional exposure of another to HIV through sexual activity also may be relevant under several Commission policy statements describing general circumstances that may warrant a sentence above the guideline range. These include §5K2.0 (Grounds for Departure), §5K2.2 (Physical Injury), §5K2.3 (Extreme Psychological Injury), and §5K2.8 (Extreme Conduct).

III. EMPIRICAL ANALYSIS

The Commission examined 235 federally prosecuted cases sentenced in fiscal year 1993 in an effort to determine the frequency with which the intentional exposure of others to HIV through sexual activity was an issue at sentencing. All cases in which the defendant was convicted of any type of sexual abuse were included in the review. Cases involving convictions for certain crimes of violence also were included to determine the extent to which a crime involving sexual abuse may have resulted in a conviction under a statute unrelated to sexual abuse. Additionally, pornography cases were reviewed to obtain information on whether sexual assault or abuse occurred in the offense behavior.⁴ Of the 235 cases reviewed, HIV was mentioned in the presentence report of only four (1.7%) cases. Only one case contained an indication that the defendant intentionally exposed the victim to HIV and that case did not involve a sexual crime (the defendant was convicted under 18 U.S.C. § 113(f) (Assaults within the Maritime and Territorial Jurisdiction)). There is no indication from the presentence report or other court documents that the defendant's intent to expose the victim to HIV was specifically considered at sentencing.

IV. CASE LAW ANALYSIS

As indicated above, Congress has not created a specific criminal statute targeting willful exposure of others to HIV. A minority of states, however, has enacted legislation to punish the intentional exposure or risk of exposure to HIV. Although there is considerable variation among the

³ See, e.g., 18 U.S.C. § 2241.

⁴ The following selection criteria were used: cases involving the guidelines specifically applicable to sexual abuse offenses - §2A3.1 (Criminal Sexual Abuse: Attempt to Commit Criminal Sexual Abuse), §2A3.2 (Criminal Sexual Abuse of a Minor (Statutory Rape) or Attempt to Commit Such Acts), §2A3.4 (Abusive Sexual Contact or Attempt to Commit Abusive Sexual Contact); cases involving statutes specifically applicable to sexual abuse cases - 18 U.S.C. §§ 2241 (Aggravated Sexual Abuse), 2242 (Sexual Abuse), 2252 (Certain activities relating to material involving the sexual exploitation of minors), 2258 (Failure to report child abuse); and cases involving the guidelines applicable to other assaultive behavior - §2A1.4 (Involuntary Manslaughter), §2A2.1 (Assault with Intent to Commit Murder; Attempted Murder), §2A2.2 (Aggravated Assault), and §2A2.3 (Minor Assault).

state statutes, they generally make exposing a person (other than one's spouse) to HIV through sexual activity a criminal offense.⁵

A review of reported federal cases reveals no case on the issue of HIV-infected persons engaging in sexual activity and intentionally exposing others to HIV.⁶ The issue of punishing a defendant's intentional exposure of others to HIV has arisen in the context of a HIV-infected inmate who bit several prison guards and who was prosecuted under federal assault statutes.⁷ In that case, the Eighth Circuit held that the defendant's mouth and teeth were deadly and dangerous weapons. The court further held that the evidence was sufficient to support the conviction whether or not the defendant was HIV-infected.⁸

Several state appellate courts have affirmed enhanced sentences based on HIV-infected individuals engaging in sexual activity and intentionally exposing others to HIV.⁹ Similar issues apparently have not yet resulted in any reported opinions in federal courts.

V. CONCLUSIONS

The various assault and sexual misconduct sentencing guidelines do not provide for a specific enhancement based on the defendant's conduct of intentionally exposing others to HIV. A review of cases sentenced pursuant to these guidelines shows only a few instances when HIV exposure was an issue. Because the circumstance of willful exposure to HIV appears to occur infrequently, an upward departure from the guideline range may be the most appropriate way to handle the issue at this time. The Commission's general departure policy statement, §5K2.0, states that the courts may depart from the established guideline range if the court finds "that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described." Intentional exposure of another to HIV also may be relevant under several of the

⁵ Jurisdictions having such laws include Florida, Georgia, Idaho, Illinois, Louisiana, Michigan, Missouri, Nevada, Oklahoma, and Washington.

⁶ There are several state and military justice cases on the issue. See, e.g., People v. Dempsey, 610 N.E. 2d 208 (Ill. 1993); United States v. Johnson, 30 M.J. 53 (C.M.A.), cert. denied, 498 U.S. 919 (1990); United States v. Wornack, 29 M.J. 88 (C.M.A. 1989).

⁷ United States v. Moore, 846 F.2d 1163 (8th Cir. 1988).

⁸ Moore is a preguidelines case; i.e., the offense occurred before November 1, 1987.

⁹ See, e.g., State v. Farmer, 805 P.2d 200 (Wash. 1991); Cooper v. State, 539 So. 2d 508 (Fla. 1989); State v. Guyante, 783 P.2d 1030 (Or. 1989).

more specific Commission departure provisions, including Physical Injury (§5K2.2), Extreme Psychological Injury (§5K2.3), and Extreme Conduct (§5K2.8).

Recognizing that the intentional exposure of others to HIV clearly aggravates the harm associated with assaultive crimes, the Commission sees this matter as a serious sentencing issue that warrants careful monitoring. To supplement the research and data analysis described in this Report, the Commission currently is seeking public comment on the following issues:

Issues for Comment: Section 40503 of the Violent Crime Control and Law Enforcement Act of 1994 directs the Commission to conduct a study and consider appropriate guideline amendments relating to offenses in which an HIV-infected individual engages in sexual activity with knowledge of his or her HIV infection status and with the intent through such sexual activity to expose another to HIV. A report is to be submitted to Congress by March 13, 1995. The Commission invites comment on any aspect of this issue. In addition, the Commission invites comment on whether the infectious bodily fluid of a person should be defined expressly as a "dangerous weapon." The Commission further invites comment on whether the definitions relating to serious bodily injury and permanent or life-threatening bodily injury should be amended to expressly include infection by HIV-infected bodily fluid. The Commission also invites comment on whether basing enhanced penalties for willful sexual exposure to HIV will have any implications for HIV testing behavior.

As part of the ongoing guideline amendment process, the Commission will carefully consider written public comment, together with testimony at its March 14, 1995, public hearing on proposed amendments before making final decisions on these issues. Should this process support the need for amendments to address more effectively the issue of intentional exposure of others to HIV, the Commission intends to promulgate any needed amendments and submit them to Congress for review no later than the May 1 statutory deadline.¹⁰

¹⁰ See 28 U.S.C. § 994(p) (1993).