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COLUMN: LEGISLATION: THE VIOLENT CRIME CONTROL AND LAW ENFORCEMENT ACT OF 1994: DRUG CRIMES AND PENALTIES

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TEXT:

[*45] The Violent Crime Control and Law Enforcement Act of 1994 became effective on September 13, 1994 when it was signed by President Clinton. It is the first Omnibus Crime Bill to be passed by Congress since 1988.

Congressional approval of the provisions of the act took almost a year. In November 1993, the Senate passed a \$ 22.3 billion measure. In April 1994, the House passed its own \$ 28 billion bill. At the conclusion of the Senate/House conference in July 1994, the cost of the bill had grown to \$ 33.5 billion.

In August 1994, the House defeated the "Rule" governing debates and amendments, and proceeded to pass a second conference report. The provisions of this conference report were ratified by the Senate and sent to President Clinton for his signature. The final price tag of the crime bill is \$ 30.2 billion.

New Drug Crimes And Penalties

The principal drug offense provisions of the Violent Crime Control and Law Enforcement Act of 1994 involve penalty enhancements for drug trafficking (1) in prisons, (2) near schools, public housing and truck stops, and (3) involving minors for distribution. The act also creates an offense of advertising illegal drugs.

Drug Trafficking In Prison

18 U.S.C. § 1791 is amended to provide enhanced penalties for possessing or providing contraband in prison, and to require a sentence for a violation of this section to run consecutively to the sentence imposed for the underlying drug offense (Violent Crime Control and Law Enforcement Act, § 90101).

Smuggling And Using Drugs In Federal Prisons

Section 90103 of the act requires the Federal Sentencing Commission to amend the sentencing guidelines to increase penalties for simple possession of controlled substances in

federal prisons and detention centers (under *21 U.S.C. § 844*), for smuggling controlled substances into prisons or detention centers, and for felony distribution within such facility. The court is prohibited from granting probation for these offenses.

Distribution Or Manufacturing Drugs In Or Near Schools And Colleges

The Federal Sentencing Commission is directed to increase guideline penalties for a violation of *21 U.S.C. § 860*, which provides increased statutory maximum penalties for distribution, possession with intent to distribute or manufacture of a controlled substance in, on or within 1000 feet of schools, colleges, playgrounds, youth centers, and video arcade facilities. ("Drug-Free Zones") (Violent Crime Control and Law Enforcement Act, § 90102).

Drug Activity Near Public Housing

Section 320107 of the Violent Crime Control and Law Enforcement Act further amends *21 U.S.C. § 860* by expanding the list of prohibited areas to include areas within 1000 feet of public housing.

Using Minors To Distribute Drugs

21 U.S.C. § 860 is amended yet further to provide that any person over 21 who uses a person under 18 to assist in distributing drugs or avoiding detection or apprehension for illegal drug activity in the listed drug-free zones, shall be subject to three times the maximum term of imprisonment under *21 U.S.C. 841*. (Violent Crime Control and Law Enforcement Act, § 140006).

Section 140008 of the act directs the sentencing commission to enact appropriate sentence enhancements for defendants over 21 years of age who are convicted of an offense if they involved a minor in its commission.

Drug Free Truck Stops

Section 180201 of the Violent Crime Control and Law Enforcement Act creates "The Drug Free Truck Stop Act," which provides that distribution or possession with intent to distribute a controlled substance within 1000 feet of a truck stop or safety rest area shall be subject to twice the maximum term of imprisonment under *21 U.S.C. 841* for a first offense, and three times the maximum for a second offense. This section also directs the sentencing commission to enact enhanced guidelines for these offenses.

Advertising Illegal Drugs

21 U.S.C. § 843 is amended to add an additional offense of placing an advertisement in a publication either seeking to obtain or offering to provide a Schedule I controlled substance. The maximum penalty for a first offense is four years. (Violent Crime Control and Law Enforcement Act, § 90106).

Other Crimes And Penalties Concerning Drugs

Many other provisions of the act, including those pertaining to the death penalty, three strikes, firearms offenses, and street gangs provide for increased penalties when drugs are involved. Two provisions, the mandatory minimum safety valve, and the substance abuse treatment in prison section, allow for reduced sentences.

[*46] Death Penalty

Section 60001 of the act creates the "Federal Death Penalty Act of 1994," to be codified at *18 U.S.C. § 3591, et. seq.* The act authorizes the death penalty for the following offenses involving drugs:

- *Continuing Criminal Enterprise*

18 U.S.C. § 3591(b) authorizes the death penalty for a defendant convicted of a Continuing Criminal Enterprise under *21 U.S.C. § 848(b)*, if the quantity of drugs involved in the offense exceeds either twice the amount specified in *§ 848(b)(2)(A)* or twice the gross receipts specified in *§ 848(b)(2)(B)*; or if the defendant is a principal administrator or organizer under *§ 848(b)(1)*, and he either attempts to kill or directs or assists someone else to attempt to kill a public officer, juror, witness or a member of their family, to obstruct the investigation or prosecution of the enterprise.

The quantity of drugs specified in *§ 848(b)(2)(A)* is 300 times the amount set forth in *21 U.S.C. § 841(b)(1)(B)*. For marijuana, this is 100 kilograms or 100 plants. Thus, 30,000 kilos or plants of marijuana expose a principal administrator or organizer to life imprisonment, and twice that amount, 60,000 kilos or plants, qualifies him for the death penalty.

The amount of gross receipts specified in *§ 848(b)(2)(B)* is \$ 10 million during any 12-month period of the existence of the enterprise.

In deciding whether to impose the death penalty under this section, aggravating factors to be considered are set forth in *18 U.S.C. § 3592(d)*. They include previous conviction of an offense for which a sentence of death or life imprisonment was authorized; two or more prior felony convictions involving either drugs or the infliction of serious bodily injury or death on another person; one prior state or federal conviction for a drug offense for which a sentence of *five years* or more was authorized; use of a firearm in committing the offense or in furtherance of the criminal enterprise, or directing another to do so in order to threaten or injure a person; distribution of drugs to persons under 21 or near schools, youth facilities or public housing; using minors to distribute drugs; and importation, distribution or manufacture of drugs mixed with a potentially lethal adulterant if the defendant was aware of it.

Any other aggravating factor may be considered provided notice has been given to the defendant.

- *Two or More Felony Drug Convictions (Aggravating Factor for Homicide)*

Under *18 U.S.C. § 3592(c)(10)*, two or more state or federal convictions for any felony involving the distribution of drugs is an aggravating factor to be considered when deciding whether to impose a death sentence for homicide.

- *Indiscriminate Use Of Weapons To Further Drug Conspiracies*

Section 60008 of the act creates the "Drive By Shooting Prevention Act of 1994," to be codified at *18 U.S.C. § 36*.

The provisions of this act apply to "major drug offenses," which are defined as a continuing criminal enterprise; a conspiracy under *21 U.S.C. 846* or *963*; or a drug offense for which there is a mandatory minimum ten-year penalty under *841(b)(1)(A)* or *960(b)(1)*.

The act provides that any person who, in furtherance of a "major drug offense" and with the intent to intimidate or injure someone, fires a weapon into a group of two or more persons and kills someone, may be sentenced to death if the killing is a first-degree murder.

(If the killing is a murder other than a first-degree murder, the maximum penalty is life.) First-degree murder is defined in *18 U.S.C. 1111(a)*.

- *Gun Murders During Drug Trafficking Crimes*

18 U.S.C. § 924 is amended to add a new subsection (i), authorizing the death penalty for a person who, during the course of an offense under 924(c) (using a firearm during or in relation to a drug offense), causes the death of someone through the use of a firearm, if the killing is defined as a murder under *18 U.S.C. 1111(a)*. (Violent Crime Control and Law Enforcement Act, § 60013).

Three Strikes

18 U.S.C. § 3559 is amended to provide for mandatory life imprisonment for persons convicted of certain third felonies. (Violent Crime Control and Law Enforcement Act, § 70001).

This section applies to persons convicted of a *serious violent felony* in *federal court*. "Serious violent felony" is defined in § 3559(c)(2)(F) as murder; manslaughter (other than involuntary); assault with intent to commit murder; assault with intent to commit rape; aggravated sexual abuse and sexual abuse; abusive sexual contact; kidnapping; aircraft piracy; robbery (unless a weapon was not used or threatened to be used and death or serious bodily injury did not occur); carjacking; extortion; arson (unless the offense posed no threat to human life and the defendant so reasonably believed); firearms use; and attempt, solicitation and conspiracy to commit these offenses.

"Serious violent felony" also includes any other offense punishable by a maximum term of ten years or more that has as an element the use, attempted use, or threatened use of physical force against another person, or that involves a substantial risk of such force.

A person convicted in federal court of a serious violent felony will be sentenced to life imprisonment if he has been previously convicted of two or more state or federal serious violent felonies, or one serious violent felony and one *serious drug offense*.

A serious drug offense is defined in *18 U.S.C. 3559(c)(2)(H)* as a state or federal drug offense that if prosecuted in federal court would be subject to a ten-year mandatory minimum penalty under *21 U.S.C. 841(b)(1)(A)*, 848, or *960(b)(1)(A)*.

In order for the life sentence under this section to apply, the prior felonies must be final convictions and must have occurred on separate occasions. Further, each serious violent or drug felony used as a basis for sentencing, other than the first, must have been committed after the defendant's conviction of the preceding serious violent or drug felony.

If one of the felonies used to support a life sentence under this section is later found unconstitutional, or if the conviction is later set aside because of factual innocence, the defendant may be resentenced to a sentence of less than life.

A defendant who reaches the age of 70 and has served at least 30 years of the sentence may be released if the Federal Bureau of Prisons decides that he does not pose a danger to society or another person. This is the so-called geriatric provision, enacted primarily to limit the government's liability for medical expenses of elderly prisoners.

Firearms Offenses

Section 110501 of the act directs the sentencing commission to increase guideline penalties for a violation of *18 U.S.C. § 924(c)* (use of a firearm during and relation to a drug trafficking offense) if the firearm involved is a semi-automatic weapon.

A new subsection (j) is added to *18 U.S.C. § 924*. This provision creates a new crime of smuggling a firearm into a prison with the intent to engage in or promote a drug offense. It carries a penalty of up to ten years. (Violent Crime Control and Law Enforcement Act, § 110503).

Section 110513 directs the sentencing commission to increase guideline penalties for defendants convicted under *18 U.S.C. § 922(g)* (prohibiting felons and others from [*47] sending and receiving firearms) if they have a prior serious drug felony conviction.

Criminal Street Gangs

Section 150001 of the act creates a new offense for members of "criminal street gangs." It will be codified at *18 U.S.C. § 521*.

The statute first defines "criminal street gang." It then provides for increased penalties of up to ten years for a defendant convicted of either a federal violent crime or a federal drug felony that carries a maximum penalty of not less than five years, if the offense involved the following circumstances:

- (1) the defendant participated in the gang with knowledge of the gang's ongoing involvement in such illegal drug activity,
- (2) the defendant intended to promote the felonious gang activity or maintain or increase his position in the gang, and
- (3) within the past five years, the defendant was previously convicted of a state or federal drug offense which authorized a penalty of not less than five years, or a federal or state crime of violence or other felony involving a risk that physical force would be used during the offense.

Mandatory Minimum Safety Valve

18 U.S.C. § 3553 is amended to add a new subsection (f) which limits the applicability of mandatory minimum penalties for drug offenses in certain cases.

The provision provides that the court may sentence a person convicted of a non-violent felony drug offense (except continuing criminal enterprise) "without regard to any mandatory minimum sentence," if all of the following criteria are met:

- The defendant does not have more than one criminal history point under the sentencing guidelines;
- The defendant did not use or threaten violence, or possess a firearm or dangerous weapon, or induce another to do so in connection with the offense;

- The offense did not result in death or serious bodily injury;
- The defendant did not have a supervisory role under the sentencing guidelines and was not engaged in a continuing criminal enterprise; and
- The defendant, not later than the time of sentencing, has "truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan . . ." If the defendant has no useful or relevant information, or the government is already aware of it, he may still receive the reduction.

If the defendant meets *all* of the above criteria, the court may sentence him within the sentencing guideline range for the offense and disregard the mandatory minimum penalty. For an offense with a five-year mandatory minimum sentence, the court may not depart below a 24-month sentence under this section.

While the provision does not address other departures, it would appear that the court could grant a further downward departure from the guideline sentence (and even from 24 months) if other departure grounds are present.

It is unclear whether the defendant, in providing information to the government about the offense and relevant conduct, must provide information about other persons' involvement as well as his own.

The provision applies to all *sentences imposed* on or after September 23, 1994, the tenth day after enactment of the Violent Crime Control and Law Enforcement Act. (Section 80001).

Substance Abuse Treatment In Prison

Section 32001 of the act amends *18 U.S.C. § 3621* to allow up to a one-year sentence reduction for defendants convicted of a non-violent offense who complete a residential substance abuse treatment program in federal prison.

The amendment further provides that the Bureau of Prisons (subject to the availability of appropriations) shall make such programs available to all prisoners by 1997, and to at least 50 percent of its prisoners by the end of 1995.

Miscellaneous Provisions Affecting Drug Offenders

Other provisions of the act pertaining to [*48] drug offenders provide for:

- Mandatory drug testing of drug offenders on probation, parole and supervised release, with certain exceptions. (Section 20414, creating *18 U.S.C. § 3608*);
- Mandatory revocation of probation and supervised release, and mandatory imposition of a jail term, for possession of a controlled substance or firearm, or refusal to take a drug test. (Section 110505, amending *18 U.S.C. § 3583*, and Section 110506 amending *18 U.S.C. § 3565(a)*);
- Notification to chief state and local law enforcement officers of drug offenders' imminent release from custody on supervised release or change of address while

on supervised release, with details of the offenders' offense and criminal history. This applies to persons convicted of any federal drug felony (as well as to violent offenders). (Section 20417).

- Notification by the clerk of a state or federal criminal court to the U.S. Attorney in both the district where the defendant lives and where he is charged, if cash bail of more than \$ 10,000 is received and the defendant is charged with any federal offense involving a controlled substance, or a similar state drug offense. The clerk must also file a return (an 8300 Form) with the Internal Revenue Service. (Section 20415)

Comparison Of Penalties With Prior Law

Except for the death penalty eligible offenses, the act does not substantially increase penalties for drug offenses, as demonstrated by the following penalties which were in effect at the time the act was passed by Congress and approved by President Clinton.

21 U.S.C. 841(b)(1)(A): Provides for life imprisonment for a serious drug felony, regardless of whether a weapon or violence is involved, if the defendant has two or more prior state or federal felony drug convictions. A mandatory minimum 20-year sentence is authorized if he has one prior such conviction.

18 U.S.C. 924(c): Provides for the imposition of a five-year mandatory sentence consecutive to any sentence imposed for a drug offense, if a firearm is used during and in relation to a drug crime. If the firearm is a short-barreled rifle or shotgun, the penalty for a first offense is ten years. If the firearm is a machine gun, destructive device, or is equipped with a silencer, the penalty for a first offense is 30 years. If a person is convicted of more than one drug offense, there is a five-year consecutive sentence imposed for each offense in which a firearm was used.

For a second or subsequent conviction under this section, the mandatory minimum consecutive penalty is life imprisonment for a machine gun, destructive device or silencer, and 20 years for other firearms.

Career Offender Sentencing Guidelines: These guidelines apply to a defendant convicted of a violent crime or drug offense who has two or more prior state or federal convictions of either a crime of violence or drug offense. In all instances, a career criminal's criminal history category under the guidelines is set at level six (the highest). In addition, the offense level of the offense of conviction is significantly increased. For most drug offenses, this results in a sentencing range of between 20 years (level 32) and life (level 37).

Armed Career Criminal Sentencing Guidelines: These guidelines apply to defendants convicted of a violation of *18 U.S.C. § 922(g)*, who have three or more prior convictions for a violent felony or a serious drug offense, or both, as defined in *18 U.S.C. § 924(e)(2)*. Under *18 U.S.C. § 924(e)*, a mandatory minimum fifteen-year sentence is required, however, if the guideline sentence (using the career offender table) is higher (which is almost always the case), the higher guideline sentence is imposed.

Continuing Criminal Enterprise, 21 U.S.C. § 848: Provides for a mandatory minimum sentence of 20 years, and a maximum sentence of life for a defendant without a prior felony drug conviction. The statute applies to a defendant who commits a federal felony drug offense, as part of a continuing series of such offenses, which he undertakes in concert with

five or more persons with respect to whom he occupies a position of organizer, supervisor or manager, and from which offenses he obtains substantial income or resources. If the defendant has a prior federal felony drug conviction, the mandatory minimum sentence is increased to 30 years.

21 U.S.C. § 848(e)(1) provides for the imposition of the death penalty for an intentional killing during the illegal activity of the enterprise.

21 U.S.C. § 859: Provides that a person over 18 who distributes a drug to a person under 21 is subject to twice the maximum penalty for the drug offense under *21 U.S.C. § 841*. If the defendant has a prior conviction under this section, the penalty can be three times the maximum penalty. The same doubling and tripling of statutory penalties has also existed in *21 U.S.C. 860* and *861* with respect to drug activities in or near prohibited places (schools, playgrounds, swimming pools, video arcades), and drug activities in which a person over 18 uses a person under 18 to assist in distribution or avoiding detection.

Conclusion

The Violent Crime Control and Law Enforcement Act of 1994 does not appreciably increase sentences for drug offenses over existing federal statutes and sentencing guidelines. The new federal death penalty offenses, with the exception of the provision authorizing the death penalty for a defendant convicted of being a principal administrator of a continuing criminal enterprise involving twice the specified amount of drugs or gross proceeds, are not true drug offenses. In that these offenses require an actual, threatened or attempted killing, they are really crimes of violence, many of which would have qualified for the existing death penalty as first-degree murder under *18 U.S.C. § 1111*.

The Violent Crime Control and Law Enforcement Act is more a measure of election year politics than increased punishment. Of course, this may well change with the Republicans' promised Crime Bill II, scheduled for the new year as part of their Contract With America.

With increasing evidence that longer sentences and three-strike proposals have little impact on crime, but result in greatly increased prison costs, danger to police and correction officials and racial disparity, Congress would do far better to develop alternative strategies, rather than another crime bill, to combat violent crime in this country. Congress should seriously consider implementing reductions in prison sentences for all non-violent drug offenses to make space for truly violent offenders; redirecting and allocating substantial resources for prevention and treatment programs instead of prison cells for drug offenders; fully funding Head Start and other educational programs to ensure that all children have an equal chance to succeed; and rebuilding the inner cities and providing education, vocational training and employment opportunities to those in need of assistance.

Unfortunately, at present, the politics of contraband may not allow it.