



Families Against Mandatory Minimums
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Summary of HR 1528 “Defending America's Most Vulnerable: Safe Access to Drug Treatment and Child Protection Act of 2005”

AMENDMENTS TO SENTENCING STATUTE

18 U.S.C. § 3553 Imposition of a sentence (amended by sec. 12 “Sentencing protections”)

- **Eliminates** consideration at sentencing of a defendant’s need for education, vocational training, medical care, or other correctional treatment
- **Virtually eliminates** downward departures by limiting consideration of enumerated sentencing factors (including encouraged factors) to sentences at or above the minimum of the guideline range
- **Permits** downward departures for substantial assistance and fast track program
- **Prohibits** downward departures for substantial assistance unless the government makes a substantial assistance motion
- **Establishes** procedures in the event the court seeks to grant a sentence below the guideline range:
 - court must provide parties 20 days written notice of the intention to impose a below range sentence which includes particular sentence, supporting factors, why the sentence is reasonable and how it avoids unwarranted disparity
 - court must permit parties to brief the issue
 - court must conduct a full evidentiary hearing on reasonableness and disparity
 - **Delineates** the information that may and may not be admitted at such hearings:
 - Sentencing information from the Commission may be received
 - Evidence about the sentence one would have received in state court, the sentence another defendant received as a result of cooperation or due to an early disposition program may not be received.

NEW OFFENSES AND NEW OR INCREASED MANDATORY MINIMUMS

21 U.S.C. 841(b) (amended by Sec. 11 “Life imprisonment without release for drug felons and violent criminals convicted a third time”)

- **Expands** the provision for life without parole for persons with 2 or more prior drug felony or crime of violence convictions to include the following sections and new

provisions (detailed in the rest of this analysis): 21 U.S.C 849, 856, 858 and Sec. 422, 424, 425, and 426

21 U.S.C 856: Maintaining drug-involved premises affecting children (amended by Sec. 10 “Protecting human life and assuring child safety”)

- **Adds** provision that makes it unlawful to maintain, manage, lease, etc. a place in order to knowingly store a controlled substance
- **Adds** new penalties and fines if the violation involves or is intended to involve a person under 18 or an incompetent person:
 - **Adds** \$2,000,000 fine for an individual and \$8,000,000 for an organization
 - **Adds** new mandatory minimum of 5 years (maximum life) for any person and 10 years (max life) for a parent, guardian, or a person responsible for the care of supervision of the minor.

21 U.S.C. § 858: Endangering human life while illegally manufacturing controlled substance (amended by Sec. 10: “Protecting human life and assuring child safety”).

- **Increases** statutory maximum from ten years to life
- **Adds** new 3-year mandatory minimum for violating statute (maximum life)
- **Adds** new 5-year mandatory minimum for violation of the statute in a way that creates a substantial risk of harm to a person younger than 18 or an incompetent person.

21 U.S.C. § 859: Distribution to persons under 21 (amended by Sec. 2 (a) and (b) “Protecting children from drug traffickers: distribution to persons under 21 years”)

- **Adds** attempt or conspiracy to prohibited conduct
- **Establishes** a mandatory minimum sentence of ten years for the first violation of the new offense of distribution to a person under 18 by a person at least 21 years old, regardless of any maximum term of imprisonment
- **Adds** a new mandatory sentence of **life in prison** for a second conviction of distribution to a person under 18 by a person at least 21 years old or for a first conviction after a prior conviction for a felony drug offense has become final, regardless of any maximum term of imprisonment.

21 U.S.C. § 860. Distribution or manufacturing in or near schools or colleges (amended by Sec. 2(c))

- **Adds** attempt or conspiracy to penalized conduct
- **Applies** range of 1000 feet for all protected facilities
- **Adds** public library and daycare facilities to list of protected facilities
- **Increases** mandatory minimum under the statute from one to five years for a first conviction and from three to ten years for a second conviction or for a first conviction after a prior conviction for a felony drug offense has become final.

21 U.S.C. § 860 (c) Employing children to distribute drugs near schools or playgrounds (amended by Sec. 2(e) “Employing children in distribution near protected places”)

- **Lowers** from 21 to 18 the age of persons who can be penalized under the statute
- **Adds** attempt or conspiracy to penalized conduct
- **Adds** mandatory minimum of ten years for a first offense regardless of any maximum term of imprisonment and a mandatory minimum sentence of 15 years for a second conviction or for a first conviction after a prior conviction for a felony drug offense has become final.

21 U.S.C. § 861 Employment or use of persons under 18 years of age in drug operations (amended by Sec. 2(f) Attempt and conspiracy relating to employment or use of persons under 18 years of age in drug operations)

- **Adds** attempt or conspiracy to penalized conduct
- **Increases** mandatory minimum for people under age 21 from one to five years for first offense under the statute regardless of any maximum term of imprisonment and **adds** a mandatory minimum sentence of ten years for a second conviction or for a first conviction after a prior conviction for a felony drug offense becomes final regardless of any maximum term of imprisonment
- **Adds** mandatory minimum sentence of ten years for people 21 years or older convicted of a first offense under the statute regardless of any maximum term of imprisonment; and mandatory minimum sentence of life in prison for a second offense regardless of any maximum term of imprisonment
- **Adds** mandatory minimum sentence of five years and a maximum sentence of life for use of a person 16 years or younger (raises current triggering age from 14 to 16).

21 U.S.C. § 863: Drug paraphernalia (amended by Sec. 2(l) “Drug paraphernalia intended for children”)

- **Adds** facilitating a sale or providing drug paraphernalia to the existing provision of selling or offering to sell it
- **Adds** new 2-year mandatory minimum for violating or having the intent to violate this statute with respect to any person under 18, or with any person who violates this statute by transporting, importing, or exporting drug paraphernalia with the knowledge that it is intended to be provided to or used by a person under 18

Sec. 424 of Part D of the Controlled Substances Act: Drug trafficking in the presence of children (new section) (Sec. 2(k)(1)).

- **Adds** new 5-year mandatory minimum sentence for any person and 10-years for parent, guardian, or supervisor for committing a drug trafficking crime in or near the presence of a person under 18 or an incompetent person, or in a place where such person resides for any period of time; maximum life in both instances

- **Defines** “in or near the presence of a person” to mean: “within visual sight of such person, within any dwelling, automobile or other vehicle, or boat, in which such person is present, or within 500 feet of such person.”

Sec. 425 of Part D of the Controlled Substances Act: Failure to protect children from drug trafficking activities (new section) (Sec. 2(m))

- **Creates** a new offense for persons who witness or learn about a variety of drug trafficking activities and do not report it to authorities within 24 hours and do not provide full assistance investigating, apprehending, and prosecuting the offender
 - Triggering offenses include:
 - Maintaining drug-involved premises affecting children
 - Endangering human life while illegally manufacturing controlled substance
 - Distribution to persons under 21
 - Distribution or manufacturing in or near schools or colleges
 - Attempt and conspiracy relating to employment or use of persons under 18 years of age in drug operations
 - Drug trafficking in the presence of children
 - Drug offenses near drug treatment facilities or targeting persons in drug treatment
- **Adds** new 2-year mandatory minimum for individuals and 3-year mandatory minimum for parents, guardians, or persons responsible for the care or supervision of minors who violate this provision; 10-year max for both

Sec. 426 of Part D of the Controlled Substances Act: Protection of persons in drug treatment (new section) (Sec. 4)

- **Creates** new offense of distribution, possession with intent to distribute, etc. or attempt or conspiracy to do so within 1,000 feet of real property containing a drug treatment facility
- **Creates** new offense of intentionally offering, soliciting, encouraging, inducing, etc. a person enrolled in drug treatment, under court order to enroll in drug treatment, or a person previously enrolled in drug treatment to purchase, possess or receive controlled substance (or conspiring or attempting to do so)
- **Establishes** five-year mandatory minimum for violation and ten year mandatory minimum in the event of serious bodily injury or death regardless of the maximum term of imprisonment. Second offense or offense after at least one prior felony drug conviction carries a mandatory minimum sentence of ten years and, in the event of serious bodily injury or death, the sentence is a mandatory term of life in prison (first offenses involving five or fewer grams of marijuana are excluded from this provision). The statutory maximum in all cases is life.

18 U.S.C. § 3553 (f) The Safety Valve (amended by Sec. 6 “Assuring limitation on applicability of statutory minimums to persons who have done everything they can to assist the government”

- **Prohibits** safety valve relief to persons whose offense or relevant conduct (conduct that may be used to increase a sentence even if it was not charged, even if the defendant was acquitted of the conduct and in some cases, even if it was the conduct of others besides the defendant):
 - involved a controlled substance or material used or intended in its manufacture “in or near the presence of a person under . . . 18;
 - or in a location in which a person under . . . 18 resides for any period of time”;
 - or involved any conduct, even uncharged conduct, under 21 U.S.C. §§ 858 (b)], 859, 860, 860a, or 861 (see above);
- **Eliminates** the “fifth prong” {by the time of sentencing the defendant has truthfully provided all information and evidence concerning the offense or offenses or part of the same course or conduct);
- **Limits** Safety Valve relief to those defendants who the government certifies have:
 - pled guilty to the most serious readily provable offense; and
 - “done everything possible to assist substantially in the investigation and prosecution of another person.”
- **Prohibits** safety valve relief if:
 - the defendant “delayed affirmative efforts to assist substantially beyond a time when such efforts could have reasonably been useful to the Government;
 - the defendant provided false, misleading or incomplete information.
- **No longer requires but only authorizes safety valve relief for qualifying defendants.**
- **Prevents** the Court from administering a sentence below the minimum guideline range
- **Eliminates** the safety valve entirely if this provision is held invalid.

18 U.S.C. § 3145 (c) Review and Appeal of a release or detention order (amended by sec. 9 “Mandatory detention of persons convicted of serious drug trafficking offenses and crimes of violence.”)

- **Requires** government certification that release is necessary so that the defendant can provide substantial assistance post-conviction or pre-sentence (governed by 18 U.S.C. § 3143 (a).) Purports to do so by amending 18 U.S.C. § 3145 (statute governing appeals of release or detention orders) to require defendants to engage in ongoing substantial assistance to the government in the investigation or prosecution of others as a condition of pre-sentence release.

DIRECTIVES TO THE SENTENCING COMMISSION

Mitigating Role Cap (amended by Sec. 3 “Fairness in sentencing: assuring traffickers in large quantities of drugs receive appropriate sentences and denying double sentencing benefits”) U.S.S.G. §§ 2D1.1(a)(3) and application note 21, 3B1.3 application note 6, 2D1.1(b)(7)

- **Eliminates** the mitigating role cap for minimal or minor players
- **Prohibits** the Sentencing Commission from reinstating the role cap

Safety Valve (Sec (Sec. 2 (n)(1) “Sentencing Guidelines”) U.S.S.G. 5C1.2

- **Eliminates** guideline safety valve adjustment under section 5C1.2 for drug offenses if the conduct occurred or is found to comprise relevant conduct that occurred in or near the presence, residence at any time, of a person under the age of 18 or an incompetent person or involves conduct proscribed by one of the statutes relating to protected persons or locations.

Sentencing enhancements for certain drug offenses related to minors (Sec 2 (n)) including U.S.S.G. §§ 2D1.1(b)(6)¹ and 2D1.10(b)(1)(B)

- **Directs** that the Commission establish a base offense level for drug offenses be increased by 2 to 4 levels (depending on the relationship to the minor) for persons whose offense or relevant conduct involved “manufacturing, transporting, possessing, storing, using, or trafficking” a controlled substance “in or near the presence of a person under the age of 18, or in a location in which a person under the age of 18 resides for any period of time” or if it involved offense or relevant conduct proscribed under 18 U.S.C. 858 (b)], 859, 860, 860a, or 861 (see above). Makes this base offense level operate in addition to any applicable increase in section the methamphetamine manufacturing provisions (see immediately below)
- **Appears to increase from** 6 levels to 8 levels the base offense level in U.S.S.G. § 2D1.1(b)(6) and 2D1.10(b)(1)(B) for creating a substantial risk of harm to the life of a minor in the manufacture of amphetamine.

Conforming guideline sentencing to conspiracy law (Sec. 5 directing amendments to U.S.S.G. § 1B1.2²)

- **Adds** to relevant conduct consideration for persons convicted of controlled substance offenses the conduct of other members of the conspiracy that occurred **before** the defendant joined the conspiracy that was known to the defendant before joining the conspiracy.
- **Adds** the conduct of others in furtherance of the conspiracy that occurred during the defendant’s participation in the conspiracy that was merely known to the defendant or reasonably foreseeable to the defendant (whether or not the conspiracy was charged).

¹ There appears to be a typographical error so that the bill purports to amend section 2D1.1(b)(5)(C), which subsection does not exist.

² This is more likely a reference to section 1B1.3 Relevant conduct.

Assuring sentencing enhancement for relevant conduct. (Sec. 7 directing amendments to U.S.S.G. § 2D1.2 (Protected Location and Protected Individuals))

- **Extends** protected location enhancements to all drug offenses and conspiracies (enhancement currently applies only to statutory violation of drug trafficking in a protected location or to pregnant or underage individual);
- **Directs** that conduct treated by protected location and protected individual statutes shall be treated as relevant conduct for persons convicted under sections 841 or 856.
- **Increases** all base offense levels currently provided for in the guideline by at least two levels.

Assuring progressive enhancements for persons possessing or using firearms (Sec. directing amendments to U.S.S.G. § 2D1.1 (b) dealing with enhancements for offenses related to drug trafficking)

- **Adds** 8 level enhancement if the defendant possessed a firearm near a person under 18 or in a location where a person under 18 resides or resided for any length of time
- **Adds** 6-level enhancement if the defendant discharged a firearm, possessed 8 or more firearms or possessed a machine gun or a silencer
- **Adds** 4-level enhancement if the defendant:
 - brandished or used a weapon;
 - possessed a short-barreled weapon or semi-automatic weapon;
 - possessed 6 or more firearms
- **Adds** 3 levels if the defendant: possessed 2 or more weapons.
- **Adds** 2 levels if the defendant possessed a dangerous weapon.
- **Adds** 6 levels if the offense involved permanent or life-threatening bodily injury
- **Adds** 4 levels for serious injury;
- **Adds** 2 levels for bodily injury

- **Adds** 2 levels if defendant committed any part of the offense after sustaining a felony controlled substance conviction;
- **Limits** cumulative adjustments for firearms and injuries to 10 levels.

Protecting human life and assuring child safety (Sec. 10) directing amendment of U.S.S.G. § 2D1.1(b)(6)(B) and (C)

- **Expands** 2D1.1(b)(6)(B) and (C) from only methamphetamine and amphetamine to include all controlled substances if its manufacture created a substantial risk of harm to a human life or the environment
 - Original provision adds a 3-level adjustment or increases the offense level to 27 if the result is less than this, or a 6-level adjustment or a level 30 if there was substantial risk of harm to a minor or incompetent person

To read H.R. 1528 and for more information on FAMM's efforts to stop the bill, please visit www.famm.org or call (202) 822-6700.