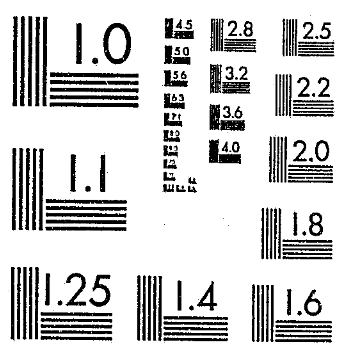

MICROCOPY RESOLUTION TEST CHART
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Department of Justice

STATEMENT

OF

STEPHEN S. TROTT
ASSISTANT ATTORNEY GENERAL
CRIMINAL DIV

BEFORE

THE

SUBCOMMITTEE ON CRIME
COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

CONCERNING

CAREER CRIMINAL - S. 52 AND H.R. 1627

ON

JUNE 28, 1984

Mr. Chairman and Members of the Subcommittee, I am pleased to be here today to present the views of the Department of Justice on two bills which provide lengthy mandatory sentences for armed career criminals. These bills are S. 52 as passed by the Senate on February 23, 1984, and H.R. 1627, a bill identical to S. 52 as it was originally introduced.

The subject of federal prosecution of persons with two or more robbery or burglary convictions who commit another one of these offenses while armed with a firearm is a familiar one both to the Department and to this Subcommittee. In the last Congress, then Deputy Assistant Attorney General Roger M. Olsen testified before you concerning H.R. 6386, a bill quite similar to H.R. 1627. We took the position that the federal government can lend some degree of assistance to the states in combatting career robbers and burglars, provided that the problems inherent in establishing concurrent federal-state jurisdiction in this area can be resolved. That remains our position today. We are not opposed to legislation creating federal jurisdiction over armed robberies and burglaries committed by recidivist offenders, although we think that the problems associated with concurrent jurisdiction over these crimes are real and must be carefully addressed.

In addition, I would emphasize that while we are willing to accept some share of the load in prosecuting career robbers and burglars, we do not regard legislation allowing us to do this as

having a particularly high priority. In our view, such legislation does not approach the same importance in the fight against crime as most of the provisions in S. 1762 and other bills that have passed the Senate as part of the Administration's anti-crime package. We think that what is most urgently needed is comprehensive, effective reform of such major areas of the criminal justice system as the sentencing, labor racketeering, bank secrecy, bail and forfeiture laws, rather than the sort of piecemeal tinkering with specific statutes that is done in S. 52 and H.R. 1627. Moreover, it bears mention that, of the fifteen violent crime proposals in Title X of S. 1762, of which S. 52 is not one, the Congress has thus far completed action on only one, the proposal aimed at pharmacy robberies and burglaries. We believe several of the remaining proposals contained in Title X -- many of which we know are not within the purview of this Subcommittee's jurisdiction -- are more important than the matters addressed in S. 52 and H.R. 1627.

Turning to H.R. 1627, this bill sets out a new section 2118 in title 18 providing that any person who has already been convicted of two felony robberies or burglaries and who commits a third such offense in violation of either federal or state law while armed with a firearm may be prosecuted in federal court. If found guilty, he must be sentenced to imprisonment for at least fifteen years or to life imprisonment. Regardless of the length of the sentence, it may not be suspended or made probationary, and the defendant would not be eligible for parole.

Our major difficulty with this bill is with proposed subsection 2118(e) addressing the exercise of federal jurisdiction which, because of its unusual wording, I have quoted below.[1] This subsection is apparently an attempt to overcome the Administration's chief problem with the version of this bill that was passed in H.R. 3963 and S. 1688 in the last Congress. Those bills would have allowed a state or local prosecutor to veto any federal prosecution in his district even if the Attorney General had approved prosecution. Such a restraint on federal prosecutorial discretion and delegation of executive responsibility would have raised serious difficulties as well as possible constitutional concerns. Although it is somewhat imprecisely drafted, subsection (e) would apparently overcome any constitutional difficulties by leaving the ultimate decision on whether to seek a federal indictment to federal prosecutors. However, since a case "lodged" in a state prosecutor's office may only be considered for a federal indictment on the request or concurrence

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1 Subsection 2118(e) provides:

> "(e) Ordinarily, armed robbery and armed burglary cases against career criminals should be prosecuted in State court. However, in some circumstances such prosecutions by state authorities may face undue obstacles. Therefore, any such case lodged in the office of the local prosecutor may be received and considered for Federal indictment by the Federal prosecuting authority, but only upon request or with the concurrence of the local prosecuting authority. Any such case presented by a Federal investigative agency to the Federal prosecuting authority, however, may be received at the sole discretion of the Federal prosecuting authority. Regardless of the origin of the case, the decision whether to seek a grand jury indictment shall be in the sole discretion of the Federal prosecuting authority."

of the local prosecutor, it is not clear how the United States Attorney's office would ever officially be made aware of such a case if the state prosecutor did not request its consideration. If federal authorities found out about such a case unofficially they could still seek an indictment in spite of what the state prosecutor might want, but the assertion of federal power in such a manner is hardly conducive to good federal-state relations. Moreover, there is, we submit, no rational basis for making even an initial determination of whether the state (which nearly always has jurisdiction over robbery and burglary) or the federal government (which would be given jurisdiction over a limited number of such cases under the proposed statute) should prosecute turn on whether a state or federal agency investigated and presented the case. The only justification for any federal involvement in this area of traditional state responsibility is to aid the states in certain unique situations. This necessitates close coordination and cooperation between state and federal investigators and prosecutors which can often best be obtained by consultations and decisions on a case-by-case basis.

Accordingly, we recommend that subsection 2118(e) be deleted and that a new provision be inserted in section four of the bill expressing the intent of Congress that ordinarily no prosecutions should be brought under this provision unless the appropriate state or local prosecutor requests or concurs in federal prosecution. Since section four is non-jurisdictional in nature, this language would not raise any of the constitutional problems

regarding a local prosecutor vetoing federal prosecution which I have previously mentioned, and at the same time it would minimize the risk of disrupting important federal-local law enforcement relationships when prosecutions are brought under this statute.

In addition to our overriding concern with H.R. 1627 over the way it allocates jurisdiction between the federal and state prosecutors, we have several suggestions with respect to the new armed robbery and burglary offense itself. First, subsection 2118(b) provides that the two prior felony convictions need not be alleged in the indictment or proven at trial to establish an element of the offense or the jurisdiction of the court. Rather, subsection 2118(a)(2) provides that the prior convictions are to be proven to the court at or before sentencing. We think that the two prior felony convictions which provide the basis for federal jurisdiction should be established prior to the attachment of jeopardy. If verification of this jurisdictional element is left until sentencing, a defective prior conviction, for example, one in which the defendant did not have counsel at the entry of a prior plea, could nullify the entire prosecution because double jeopardy considerations would prevent retrial. We would suggest the inclusion of language which would require the prosecution to notify the court and the defendant prior to the attachment of jeopardy of the prior convictions relied upon to

establish jurisdiction and mandate that the defendant contest the validity of any such conviction prior to the attachment of jeopardy.[2]

Second, we think that the requirement that the firearm be in the actual possession of the robber or burglar who has already been convicted twice is too narrow. We believe that the statute should reach such a recidivist robber or burglar while he or any other participant in the offense is in possession of or has readily available to him a firearm or an imitation thereof. Under the provisions of the bill as drafted, a recidivist who planned and organized a particularly life-endangering armed robbery or burglary involving several persons could remove himself from the reach of the new section simply by having his confederates carry all the firearms. In certain types of robberies, such as of banks, it is not uncommon for one or two persons to actually hold the weapons while others remove the money. Since there is no meaningful difference in their degree of culpability, all participants who have the two prior convictions should be covered by the new statute.

Third, section 2118(a) is silent on the question of how federal jurisdiction, which is based on the possession of a firearm, is to be shown. Presumably, it is intended as an element of the offense which must be proven to the trier of fact, inasmuch as the section's application is intended to be limited

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2 The bill should make clear that the pendency of an appeal does not affect the usability of the conviction, regardless of the outcome of the appeal.

to firearm-carrying recidivists, but the recidivism requirement is explicitly not made an element. Thus, it would appear that a conviction under section 2118(a) would require proof of possession of a firearm plus proof of all the elements of the state or federal statute that the defendant is charged with having violated. We would suggest that this point be specifically addressed in the legislative history.

In addition, since the terms "robbery" and "burglary" are not defined in the proposed statute, we would recommend that either the bill or the legislative history make it clear that the terms are to be given a generic rather than common law meaning and include state offense that do not use the words "robbery" or "burglary," such as a statute that proscribes criminal entry with different gradations for the types of structures entered and the act committed therein.

Finally, as we pointed out when we testified before the Subcommittee on H.R. 6386 in the 97th Congress, we think that any legislation in this area would benefit from Congressional findings that armed robberies and burglaries have an adverse effect on interstate commerce. See Perez v. United States, 402 U.S. 146(1971). While we think the Commerce Clause provides a sustainable basis for asserting federal jurisdiction over the traditionally state crimes of robbery and burglary, Congressional findings would facilitate the bill's passing constitutional muster.

S. 52

Turning to S. 52 as passed by the Senate, this bill eliminates most of the problems I have noted with respect to H.R. 1627. It provides that the two prior felony convictions necessary to establish federal jurisdiction shall be proven to the court before jeopardy attaches. It reaches the situation in which a twice convicted robbery or burglary participates in another armed robbery or burglary but does not himself handled the gun. And it contains appropriately broad definitions of the terms "robbery" and "burglary."

Most significantly, S. 52 solves the problems associated with concurrent federal-state jurisdiction over third-time robbers and burglars by making the new section 2118 applicable only where the charged third-time robbery or burglary offense can itself be prosecuted in a court of the United States. In effect, while section 2118 does set out a new offense, it would actually operate as an enhanced sentencing statute for person who have two prior state or federal robbery or burglary convictions and who are involved in another armed robbery or burglary that is a violation of a federal statute such as robbery in the special maritime and territorial jurisdiction (18 U.S.C. 2111), robbery of federal property (18 U.S.C. 2112), robbery or burglary in the Indian country (18 U.S.C. 1153), or bank or postal robbery or burglary (18 U.S.C. 2113-2115). Thus, the coverage of S. 52 as passed is considerably narrower than as introduced. It would not

expand federal jurisdiction over third-time state robberies and burglaries, the obvious goals of the sponsors of S. 52 and H.R. 1627.

As I indicated at the start of my testimony, the Department of Justice is not opposed to such an expansion, although we realize that distinguished groups directly concerned with law enforcement at the state level, such as the National District Attorneys Association, are opposed to the concept of extending federal jurisdiction over state robberies and burglaries. Indeed, we agree that in most cases, local police, prosecutors, and the court system can handle the threat posed by even the most dangerous career robbers and burglars. This obvious fact is the reason that we do not regard the assertion of federal jurisdiction over selected robbery cases as being of great significance in the fight against violent crime when compared with other, more urgently needed reforms of the federal criminal justice system.

Nevertheless, from our perspective there may be a need for federal assistance in certain limited situations where, for example, court congestion, prison overcrowding, inadequate state sentencing statutes, or any number of other factors may render state prosecution of an armed robber or burglar inadequate or ineffective. We believe, moreover, that a statement of Congressional intent that ordinarily federal prosecution should not be undertaken without the request or concurrence of the local prosecutor would underscore the point that the creation of federal jurisdiction over these crimes is to assist the states

and at the same time would serve to avoid any constitutional problems associated with allowing a federal prosecution only with the concurrence of or lack of objection from a non-federal official. We strongly urge the Subcommittee to include such a provision if it decides to report out legislation in this area.

Mr. Chairman, that concludes my prepared remarks and I would be happy to respond to any questions at this time.

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