National Association of Criminal Defense Lawyers

STATEMENT OF

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NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

BEFORE THE

SUBCOMMITTEE ON CRIME

COMMITTEE ON THE JUDICIARY

UNITED STATES HOUSE OF REPRESENTATIVES

CONCERNING

AMENDMENTS TO THE ARMED CAREER CRIMINAL ACT OF 1984

H.R. 4768, H.R. 4639

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Mr. Chairman and distinguished members of the Subcommittee, I am deeply appreciative of the opportunity to present testimony today, on behalf of the National Association of Criminal Defense Lawyers, with regard to pending legislation to expand the reach of the Armed Career Criminal Act of 1984.

My name is Bruce Lyons, and I am the President-elect of NACDL. I have been engaged in the private practice of criminal law in Fort Lauderdale, Florida for the past 15 years. I have served for four years in the Broward County prosecutor's office, and an additional four years as a municipal court judge. I was appointed by the Governor in 1971 to serve on the Broward County Narcotic Guidance Council, and I have been a faculty member of the National College for Criminal Defense since 1978.

The National Association of Criminal Defense Lawyers (NACDL) is a nationwide, voluntary bar association comprised of over 4,000 lawyers and law professors, most of whom are actively engaged in defending criminal prosecutions and individual rights. NACDL is specifically dedicated to promoting the proper administration of criminal justice.

NACDL was founded 26 years ago to promote study and research in the field of criminal defense law, and to encourage the integrity, independence and expertise of criminal defense lawyers. Throughout its history, the NACDL has worked to protect the rights and liberties of those accused of criminal offenses. We have pursued these goals through a variety of educational and public service activities, including national training programs, publications, committee activities, legislative action, and by appearing as amicus curiae in significant criminal justice cases.

Introduction

NACDL recognizes the extraordinary law enforcement problems and the threat to public safety posed by "career criminals." We have read the studies, and share the Congress's deep concern that a very large proportion of serious crime in this country is committed by a relatively small number of hard-core repeat offenders. We applaud this Subcommittee's efforts to deal constructively with the issue.

Expanding the range of prior offenses

Both of the bills under consideration today would significantly expand the range of possible prior offenses which would qualify

a defendant for federal prosecution under the Armed Career Criminal Act. On its face, the fundamental premise of these bills seems sound--that it makes no sense to single out robbery and burglary as qualifying prior offenses while omitting more serious felonies such as murder or major drug dealing.

At the outset, however, it is worth noting that the legislative history makes plain that the Congress's primary concern in attacking the career criminal issue in 1984 was the problem of "crime for profit." (See, e.g., H. Rep. 98-1073, at 3, quoting January 26, 1983 floor statement of Senator Specter upon introduction of S. 52.) It is the profit motive that makes crime attractive as a "career." Most violent felonies other than robbery and burglary--such as rape, murder, or assault--have nothing to do with profit, and thus are unlikely to be repeated with the degree of frequency and regularity which goaded Congress into action on the original Act. The addition of essentially non-profit-motivated offenses to the Act thus does not appear to advance the original congressional purpose.

The two bills before the Subcommittee today differ significantly in the scope of the range of possible qualifying prior offenses. H.R. 4639 picks up the definition of "crime of violence" contained in section 16 of title 18, while H.R. 4768 is targeted much more narrowly at "violent felonies" entailing physical force against a person.

Of these two provisions, NACDL strongly favors the former. The proposed definition of "crime of violence" in H.R. 4639 is so broad as to include misdemeanors, offenses purely against property, or offenses entailing nothing more than a "substantial risk" of physical force against the property of another. Conceivably, this provision could be used to lock up a three-time vandal, grafitti artist or misdemeanor trespasser for the mandatory 15 year minimum sentence.

We note that the Justice Department concurs in the view that the very severe mandatory sanctions of the Act should not apply where the prior offenses were minor. In testimony last week before the Senate Judiciary Subcommittee on Criminal Law, Deputy Assistant Attorney General James Knapp recommended in his oral statement that an appropriate cutoff point might be a sentence of at least one year imprisonment for each prior offense.

We would suggest that the "violent felony" standard proposed in H.R. 4768 would benefit from the addition of some such reference to the length of imprisonment for the prior offenses. The definition of felony varies widely from state to state. See Lafave & Scott, Criminal Law, 26-27 (8th ed. 1985). A felony in one state may be only a misdemeanor in a neighboring jurisdiction. Accordingly, in order to effectuate the Congress's current goal of "avoiding

unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct" (as stated in the Sentencing Reform Act of 1984, at 28 U.S.C. 991(b)(1)(B)), we would recommend specifying in the statute a minimum number of years which must actually have been served for each prior qualifying "violent felony" offense.

We note that the term "violent felony" would not appear to encompass the current law provision covering burglary, since "physical force against the person of another" is not an element of burglary. If the Subcommittee concludes that it can accept no retreat from current law, we would suggest that the preservation of burglary as a prior offense be accomplished simply by retaining "burglary" in section 1202(a), rather than by substituting for it the all-inclusive "crime of violence" definition proposed in H.R. 4639.

Prior drug offenses

Mr. Chairman, the issue of determining which new violent offenses to add to the Act may well pale in significance compared to the proposed addition, in both bills, of "serious drug offenses" punishable by imprisonment of 10 years or more, as qualifying prior offenses. The House Report, in stating that "a person is 40 times more likely to be a victim of robbery than of rape," id. at 3, appeared to suggest that the addition of further violent crimes might do little to attack the problem of career criminals, or increase the useful range of the statute.

However, the addition of this new class of "serious drug offenses" may well not only multiply many fold the number of cases brought within the reach of the Act, but it may also unnecessarily duplicate the prosecution tools already available under title 21--tools which have not been proven flawed, and which even contain their own enhanced sentencing provisions for repeat offenders. In other words, despite the superficial appeal of including serious drug offenses within the Act, we question whether there is any practical need to do so at all.

We are also concerned that, although the drafters of the "serious drug offenses" language may have intended to target drug dealers--those who make a "career" out of it, and are motivated by profit--the provision may in fact extend to mere possession for personal use. Although section 844 of title 21 appears to carve out a lesser status (a 2 year sentence) for "simple possession," the fact is that under section 841, the requisite "possession with intent to distribute" can be established simply by showing possession of a sufficiently large quantity of a controlled substance. No further specific showing of an "intent to distribute" is necessary to send the issue to a jury. And the quantities specified in section 841(b)--for example, 5 grams

of LSD, or as little as 100 grams of certain other schedule I or II substances--freqently signify nothing more than heavy personal use or addiction.

There are two possible ways to address this issue. One would be to raise the proposed 10-year imprisonment standard to reflect more accurately and specifically the penalties which attach to the kinds of major trafficking offenses which the Subcommittee intends to target. Perhaps a more direct way would be to specify in the statute not only some period-of-imprisonment standard, but also a requirement that it be affirmatively shown that the prior offense entailed some actual effort at distribution.

Mandatory sentencing

Comment must be made, Mr. Chairman, on the mandatory sentencing aspect of the underlying 1984 Act. The Act provides for a mandatory minimum sentence of 15 years, without possibility of probation, parole or suspension of sentence. At the same time, one of the most highly touted features of the Act, throughout the legislative history, is the notion of "leveraging"--that is, prosecuting under the Act in Federal court only often enough to convince state defendants that they would be better off entering a guilty plea in state court in order to receive a sentence of less than 15 years.

This notion is fundamentally inconsistent with the commitment of the Congress and the U.S. Sentencing Commission to the goal of determinate sentencing. Is it not oxymoronic to have a discretionary mandatory sentence? Where is the deterrent effect of a swift and sure mandatory sentence if its application is entirely within the informal combined discretion of the U.S. Attorney and the district attorney? How does a statutory scheme which singles out some 13 repeat offenders per year for 15 year sentences advance the Congress's stated goal of avoiding "unwarranted sentencing disparities?" How do I explain to my client that he has been selected for prosecution under the Act in order to maintain the "leveraging effect" on other similarly situated defendants who will receive lesser sentences in state court?

Finally, Mr. Chairman, I would call the Subcommittee's attention to an excellent and very thorough four-part series, entitled "A Law Meets Reality--And Loses," which ran last week in the Washington Post, on the pitfalls and misconceptions surrounding the experience with mandatory sentencing in the District of Columbia. The series, based upon methodical study of 600 cases and thousands of court documents from the past five years, paints a distressing picture of the complete failure of mandatory sentencing to live up to the popular expectations that surround it--primarily, that it would result in swift, sure and even-handed punishment. This study, and its implications for the Armed

Career Criminal Act, merit serious consideration by this Subcommittee before action is taken on legislation, such as that pending today, to expand the reach of the Act. A copy of the series has been furnished to the Subcommittee staff.

Conclusion

Mr. Chairman, NACDL prefers the approach taken in your bill, H.R. 4768, to that taken in the earlier bill, H.R. 4639. We commend your leadership in moving to correct the most glaring problems raised by that earlier measure.

At the same time, it is our view that there are some very significant questions, both of a legislative and oversight nature, to which this Subcommittee might well devote some further consideration and refinement in the wake of today's hearing. We would respectfully suggest that the Subcommittee not rush to markup. We urge a hiatus of at least a few weeks--particularly to plumb the depths of the relationship between the proposed amendments and the provisions of the Controlled Substances Act. NACDL would of course be pleased to work with the Subcommittee in exploring and resolving these issues.

This concludes my prepared statement. I would be happy to respond to any questions any member of the Subcommittee may have.