IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

UNITED STATES OF AMERICA *

v. * CASE NO.

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CONSOLIDATED MOTION TO DISMISS INDICTMENT

The defendant, by and through his attorneys, James K. Bredar, Federal Public Defender for the District of Maryland, and Shirley M. Watts, Supervisory Assistant Federal Public Defender, hereby moves this Honorable Court, pursuant to Rule 12 (b) (2) of the federal Rules of Criminal procedure to dismiss the indictment in this case. As grounds for such motion, the defendant states the following:

1. The statute under which the defendant is charged is unconstitutional because the charged conduct does not affect commerce.

2. The statute is unconstitutional because it violates the Tenth Amendment of the United States Constitution.

3. The statute violates the Due Process Clause of the Fifth Amendment because it is void for vagueness.

WHEREFORE, defendant requests that this Court enter an order dismissing in the Indictment in whole or part.

Respectfully submitted,

JAMES K. BREDAR
Federal Public Defender

____
SHIRLEY M. WATTS
Assistant Federal Public Defender

100 S. Charles Street
401 Equitable Bank Center, Tower II
Baltimore, Maryland 21201-2705
(410) 962-3962

REQUEST FOR HEARING

Pursuant to Rule 105.6 of the Local Rules of the United States District Court for the District of Maryland, a hearing is requested on the defendant's motion.

____
SHIRLEY M. WATTS
Assistant Federal Public Defender

CERTIFICATE OF SERVICE

I hereby certify that on this ____ day of April, 1993, a copy of the foregoing was hand delivered to   , Esquire, Assistant United States Attorney, 101 W. Lombard Street, Baltimore, Maryland 21201.

____
SHIRLEY M. WATTS
Assistant Federal Public Defender

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MEMORANDUM OF POINTS AND AUTHORITIES

THE INDICTMENT MUST BE DISMISSED BECAUSE THE STATUTE IS UNCONSTITUTIONAL

A. 18 U.S.C. §2119 Is Unconstitutional Because It Does Not Affect Commerce.

Under Article I, §8, clause 3 of the United States Constitution Congress has the power to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." Historically, this clause was given a narrow interpretation. See Hammer v. Dagenhart, 247 U.S. 251 (1918) (commerce clause does not give Congress the power to regulate an evil when it is not directly related to interstate commerce and when the item shipped through interstate commerce was itself harmless); Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935) (held statute unconstitutional where there was no direct nexus between the prohibited act and interstate commerce, and declared that "extraordinary conditions may call for extraordinary remedies . . . [but they] do not create or enlarge constitutional power").[1]

More recent commerce clause jurisprudence has broadly construed the commerce power to allow Congress to regulate many things that at one time were within the purview of the states.

[1] Though both Hammer and Schechter have effectively been overruled by later cases, they teach both history and wisdom.

The expansion of the Commerce Clause has been used in a business context for many years to allow Congress to regulate business affecting commerce. Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964); National Labor Relations Board v. Fainblatt, 306 U.S. 601 (1939); United States v. American Building Maintenance Industries, 422 U.S. 271 (1975). The rationale for this was to have a united business and national labor policy.

Congress then began to use the expansive reading of the Commerce Clause in the criminal law context. The language used in 18 U.S.C. §2119 tracks the interstate commerce language that Congress used in drafting 18 U.S.C. §§922(g) and (h), the federal firearm statutes. Specifically, 18 U.S.C. §2119 reads:

> Whoever, possessing a firearm defined in section 921 of this title, takes a motor vehicle that has been transported, shipped, or received in interstate or foreign commerce from a person or presence of another by force and violence or by intimidation, or attempts to do so shall-

18 U.S.C. §2119 (1992).

The commerce power cannot go unchecked because to do so would allow "the National Government [to] devour the essentials of state sovereignty." National League of Cities v. Usery, 426 U.S. 833, 855 (1976). (overruled, can I cite for language?? or cite Garcia dissent) [Courts should not passively defer to Congress; they should (aggressively) scrutinize its laws for proper constitutional underpinnings.] Alexander Hamilton addressed the balance of power between the legislature and the courts:

> [i]f it be said that the legislative body themselves are the constitutional judges of their own powers and that the construction they put on them is conclusive upon the other departments it may be answered, that this cannot be the natural presumption where it is not to be collected from any particular provisions in the

> Constitution. . . . It is far more rational to suppose that the courts were designed to be an intermediate body between the people and the legislature in order, among other things, to keep the latter within the limits assigned to their authority.

The Federalist No. 78, at 395 (A. Hamilton) (Garry Wills ed. 1987), [kath, in this section or tenth amendment?? -- here I think]

In order for an activity to fall within the Commerce Clause power, there must be a nexus between commerce and the activity regulated. In Hodel v. Virginia Surface Mining & Reclamation, 452 U.S. 264 (1981), the Supreme Court set forth a two-prong test to analyze commerce clause challenges. First, there must be a rational basis that the activity affects interstate commerce. Second, the means must be reasonably related to the ends. The activity must either relate to interstate transactions, have an effect on interstate commerce, or be an activity which is necessary and proper to regulate in order to effectuate the commerce power. Constitutional Law 3d, at 158 (Nowak, et al. ed 1986). [blue book]

This language, as used in the firearm statute, was held to be constitutional as a permissible use of the Commerce Clause because there was a nexus between the possession of a firearm by a convicted felon and commerce. Scarborough v. United States, 431 U.S. 563 (1977). In Scarborough, the Court examined the statute's legislative history to explore the effect on commerce and found that it supported congressional intent to punish illegal possession of guns that travelled in interstate commerce. Specifically, the Court quoted Senator Long, "the possession of these weapons by the wrong kind of people is either a burden on commerce or a threat that affects the free flow of commerce." Id. at 572 (citation omitted). In other words, a nexus existed

because the crime was the possession of the item that had traveled in interstate commerce.[2]

The nexus that the court determined existed for firearms statutes does not apply to 18 U.S.C. §2119. Under this new section, the item that traveled in interstate commerce is the vehicle. However, this is not what is made criminal by the statute. The crime is not possessing the vehicle. If it were, there would be the same nexus as exists in the context of the firearms statutes; however, what is made criminal by this statute is possessing a firearm in taking the car, the item that traveled in interstate commerce. [There is no direct nexus]/There is no rational relation between the prohibited act and commerce. Taking the car while possessing a firearm does not "affect" commerce. Therefore the statute is unconstitutional.

If, in fact, this Court holds that the new statute was constitutional it would then federalize the taking of any item that at some time in history has traveled in interstate commerce. In other words, when a shoplifting occurs in a Maryland supermarket and the offender takes a gallon of milk that was pasteurized (??) in Virginia, and a box of Wheaties that was manufactured in Detroit, he or she would be subject to a federal violation, since the items taken at some point had traveled in interstate commerce. This is a dangerous path to pursue considering the already heavy burden of the criminal case load in this and other federal districts. In addition, in his annual letter

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[2] When faced with the same question, the Ninth Circuit, in relying upon Supreme Court decisions, held "a prior interstate transfer of a firearm provides a sufficient interstate nexus to justify federal proscription of it subsequent receipt by a felon." United States v. Haddad, 558 F.2d 968, 972 (9th Cir. 1977). In discussing the effect on commerce, the court noted that, "Congress was aware of the large number of crime guns which are obtained through interstate channels. In passing the Act, it is intended to dry up this supply completely for the felon." Id. at 973.

to Congress Chief Justice Rhenquist specifically requested Congress not to federalize conduct already made criminal by the states. See also, Hodel v. Virginia Surface Mining & Reclamation, 452 U.S. 264 (1981), (Rhenquist, J., concurring) (the interstate commerce nexus is constitutional if the regulated activity has a "substantial effect" on commerce; remarked that the modern interpretation of the commerce clause could lead one to believe "that the federal system exists only at the sufferance of Congress").

The tenuous commerce clause connection Congress devised for §2119 is an obvious pretext. Congress has blatantly bootstrapped an inherently harmless item, a motor vehicle, to create the federal power to regulate the proscribed conduct, forceful taking of the motor vehicle while in possession of a firearm. In Hammer v. Dagenhart, supra, the United States Supreme Court, in its earlier commerce clause jurisprudence, supra fn.1, distinguished between interstate transport of goods that Congress wanted to regulate because they were themselves evil, and situations where the evil Congress sought to regulate was not directly related to commerce and the item shipped though interstate commerce was itself harmless. In the former situation, federal regulation was constitutional; in the latter it was unconstitutional. This distinction underscores when the commerce clause is a proper mechanism for Congress to exercise its police power and when it is not. Applying the reasoning from Hammer to this case, the statute should be held unconstitutional. The evil Congress seeks to regulate, the forceful taking of a motor vehicle, is not directly related to commerce and the item shipped through interstate commerce, all motor vehicles, is itself harmless.

The U.S. Supreme Court [even] reinforced the limits of Congress' power in NLRB v. Jones & Laughlin Steel Corp., one of the first cases to expand Congress' power to make commerce-based laws:

> Undoubtedly the scope of this power must be considered in light of our dual system of government and may not be extended so as to embrace effects on interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government.

301 U.S. 1, 37 (1937).

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clear intent: enmons, 416 us at 411. C reach can be limited if c did not clearly manifest its intent to reach the conduct. BUT, IN THIS CASE, LEG HIST DOES CLEARLY SHOW INTENT TO REACH LOCAL/STATE ACTIVITY -- I THINK IT HURTS MORE THAN HELPS TO RAISE THIS ISSUE, EVEN THOUGH IT IS THE ONLY WAY TO SUCCESSFULLY CHALLENGE A § UNDER COMMERCE CLAUSE.

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The manner in which the government is requesting this statute to be interpreted is also in direct contradiction of 18 U.S.C. §659. Under that statute, a person who steals something that has traveled in interstate commerce and has reached its final destination is not subject to punishment by the federal government. The reasoning behind the statute is to protect goods that flow in commerce. This protection is no longer needed once the item has reached its destination. United States v. Garber, 626 F.2d 1144 (3rd Cir. 1980), cert. denied, 449 U.S. 1079 (1981). The statute specifically talks about items that are transported by freight, which is how cars are transported from the factory to the dealer. Under this statute, once the car has reached the dealership, it is no longer in interstate commerce. See also United States v. Hiscott, 586 F.2d 1271 (7th Cir. 1978) (no commerce clause connection under 18 U.S.C. §2313 once a stolen vehicle "[comes] to rest" in a particular state, even if an individual has future illegal dealings with

the vehicle). [Kath, but se 2119 leg hist]

In this case, the car involved is a 1990 Mercedes Benz. It reached the dealership (if dealership in maryland/or the owner's home) in __________ 19_. (imported from Germany). Once it reached the dealership (owners home in Maryland), any relation it might have had to interstate commerce ceased. After a car has reached its final destination and it is (illegally) taken across state lines, then an individual can be charged with a Dyer Act violation. Again, this is because there is some connection with the interstate movement of the stolen vehicle. However, regulation of the interstate transportation of a vehicle is far beyond the scope of the Commerce Clause.

Because there is no interstate nexus [no rational relation] between possessing a firearm while taking a car and commerce, and 18 U.S.C. §659 [and 2313] suggest/s that once a car reaches it final destination it is no longer in interstate commerce, 18 U.S.C. §2119 must be found unconstitutional.

B. The Statute Is Unconstitutional Because It Violates the Tenth Amendment.

Under the Tenth Amendment, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." "The Tenth Amendment has been characterized as a truism, stating merely that all is retained which has not been surrendered." United States v. Darby, 312 U.S. 100 (1941). In other words, "Congress may not exercise power in a fashion that impairs the states' integrity or their ability to function effectively in a federal system." Fry v. United States, 421 U.S. 542, 547 n. 7 (1975). In addition, "[C]ongress has traditionally been reluctant to define as a federal crime conduct readily denounced as criminal by the States." United States v. Bass, 404 U.S. 336, 349

(1971). The United States Constitution does not expressly grant the federal government a general police power. In Rewis v. United States, 401 U.S. 808 (1971), the Court held that conducting a gambling operation frequented by out-of-state bettors does not, without more, constitute a violation of the Travel Act. In reaching this conclusion, the Court noted:

> Given the ease with which citizens of our Nation are able to travel and the existence of many multistate metropolitan areas, substantial amounts of criminal activity, traditionally subject to state regulation, are patronized by out of state customers. In such a context, Congress would certain recognize that an expansive Travel Act would alter sensitive federal-state relationships, could overextend limited federal police resources, and might well produce situations in which the geographic origin of customers, a matter of happenstance, would transform relatively minor state offenses into federal felonies.

Id. at 812.

The very thing that the Court was concerned about in Rewis will happen in Maryland. The federal statute criminalizes conduct that is about to be criminalized under state law. See 1993 Md. S.B. 339. [blue book] This proposed legislation was introduced to the Senate Judiciary Committee on January 25, 1993 and was passed by the Senate on February 15, 1993. This legislation was introduced to the House Judiciary Committee on February 16, 1993 and a hearing was held on March 30, 1993. The proposed Maryland legislation makes both carjacking and armed carjacking crimes. It establishes a penalty of a sentence of imprisonment for a minimum of fifteen (15) years and a maximum of thirty (30) years for the commission of either offense. There will be no allowance for suspended sentences or parole for armed carjacking. The proposed legislation prohibits the defense that the defendant did not intend to permanently deprive the owner of the motor vehicle. Further, it makes carjacking an aggravating circumstance for the purpose of death penalty sentencing.

Maryland law already has a law that criminalizes the use of a dangerous or deadly weapon while taking property of another. Under Maryland common law, robbery, which is the "felonious taking and carrying away of the personal property of another, from his person or in his presence, by violence, or by putting him in fear," is a felony. Darby v. State, 3 Md. App. 417, 239 A.2d. 584 (1968), cert. denied, 393 U.S. 1105 (1969). The penalty of imprisonment for robbery, prescribed by statute, is not less than three but no more than ten years. Md. Code 1957, art. 27, §486 (1951). Furthermore, the statutory penalty for robbery with a deadly weapon is not more than twenty years. Md. Code 1957, Art. 27, §488 (1951). Maryland law also makes the unauthorized use of a vehicle a crime. Md. Code 1957, art. 27 §349 (1990). Among other things, that statute proscribes unlawfully taking a motor vehicle out of the custody of another or against the will of another. The legislature determined the commission of this crime was a misdemeanor carrying a penalty of a fine for not less than fifty or more than one hundred dollars and/or imprisonment for not less than six months or not more than four years. It is clear that State legislature has, within its police power, criminalized the conduct with which the government charges Mr. Ford.

The punishment for crimes involving cars which have arrived in the state has been left to the states to regulate. The state recognizing this power has passed appropriate legislation to address this issue. The federal statute intrudes into and duplicates an area specifically delegated to the states for regulation. In addition, the enforcement of this statute requires a substantial extension of federal police resources to duplicate state police practices. Since there is no proof of an interstate nexus, and this legislation would substantially affect the federal-state balance of power, the statute should be held unconstitutional as a violation of the Tenth Amendment.

D. The Statute Violates the Due Process Clause of the Fifth Amendment because it is Void for Vagueness.

Even if the statute is constitutional under the Commerce Clause and/or the Tenth Amendment, since the act or conduct prohibited is not clearly defined, it is void for vagueness as applied to the government' s facts of this case. In deciding the issue of constitutionality, the court must look not only to the plain language of the statute, but must also consider the legislative history. The legislative history reinforces the Congressional intent. United States v. R.L.C., 112 S.Ct. 1329 (1992). H.R. 4542 was introduced by Mr. Schumner, Chairman of the Subcommittee on Criminal Justice, and Mr. Sensenbrenner on March 24, 1992, "to reduce auto theft significantly by driving the potential, and therefore the profit, out of the resale of stolen automobiles and major automobile parts.... Destroying the profit element associated with these crimes is the key focus of H.R. 4245." H.R. Rep. No. 851, 102nd Cong., pt. 3 (1992). USCCAN p 2895 - 2896.[blue book]

In this case, police reports indicate that Mr. Ford responded to an advertisement for a Mercedez Benz in the newspaper. He and his friend, now co-defendant, Keith Austin, went to the owners home in Potomac, Maryland to test drive the car. It is alleged that the motor vehicle was taken from the owner during this test drive. The car was later seen in Takoma Park, Maryland. Mr. Ford was arrested when the car was in (Takoma Park, Maryland). There is no allegation that the car was taken out of the state of Maryland during the alleged carjacking. There is no allegation that the car was taken out of the state of Maryland after the alleged carjacking and before Mr. Ford' s arrest. Accordingly, there is no indication from these facts that the car was traveling in interstate commerce, or that the car had been taken for the purpose of reselling any of the parts. There is no indication that there was ever a profit motive or intent to resell the parts;

therefore, the application of the statute to Mr. Ford in this case is unconstitutional.

If the court were to find that Congress did want to criminalize the conduct in this case, the statute still must be found unconstitutional because it is void for vagueness. "The void for vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement. Law enforcement must be given minimal guidelines." Kolender v. Lawson, 461 U.S. 352, 357 (1982). In Kolender, the Supreme Court struck down a criminal statute as unconstitutionally void for vagueness. The statute in that case required people who loiter or wander on the streets to provide credible and reliable information to account for their presence when stopped by a police officer.

The statute in this case is similar to the statute in Kolender because by not specifying how the possession of a firearm relates to the conduct, the conduct it criminalizes is not known to the individual. The statute states:

> Whoever, possessing a firearm defined in section 921 of this title, takes a motor vehicle that has been transported, shipped or received in interstate or foreign commerce from a person or presence of another by force and violence or by intimidation, or attempts to do so shall-

In other federal statutes such as 18 U.S.C. §924(c) the conduct is specific, a person must use and carry a weapon in the commission of a crime of violence. Similarly, in 18 U.S.C. §2113(d) the proscribed conduct is use of a dangerous weapon in the commission of a robbery. This clarity is missing in 18 U.S.C. §2119.

Deterrence, or "general prevention," is one of the primary theories of criminal justice and punishment. LaFave, et. al., Criminal Law 2d, §1.5(a), p, 24. Under this theory, it is believed that potential criminals will weigh the consequences of committing the crime against the perceived

benefits. These consequences are conveyed to this individual through clear statutes which notify "ordinary people" of penalty for proscribed conduct. The government's facts of this case show it was Austin, and not Ford, who had the gun. There is no allegation that Mr. Ford knew Austin had a gun. (??) [[Assuming, under the government's facts, that Mr. Ford intended to commit a crime,]] Mr. Ford may have thought he was committing the crime of Unauthorized Use of a Vehicle or Robbery.[3] The ambiguity of the carjacking statute failed to warn Ford, or any person of ordinary intelligence, that he could be charged with armed carjacking, a federal crime carrying a sentence of up to fifteen years. The proscribed act is unclear. Is mere possession of a gun during a taking of a car proscribed under §2119? Or, is only the use of the firearm in connection with the taking of the car the proscribed act? Since it is unclear, and since Mr. Ford in this case could not have been properly notified about the proscribed conduct, the statute is void for vagueness in violation of the Due Process Clause of the Fifth Amendment as applied to this case.

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OVERBREADTH:: I don't think we can make a half decent/credible argument -- it must be "as applied" -- we would have to argue that the statute covers legal as well as illegal conduct and that Mr. Ford in fact was acting in a legal manner at the time of this event. There is no way we can say taking car without gun was legal -- unless we say that he didn't intend to take car, only

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[3] As set forth above, see Section ____, Unauthorized Use of a Vehicle is a misdemeanor punishable by a sentence of imprisonment of a fine for not less than fifty or more than one hundred dollars and/or imprisonment for not less than six months or not more than four years, see Md. Code 1957, art. 27, §349, and Robbery is punishable by a sentence of imprisonment for not less than three but no more than ten years. Md. Code 1957, art. 27, §486 (1951).

test drive it , but that is an issue of intent and not of constitutional character -- Do you agree??

As for "from the . . . presence of another" language, this is used in most statutes; taken from common law -- therefore no argument that unclear.

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E. Where There is Ambiguity in the Language of the Statute, the Rule of Lenity Requires that the Ambiguity Be Decided in Favor of Mr. Ford.

An "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." Rewis v. United States, 401 U.S. 808, 812 (1971). The United States Supreme Court applied this principle again in Bass explaining:

> This principle is founded on two policies that have long been part of our tradition. First, 'a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear. Second, because of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity. This policy embodies the instinctive distaste against men languishing in prison unless the lawmaker has clearly said they should have. Thus, where there is ambiguity in a criminal statute, doubts are resolved in favor of the defendant.

United States v. Bass, 404 U.S. 336, 348 (1971).

In this case there is clearly ambiguity as to what kind of conduct Congress wanted to regulate. First, there is no nexus between taking a car while possessing a firearm and interstate commerce. Second, it is unclear what specific actions are made criminal by the statute, because it does not define possession of a firearm in relation to the taking of the car, and provides no minimal guidelines for law enforcement. Third, since the legislative intent is unclear, and there is already a state statute that criminalizes the drawing or exhibiting of a gun while taking a car, there is no warning given to a common person as to what conduct will cross the line from state to federal criminal conduct. Given this ambiguity in the language of the statute, the indictment must be dismissed.