

From: Newell, William D.
To: ATF
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Subject: Fw: Materials For Bill Newell and ATF in DC
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From: Cunningham, Patrick (USAAZ)
To: Newell, William D.; Needles, James R.
Cc: Burke, Dennis (USAAZ) ; Scheel, Ann (USAAZ) ; Hernandez, Rachel (USAAZ) ; Morrissey, Mike (USAAZ) ; Hurley, Emory (USAAZ) ; Kelly, Kristen (USAAZ) 6
Sent: Sun Mar 06 18:20:55 2011
Subject: Materials For Bill Newell and ATF in DC

Bill and Jim:

As you work in DC today to prepare with ATF Leadership, enclosed below are some issues and our answers we have compiled. Issues are in Green and proposed answers are in black.

Hope they are helpful. Thanks. PJC

A. On the Status of F and F lead indictment ATF

Questions: Whether ATF is in custody, what's his plea, next steps?

Answer:

Under 9th Circuit law offenses committed by “straw purchasers” are not considered crimes of violence for which a person can be detained pending trial. As to the only other basis for pretrial detention – flight risk ATF is a US citizen and the Bail Reform Act requires the court to impose the least restrictive conditions that will reasonably assure his appearance and the safety of the community. Here, ATF was released on conditions pending Trial by the Magistrate Court. His release conditions include reporting as directed to U.S. Pretrial Services, surrendering any passport, not traveling outside the district of Arizona, having no contact with the other defendants, and not possessing a firearm or other dangerous weapon.

Regarding the treatment of “straw purchasers” by the Criminal Justice System, the five Southwest Border United States Attorneys from Arizona,

Texas, California and New Mexico recently sent the enclosed letter (pdf enclosed) to the United States Sentencing Commission urging that the prison sentences for “straw purchasers” be strengthened because of their role in the trafficking and illegal export of weapons.” The letter states in part:

‘As the chief federal law enforcement officers in the Southwest border region, we strongly believe the Commission must amend USSG § 2K2.1 if it is truly to address the national security implications of arms trafficking. As the Department explained during its meeting with Commission staff, straw purchasers are the primary source of firearms trafficked to Mexico from the United States. Most of the defendants prosecuted for arms export or arms trafficking offenses involving the Southwest border would not have obtained the firearms at issue were it not for the efforts of straw purchasers. Yet because straw purchasers face such low guideline ranges under § 2K2.1, and because many judges see straw purchasing as a mere “paper” violation, the sentences received by straw purchasers fail to reflect the seriousness of the crime or the critical role played by these defendants in the trafficking and illegal export of weapons. Simply put, straw purchasing and illegal arms exporting go hand in hand, and both must be addressed together.’”

Regarding ATF plea and next steps, he has entered a plea of Not Guilty and the current schedule for the case is as follows:

CR-11-126-PHX-JAT ATF et al)-

Motions Deadline -4/22/11

Jury Trial- 06/07/2011 at 09:00 AM

B. On the issue of “sanctioning” or “encouraging” gun sales:

ATF Agents and Lawyers from the US Attorney’s Office did not “encourage” any FFL to “keep selling guns to known straw buyers.” In the two meetings with FFLs, attorneys and agents advised the FFLs that the Government cannot advise them to sell multiple guns or advise not to sell multiple guns. The FFLs were advised that those decisions were up to FFLs as are all decisions to sell left up to the FFL to evaluate the sale and determine whether it is lawful. In short, the FFLs were advised that the Government cannot advise FFLs to halt a sale that appears lawful and we cannot authorize a sale that appears unlawful. There was no mistake as to the clarity of the Agents’ and Attorneys’ message.

FFLs need no encouragement to sell guns as that is their actual business, selling guns. By the time that the government met with the owners, they had made many multiple sales and the guns were gone.

The FFLs wanted to know that the information that they provided was actually useful, and that they were not unwittingly implicating themselves in some criminal activity of which they weren’t aware. As we have said so many times before, they were told that ATF could not authorize illegal sales to be made any more than they could prohibit lawful sales, however, ATF appreciated their cooperation and willingness to voluntarily provide information to ATF including notice of multiple long gun purchases and notice of single gun sales of certain types of firearm or sales to particular individuals. No one discussed civil liability. The FFLs were providing information to ATF regarding transactions that the FFL must have viewed as lawful, having no knowledge or reason to know that the transfers were unlawful.]

Main Justice position on the issue of Sanctioning or encouraging arms sales, the Quote of Assistant Attorney General Ronald Weich in his February 4, 2011 letter:

“At the outset, the allegation described in your January 27 letter-- that ATF “sanctioned” or otherwise knowingly allowed the sale of assault weapons to a straw purchaser who then transported them into Mexico—is false.”

C. On the issue of “walking guns” or the timely seizure of guns:

Neither the USAO nor ATF was engaged in an effort “to let guns flow to straw buyers” or to “walk” guns that could have been seized under any lawful theory with available facts to prove the theory.

The guns flow FROM straw buyers and until agents observe illegal conduct they cannot treat them as anything other than ordinary buyers. At the time of transfer of the firearms from the FFL to the straw purchaser based upon the facts available to the FFL at the time of the sale, the sales to the “straw purchasers” are lawful; and seizure of the weapons in the hands of those purchasers without evidence of criminality would violate the United States Constitution and would be an unlawful seizure and deprivation of property rights without cause. (Fourth and Fifth Amendments).

In these investigations, there may come a point over the course of an investigation where ATF believes, though it is well short of proof beyond a reasonable doubt required in criminal cases, that they can prove that a particular person only buys guns for the purposes of illegal trafficking. However, seizure of the guns at that point may not be legal because purchasing multiple long guns in Arizona is lawful, transferring them to another is lawful and even sale or barter of the guns to another is lawful unless the United States can prove by clear and convincing evidence that the firearm is intended to be used to commit a crime. (18 USC 924 (d))

In short, the law does not permit agents to take guns away from anyone who buys ten AKs at a time solely because they bought multiple guns.

D. When weapons sales were monitored and those guns later turned up in crime scenes, had ATF somehow “authorized” the sales that ATF could have ordered stopped, or did ATF somehow not seize the guns appropriately or in a timely fashion?:

The number one concern for DOJ is interdicting guns that are unlawfully transferred to persons in the United States and in Mexico who will then commit crimes with those guns. The purpose of this investigation was to locate those guns, interdict those guns and bring those responsible for their unlawful purchase, transfer, finance and use to justice.

The full array of rights available to indicted defendants is also available to those persons suspected of committing gun crimes, and the government cannot violate legitimate gun owners rights by prematurely seizing their guns.

DOJ’s goals of the investigation were two-fold: 1. Interdiction of the weapons that were purchased or possessed in furtherance of the unlawful trafficking conspiracy; and 2. Investigation with an emphasis on discovering other members of the trafficking organization, particularly the leaders of the organization who procure the guns from straw purchasers and have them smuggled into Mexico to the Cartels. There seems to be some misconception on the part of the press and members of congress that the minute that ATF suspects that someone is a straw purchaser, agents can arrest that person and seize all of their guns. As explained above, that seizure would be unlawful, and ATF may only seize when a lawful basis for seizure can be proven under the US Constitution and statues passed by Congress.

The question seems to connote that ATF can promulgate a “No Sell” list like a “No Fly List”, under which FLLs would be prohibited from selling

any guns to any person on the list. ATF has no such power and ATF cannot interfere with the operation of commerce and prohibit a gun store from making a lawful sale to lists of suspects based upon nothing more than mere suspicion. These lists might well be long and would curtail a person's rights to purchase arms without any due process.

How is it that a person becomes a suspect in a straw purchase investigation? If they are buying multiple handguns, it could be because of multiple sales reports to ATF, notifying the bureau that a suspect is buying large quantities of handguns. If they are buying only long guns, they may not become a suspect until guns they have purchased can be traced after being recovered at a crime scene, or an FFL voluntarily notifies ATF of an unusually large purchase. But a multiple purchase by itself, or the recovery of a firearm at a crime scene does not establish that the original buyer of the gun is an "unlawful straw purchaser." If it did, then when a person buys a gun and then decides they don't shoot it well, or it recoils too much, or they really can't afford the ammunition, and sells it, out of the paper, or a gun show, or to a friend, if the next owner of the gun commits a crime with it, the original purchaser would become a suspect as an "unlawful straw purchaser" and a suspect in a gun trafficking case.

And your question presupposes that ATF agents should never let mere suspects possess a firearm. Your question seems to presume that once ATF identifies a suspect, they can treat that suspect as though they were a "prohibited person", never again allowed to possess a firearm, regardless of the fact that they have not been convicted of a crime. If this were the case, ATF could stop any person they label a suspect and take any gun they have away from them. This means that if you (1) bought two 5.7 mm pistols because you wanted one for the home and one for the office, or (2) bought three AR type rifles for you and your two sons to target shoot, or (3) you sold one of your guns to your brother in law, who resold it to a co-worker who took it into Mexico and got caught with it, then you are an "unlawful straw purchaser" suspect and the next time you buy a gun, with your own money, for a hunting trip, ATF should take it away from you.

E. Regarding the question "In regards to the guns recovered in Rio Rico after the Terry shooting, when they were purchased from [LES] [LES] (Jan, 2010) was there surveillance going on in conjunction with Operation Fast and Furious, or did ATF only become aware after the fact and link it to [LES] after the fact?"

Answer: There was no surveillance going on and the ATF did not learn of the sale until three days after it took place and the weapons were gone.

F. Regarding the LA Times and CBS News stories, they do not account for the fact, or rebut in any way, that this District is actively prosecuting unlawful weapons and ammunition traffickers.

In just two recent investigations in Phoenix, 51 defendants in 10 indictments have been charged.

In Fast and Furious announced on January 25 (Press release link below) 34 defendants in five indictments were announced. The trials are set for these dates:

Fast and Furious

CR-11-126-PHX-JAT [ATF] et al)-

Motions Deadline -4/22/11

Jury Trial- 06/07/2011 at 09:00 AM

CR-11-013-PHX-SRB [ATF]

Motions Deadline- 2/25/11

Jury Trial- 04/05/2011 at 09:00 AM

CR-10-1187-PHX-ROS (**ATF** et al.)- Motions Deadline **ATF** 2/4/11
Motions Deadline **ATF** 2/4/11
Jury Trial(**ATF**) - 04/05/2011 at 08:30

AM
CR-10-1607-PHX-NVW **ATF** Motions Deadline- 3/11/11
Change of Plea Hearing- 3/23/11
Jury Trial- 04/05/2011 at 09:00 AM

CR-10-1831-PHX-FJM **ATF** et al.)- Motions Deadline **ATF**
ATF **ATF** 3/18/11
Jury Trial **ATF** **ATF**
ATF 05/03/2011 at
09:00 AM

Press Release at:

http://www.justice.gov/usao/az/press_releases/2011/PR_02172011_Macedo_Saucedo-Cuevas%20et%20al.pdf

Links to Indictments:

http://www.justice.gov/usao/az/news_archive_2011.html

In the Too Hot to Handle set of cases announced on February 17, 2011, 17 defendants in five indictments were announced. The trials are set for these dates:

Too Hot to Handle

CR-10-00961-PHX-NVW (U.S. v. **ATF** et al.) Motions Deadline (*dft.*) **ATF** 03/07/11
Motions Deadline (*dft.*) **ATF** 3/11/11
Jury Trial (*dft.*) **ATF**
ATF 04/05/2011 at 09:00 AM

CR-11-00231-PHX-JAT (U.S. **ATF** et al.) Motions Deadline (*d*) **ATF**
ATF 3/7/11
Motions Deadline (*dft.*) **ATF** 3/16/11
Status Conference (*dft.*) **ATF**
ATF
03/16/2011 at 11:15 AM Jury Trial
(*dft.*) **ATF**
ATF 04/05/2011 at 09:00 AM
Jury Trial (*dft.*) **ATF** 04/05/2011 at 09:00 AM

CR-10-01129-PHX-NVW (U.S. v. Macedo, et al.) Motions Deadline (both defendants)- 05/13/2011
Jury Trial (both defendants)- 06/07/2011 at 09:00 AM

CR-11-00245-PHX-ROS (U.S. v. ATF al.)

Motions Deadline (both defendants)- 03/03/2011
Jury Trial- 04/05/2011 at 09:00 AM

CR-10-01296-PHX-ROS (U.S. v. ATF)

Motions Deadline-02/19/2011
Jury Trial- 05/03/2011 at 08:30 AM

Press Release at:

http://www.justice.gov/usao/az/press_releases/2011/PR_02172011_Macedo_Saucedo-Cuevas%20et%20al.pdf

Indictments as:

http://www.justice.gov/usao/az/press_releases/2011/US_v_Resa_Indictment.pdf

In the Tucson Office alone there are currently five (5) pending indictments charging 23 defendants with attempting to export thousands of rounds of ammunition to Mexico and with weapons offenses. Those indictments are enclosed in PDFs.