

U.S. Department of Justice

December 2, 2010

The Honorable William K. Sessions III
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

Re: Department Proposals to Amend the Federal Sentencing
Guidelines to Address Southwest Border Firearms Trafficking

Dear Chief Judge Sessions:

On August 12, 2010, the United States Senate passed the Southwest Border Security Act,¹ which the President signed into law on August 13, 2010, allocating \$600 million to provide increased funding for, among other things, the investigation and prosecution of illegal drugs and weapons trafficking along the Southwest border of the United States. *See* Statement by the President on the Passage of the Southwest Border Security Bill, Aug. 12, 2010. In particular, the new law provides for additional prosecutors, the provision of ballistic analysis support to Mexican law enforcement operations, and additional ATF Gunrunner Teams. *Id.* In praising the law, a bipartisan accomplishment passed after special sessions of both the House of Representatives and the Senate,² U.S. Homeland Security Secretary Janet Napolitano emphasized that the law will bolster the United States' "crack down on transnational criminal organizations and reduce the trafficking of people, drugs, currency and weapons" -- an enforcement objective

¹ H.R. 6080, 111th Cong., 2d Sess. (2010).

² Both the House and Senate re-convened for special sessions during their August 2010 recess. Since the formalization of the recess period in 1970, the only other time the Senate has re-convened during its August recess was in 2005 in response to Hurricane Katrina.

she characterized as “a matter of national security.” See Statement by Secretary Napolitano on Passage of Southwest Border Bill in the U.S. Senate, Aug. 5, 2010; Press Briefing by Press Secretary Gibbs and Secretary of Homeland Security Napolitano, Aug. 13, 2010 (available at www.m.whitehouse.gov/the-press-office/2010/08/13/press-briefing-press-secretary-gibbs-and-secretary-homeland-security-nap).

In its September 8, 2010, notification of final policy priorities for the 2010-11 amendment cycle, the Commission advised that, pursuant to the directive in section 107(b) of the Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010, it would study and report to Congress “regarding violations of . . . sections 38, 39, and 40 of the Arms Export Control Act (22 U.S.C. [§§] 2778, 2779, and 2780), . . . including consideration of amendments to § 2M5.2 (Exportation of Arms, Munitions, or Military Equipment or Services Without Required Validated Export License) or other guidelines in Part K or Part M of Chapter Two of the Guidelines Manual that might be *appropriate in light of the information obtained from such study.*” 75 Fed. Reg. 54699 (emphasis added).

We understand that on October 28, 2010, a team composed of Department of Justice officials and ATF agents met with Commission staff members and discussed the challenges of investigating and prosecuting firearms trafficking along the Southwest border and the implications for national security and foreign policy interests of the United States. During that meeting, the Department officials urged the Commission, in the context of any report it prepares for Congress in connection with this priority, to consider changes not only to those guidelines to which 22 U.S.C. §§ 2778, 2779, and 2780 specifically are referenced, but also to USSG § 2K2.1, the guideline that applies in the bulk of cases in which arms trafficking is prosecuted.

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.³

Accordingly, we believe that the Commission's report to Congress should, in addition to analyzing the implications for the operation of the United Nations Participation Act, the Trading with the Enemy Act, and the Arms Export Control Act, (1) explain the significant role that "straw purchasers" and licensed corrupt dealers (prosecuted under 18 U.S.C. §§ 922(a)(6) and 924(a)(1)(A)) play in the illegal export of arms beyond *all* U.S. borders; (2) acknowledge (as Congress already has) the growing national security and foreign policy risk posed specifically by firearms trafficking to Mexico; (3) explain how straw purchases and other illegal transactions that facilitate firearms trafficking into Mexico are conducted not just in the Southwest border region, but rather throughout the United States (indeed, as far away from the Southwest border as Washington State and Minnesota), further necessitating prosecutions beyond 22 U.S.C. §§ 2778, 2779, and 2780; and (4) detail the inadequacies of a federal sentencing framework where firearms offenses whose prosecution is key to the government's disruption of arms smuggling to violent drug cartels are not subject to statutory minimum penalties and, indeed, typically result in little or no prison time.

In addition, we believe it is critical that in this amendment year, the Commission promulgate amendments to the firearms trafficking-related sentencing guidelines like those the Department has discussed with Commission staff, which would provide modest but meaningful increases in penalties for straw purchasing offenses. We look forward to discussing these and other related proposals with the Commission.

³ A recent series of articles on firearms trafficking in the *Washington Post* discussed the law enforcement and public safety challenges posed by straw purchasers. See, e.g., "Realco Guns Tied to 2,500 Crimes in D.C. and Maryland," Oct. 24, 2010 (<http://www.washingtonpost.com/wp-dyn/content/article/2010/10/23/AR2010102302994.html?sid=ST2010102304311>); "The Story of Two Guns That Killed Police Officers," Nov. 22, 2010 (<http://www.washingtonpost.com/wp-dyn/content/article/2010/11/21/AR2010112103202.html>).

The Honorable William K. Sessions III
December 2, 2010
Page 4

We appreciate the opportunity to share with you our views on this matter, and look forward to working further with the Commission to achieve effective and just sentencing laws as we continue our efforts to dismantle violent drug cartels and strengthen our country's security.

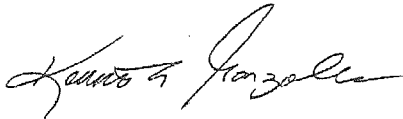
Sincerely,



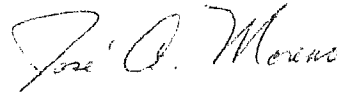
Dennis K. Burke
United States Attorney
District of Arizona



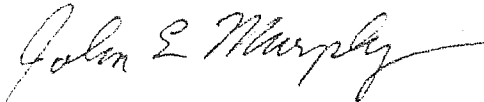
Laura E. Duffy
United States Attorney
Southern District of California



Kenneth J. Gonzales
United States Attorney
District of New Mexico



José Angel Moreno
United States Attorney
Southern District of Texas



John E. Murphy
United States Attorney
Western District of Texas

cc: Commissioners
Judith Sheon, Staff Director
Kenneth Cohen, General Counsel