

FEDERAL DEFENDERS OF MONTANA

Missoula, Montana

TO: Alan Dorhoffer, Senior Staff Attorney

FROM: John Rhodes, Assistant Federal Defender

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RE: Supplemental firearms information

CC: Amy Baron-Evans, Sentencing Resource Counsel

DOJ's proposal depends upon whether the firearm transfer complied with the governing law, that is, as DOJ puts it, whether it was part of an "unlawful scheme." This overwhelmingly, is, a question of state, and sometimes, municipal law.

According to the National Rifle Association, there are over 20,000 firearm regulations in America. See www.nraila.org/media/misc/compendium.aspx. This complex array is dizzying. This bewilderment results because most existing gun laws are state laws "subject to frequent change." *Id.*

Some examples establish this fact. Assault weapons are prohibited in California, Connecticut, New Jersey, and New York. *Id.* at note 1. Hawaii prohibits "assault pistols." *Id.* Several Chicago-area cities prohibit handguns. *Id.* The District of Columbia prohibits handguns not registered before September 23, 1976, and re-registered by February 5, 1977. *Id.* at note 9.

Some cities have their own rules. *Id.* at notes 14 and 15. "40 states prohibit or restrict municipalities from enacting local gun laws. Only ten states allow cities and counties to impose tighter gun laws." http://www.soros.org/initiatives/justice/articles_publications/publications/gun_report_20000401 at 4.

California, Connecticut, Illinois, Maryland, and Rhode Island impose waiting periods to purchase hand and long guns. See www.nraila.org/media/misc/compendium.aspx.

Florida, South Dakota, Washington and Wisconsin have waiting periods for handguns only. *Id.* Minnesota does for handguns and assault weapons but not for long guns. *Id.*

Some states require a license or permit to purchase both handguns and long guns. *Id.* Others require such authorization for handguns only. *Id.* A few states require proof of safety training to purchase a firearm. *Id.* at note 11.

Similarly, a handful of states require that firearms be registered. *Id.* Most states do not require registration. www.nraila.org/media/misc/compendium.aspx. A few states require that a sale be reported to the state or local government. *Id.* Most states do not require such reporting. *Id.* "35 states have neither licensing nor registration for any type of gun." http://www.soros.org/initiatives/justice/articles_publications/publications/gun_report_20000401 at 3.

“Gun Control in the United States: A Comparative Survey of State Firearms Laws,” a project of the Open Society Institute’s Center on Crime, Communities & Culture and the Funders’ “Collaborative for Gun Violence Prevention,” issued in April 2000, provides a comprehensive survey of the gun laws in all 50 states. http://www.soros.org/initiatives/justice/articles_publications/publications/gun_report_20000401. It characterized the regulatory framework as a “patchwork quilt.” *Id.* at 1.

It’s introduction highlights that in 43 states, “the purchase of an assault weapon requires no license or registration” and that in 46 states, “there is no limit on the number a person can buy at any one time.” *Id.* at 1.

And going to the heart of the matter before the Commission, “[o]nly four states impose a limit of one handgun per month as a precaution against gun trafficking.” *Id.* This latter fact illustrates, as detailed below in our proposed trafficking definition, that a gun trafficker is someone who is in the business of transferring firearms. “In the other 46 states there is no legal obstacle to prevent illegal gun traffickers from buying multiple handguns.” *Id.* at 4.

Indeed, “32 states require no background checks when a handgun is purchased from a private seller, whether over the back fence or at a gun show.” *Id.* at 3.

Moreover, capturing the essence of the quagmire inherent in DOJ’s “unlawful scheme” definition, the report presents “the patchwork quilt formed by the gun laws of the United States.” *Id.* The report details the lack of “a comprehensive legislative framework to regulate the build-up and movement of guns in the community.” *Id.* at 2.

Most existing gun laws are state laws. *Id.* at 5. “The scope and structure of the laws vary widely from state to state; sometimes the substance of the law can only be ascertained through a conversation with police or the state Attorney General’s office about implementation.” *Id.* State gun laws “lack [] uniformity.” *Id.*

Relying on 20,000 regulations to adjudicate an “unlawful scheme” would thus undermine uniformity, one of the fundamental goals of the Sentencing Guidelines. 28 U.S.C. § 991(b)(1)(B). Compounding this complexity is the fact that, “[s]tate laws can be confusing even to those who enforce them, due to poor drafting, local differences in interpretation, or simple misunderstandings.” *Id.* at 8.

In sum, the survey emphasized the striking “lack of uniformity in firearm regulation across the country.” *Id.* at 11. That complaint echoes the federal courts’ comments on the illegal reentry aggravated felony enhancement.

“Aggravated felony” is a term of art created by Congress to describe a class of offenses that subjects aliens convicted of those offenses to certain disabilities. See H.R. Rep. No. 101-681(I), at 147 (1990), reprinted in 1990 U.S.C.C.A.N. 6472, 6553. “Aggravated felonies” are not necessarily a subset of felonies; for instance, an offense classified by state law as a misdemeanor can

be an “aggravated felony” triggering a sentencing enhancement under § 2L1.2 if the offense otherwise conforms to the federal definition of “aggravated felony” found in 8 U.S.C. § 1101(a)(43). See *United States v. Marin-Navarette*, 244 F.3d 1284, 1286-87 (11th Cir.), cert. denied, 534 U.S. 941, 122 S.Ct. 317, 151 L. Ed. 2d 236 (2001); *United States v. Pacheco*, 225 F.3d 148, 154-55 (2d Cir. 2000), cert. denied, 533 U.S. 904, 121 S.Ct. 2246, 150 L. Ed. 2d 234 (2001); *United States v. Graham*, 169 F.3d 787, 791-93 (3d Cir. 1999). In determining whether state convictions are aggravated felonies, courts have consistently favored substance over form, looking beyond the labels attached to the offenses by state law and considering whether the offenses substantively meet the statutory definition of “aggravated felony.” See *Rivera-Sanchez*, 247 F.3d at 909 (state burglary offense not aggravated felony where state definition of offense broader than definition contained in § 1101(a)(43)); *Marin-Navarette*, 244 F.3d at 1286-87 (state offense classified as a misdemeanor under state law met federal definition of aggravated felony); *Pacheco*, 225 F.3d at 154-55 (same); *Ye v. INS*, 214 F.3d 1128, 1131-33 (9th Cir. 2000) (state burglary offense did not meet federal definition of aggravated felony); *United States v. Sandoval-Barajas*, 206 F.3d 853, 856-57 (9th Cir. 2000) (state firearm offense not aggravated felony because definition of state offense broader than federal definition contained in § 1101(a)(43)); *Graham*, 169 F.3d at 792-93 (in determining whether state offense is aggravated felony under § 1101(a)(43), “we give effect to the definition of the underlying offense and ignore the label”). In order to determine whether Robles-Rodriguez's drug possession convictions are aggravated felonies, we must navigate a rather confusing maze of statutory cross-references.

United States v. Robles-Rodriguez, 281 F.3d 900, 902-03 (9th Cir. 2002).

Similar to the “unlawful scheme” quagmire it proposes, the Department of Justice has given no sensible rationale for receipt being included in the definition of trafficking. It says: “A person who receives a firearm as part of a trafficking scheme but who has not yet had an opportunity himself to transfer the firearm in furtherance of the scheme should also be covered.” Hertling Testimony, p 8. How can a person who has not transferred anything be part of a trafficking scheme? This makes no sense.

Our definition, which tracks congressional language, *see* 18 U.S.C. § 921(a)(21)(A-F) & (a)(22), is the answer to all of these problems, and it would capture the “urban” problem (urban violence) and not the farmer who trades shotguns for a truck:

- (7) If the defendant engaged in the business of trafficking in firearms, increase by 2 levels.

The proposed corresponding application note should be modified to read:

- (13) Application of Subsection (b)(7).--
- (A) Definition of “engaged in the business of trafficking.” – For purposes of subsection (b)(7), “engaged in the business of trafficking” means a defendant who:
- (1) engages in the regular and repetitive acquisition and transport, transfer or disposition of firearms,
 - (2) has as his predominant objective in doing so (i) livelihood and profit, or (ii) criminal purposes or terrorism, and
 - (3) knows or has reason to believe that the transport, transfer, or disposition (i) would be to another individual or individuals whose possession or receipt would be unlawful or (ii) would be used or possessed in connection with another felony offense.

“Livelihood and profit” is defined for purposes of subsection (b)(7) and this application note in the first sentence of 18 U.S.C. § 921(a)(22).

“Terrorism” is defined for purposes of subsection (b)(7) and this application note in 18 U.S.C. § 921(a)(22)(A)-(C).

- (B) Use of the Term “Defendant”. – Consistent with §1B1.3 (Relevant Conduct), the term “defendant” limits the accountability of the defendant to the defendant’s own conduct and conduct that the defendant aided or abetted, counseled, commanded, induced, procured, or willfully caused.
- (C) An increase to the offense level under § 2K2.1(b)(7) is in addition to any increase to the offense level under § 2K2.1(b)(1) for the number of firearms involved in the offense.
- (D) If an increase of 4 levels is made under § 2K2.1(b)(5), and § 2K2.1(b)(7) would otherwise apply because the defendant trafficked in firearms to another individual or individuals whose possession or receipt the defendant knew or had reason to believe would be used or possessed in connection with another felony offense, [do not apply § 2K2.1(b)(7)] [increase the offense level by 1 level rather than 2 levels under § 2K2.1(b)(7)].

This application note assures that the trafficking enhancement captures the criminals who DOJ desires to punish. As DOJ explained in its written testimony: “Firearms traffickers are persons who violate existing laws and deliberately circumvent the background-check and record-keeping requirements of legal commerce in order to supply firearms to convicted firearms, drug dealers, gang members, and other prohibited persons.” Hertling Testimony, p. 3. Not only does our proposal fully capture what DOJ has told the Commission to target, it does so without sweeping in individuals who are not traffickers who DOJ expressly disavowed as deserving enhanced sentences, and moreover, does so without relying on the confusing “patchwork quilt” of 20,000 gun laws.

Thank you for considering our comments, and please let me know if I, or any other defenders, can assist the Commission further.