

Written Statement of Kyle Welch

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On Behalf of the Federal Public and Community Defenders

**Before the United States Sentencing Commission
Public Hearing on Proposed Amendments for 2011**

Re: Proposed Amendments: Firearms

March 17, 2011

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My name is Kyle Welch and I am an Assistant Federal Public Defender in the Southern District of Texas (McAllen). I would like to thank the Commission for holding this hearing and giving me the opportunity to testify on behalf of the Federal Public and Community Defenders regarding the proposed amendments for firearms.

I. Introduction

Defenders understand the Commission's desire to take steps to curb violence in Mexico by stopping the flow of firearms across the border. The level of violence is disturbing and carries with it important implications for U.S. foreign and domestic policy. The deadly shootings of Special Agent Jaime Jorge Zapa this year and of Border Patrol Agent Brian Terry in December 2010 are tragic examples of the violence in Mexico and its connection to the United States. Experience teaches us, however, that high profile tragedies may lead to hastily made but long-lasting policy decisions that can have detrimental effects.¹

Policy decisions made in the midst of an emerging controversy and congressional investigation into the "Fast and Furious" strategy of the Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF") are particularly unsound.² We urge the Commission to steer clear of the controversy until the Department of Justice, ATF, and Congress can decide on a comprehensive strategy for combating illegal firearms transactions. One-size-fits-all solutions that further complicate the guidelines should be avoided, especially in the midst of ongoing congressional investigations into ATF's handling of gun trafficking cases involving straw purchasers,

¹ At least two notoriously harsh sentencing laws have emerged from tragedies. One is 18 U.S.C. § 924(c), which was enacted shortly after the shooting of Martin Luther King, Jr., and then amended after the assassination of Robert F. Kennedy. Another is the crack penalties set forth in the Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207, which followed the death of basketball star Len Bias. As the Commission well knows, it took over two decades to begin to ameliorate the harsh and devastating consequences of the severe sentences meted out to crack offenders.

² See John Solomon, David Heath, & Gordon Witkin, The Center for Public Integrity, *ATF Let Hundreds of U.S. Weapons Fall into Hands of Suspected Gunrunners* (Mar. 3, 2011), <http://www.publicintegrity.org/articles/entry/2976>; see also Letter from Senator Charles Grassley to Attorney General Eric Holder and Acting Director of the Bureau of Alcohol, Tobacco, Firearms, and Explosives Kenneth Melson (Mar. 3, 2011) (hereinafter *Grassley Letter*), <http://grassley.senate.gov/about/upload/Judiciary-03-03-11-letter-to-Holder-Melson-ATF-SW-Border.pdf>.

“incomplete” information about Southwest border gun trafficking,³ and the heated political debate about the nature of the problem and how it should be solved.

Defenders fear that the Commission’s proposed amendments to USSG §§2M5.2 and 2K2.1 are not narrowly tailored to carry out the purposes of sentencing and bring with them the significant risk of incarcerating low-level, first-time offenders for a length of time that is not only greater than necessary, but detrimental to public safety. Further, the Commission’s broad and far-reaching issues for comment on §2K2.1 suggest the Commission is quickly – too quickly from our perspective – considering amendments that will adversely impact hundreds of individuals across the country as well as the community at large. We believe that instead of reacting to the problems of gun violence – within or outside our borders – by quickly proposing and promulgating amendments targeting straw purchasers and those involved in firearms crossing the border or export offenses involving small arms and ammunition, the Commission, as an independent expert body, should engage in a more searching inquiry that carefully sifts through the data surrounding the issues before deciding to amend the guidelines.

At this point, the Commission lacks the information necessary to draw a sound conclusion about the role the guidelines should play in these cases. ATF cannot even provide reliable data on straw purchasers, trafficking by unlicensed sellers, and gun shows because “the agency does not systematically track this information.” Government Accountability Office, *Firearms Trafficking: U.S. Efforts to Combat Arms Trafficking to Mexico Face Planning and Coordination Challenges* 39-40 (2009). Without such information, it is difficult to “understand the nature of the problem and to help plan and assess ways to address it.” *Id.* at 38. Because the Commission does not have adequate information and ATF’s plan to combat the problem is unclear, we believe it premature for the Commission to amend the guidelines related to these offenses.

The Commission’s proposal to amend the guidelines for firearms crossing the border also comes too soon because no consensus has been reached about whether efforts to control guns in the United States will curb the violence in Mexico. Key players in the highly politicized debate about violence in Mexico disagree on the nature of the problem, including the extent to which firearms crossing the border contribute to cartel violence.⁴ According to some reports, much of

³ Vivian Chu & William Krouse, Congressional Research Service, *Gun Trafficking and Southwest Border* 26 (2009).

⁴ Senator Jeff Sessions’ remarks highlight the hot debate about the chief causes of the violence in Mexico and the extent to which gun control efforts will help lessen it. Senator Sessions observed: “[I]f [the Mexican drug cartels] do not get guns from the United States, they will get them from the military. They will steal them for other countries. They will buy them on the markets out there. The problem really is not the guns. It is a part of it. But the real problem is that this group is attempting to conduct an illegal operation in Mexico, and they will intimidate and kill people who try to stop them.” *Law Enforcement Responses to Mexican Drug Cartels: Hearing Before the Subcomm. on Crime and Drugs of the S. Comm.*

the violence is related to the use of “military-grade weapons, including hand grenades, grenade launchers, armor-piercing ammunitions and antitank rockets” that are not available in the United States much less available to a straw purchaser at a gun store in Texas. See Ken Ellingwood & Tracy Wilkinson, *Mexico Under Siege: Drug Cartels’ New Weaponry Means War*, L.A. Times, Mar. 15, 2009. While U.S. authorities focus on the smuggling of more conventional weapons purchased in the U.S. and smuggled across the border, the facts on the ground seem to indicate that drug cartels are smuggling more sophisticated and lethal weapons from “Central American countries or by sea.” *Id.*⁵

What empirical information is available, including the Commission’s own data, does not support the need for higher sentences for any of the defendants targeted in the proposed amendments. The Commission’s FY 2009 dataset reveals that a majority of defendants convicted under 18 U.S.C. §§ 922(a)(6), 922(d), and 924(a)(1)(A) receive below guideline sentences, either through government sponsorship (29%) or otherwise (28%). Very few (1%) receive above range sentences.⁶ These data suggest that the guideline ranges for these offenses are too high, not too low. The Commission should not ignore empirical data in favor of unsubstantiated claims that higher sentences are necessary.

Lengthier Sentences are Not Necessary to Induce Cooperation and the Strategy of Encouraging Prosecutors to Seek Lengthier Sentences for Straw Purchasers is Unsound and Counter-productive.

As a threshold matter, inducing cooperation should not be a factor the Commission considers in deciding where to set a guideline range. It is one thing for the Commission to reward those who cooperate; it is another to set penalties higher so that those who fail to cooperate are punished more harshly. See USSG §5K1.2, p.s. (defendant’s refusal to assist authorities may not be considered aggravating factor). That said, the empirical evidence refutes the claims of some AUSAs and ATF agents that “lesser penalties” for straw purchasers

on the Judiciary and the S. Caucus on International Narcotics Control United States Senate, 111th Cong. 44 (2009) (statement of Senator Jeff Sessions) (hereinafter *Responses to Mexican Drug Cartels*).

⁵ Some gun control advocates and politicians contend that 90% of guns seized from the cartels are from the United States. *Responses to Mexican Drug Cartels*, *supra* note 4, at 3 (statement of Senator Richard Durbin); *id.* at 5 (statement of Senator Dianne Feinstein). Others call this the “90 percent myth.” See National Rifle Association, *The Ongoing Mexico Crisis – Blaming American Gun Owners*, (2009), <http://www.nraila.org/Legislation/Federal/Read.aspx?id=463>; see also *Combating Border Violence: The Role of Interagency Coordination in Investigations: Hearing Before the Subcomm. on Border, Maritime, and Global Terrorism of the Comm. on Homeland Security, House of Representatives*, 111th Cong. 33 (2009) (statement of Congressmen Mike Rogers) (“90 percent is really misleading if you look at the overall stockpile of weapons they have there”).

⁶ USSC, FY 2009 Monitoring Dataset.

“reduce[s] their ability to use the threat of prosecution to induce suspects to cooperate and provide evidence against their co-conspirators.” U.S. Dep’t of Justice, Office of Inspector General, *Review of ATF’s Project Gunrunner* 65 (2010) (hereinafter *OIG Review of Gunrunner*); *see also id.* at 66. As discussed more fully below, straw purchasers have shown no reluctance to cooperate with law enforcement officials and do so at a higher rate than many other defendants.⁷ Twenty-six percent of defendants convicted of straw purchasing under 18 U.S.C. §§ 922(a)(6) or 924(a)(1)(A) received a §5K1.1 departure for substantial assistance.⁸

Rather than have a meaningful impact on illegal firearms transactions, increased penalties for lower-level offenders in gun trafficking are more likely to encourage prosecutors⁹ to go after the “low hanging” fruit to increase conviction rates and aggregate punishment rather than pursue more intense investigations aimed at bringing down the higher level gun traffickers.¹⁰ Multiple press releases boasting about the convictions and sentences of persons involved in the purchase of firearms may be part of a public relations campaign in response to President Calderon’s claims that the U.S. is responsible for the violence in Mexico. The convictions and sentences boasted about in those releases, however, would not do anything to actually combat gun trafficking, much less curb the violence in Mexico.¹¹ The simple fact of the matter is that straw purchasers, like drug mules, often have little information about the organizations they serve. Moreover, they are easily replaced.

Even if increased penalties could help stem purchases from federally licensed dealers, such purchasers are only one source of firearms for gun traffickers or others in search of

⁷ The documents obtained by Senator Grassley regarding ATF’s “Fast and Furious” program show that straw purchasers were cooperating with authorities as they sought to investigate persons higher up in the operation. *See Grassley Letter* (Attachment 1, ATF Report of Investigation).

⁸ USSC, FY 2009 Monitoring Dataset.

⁹ The Department argued in 2006 that if the Commission did not add a “trafficking enhancement” to §2K1.1, “cases may simply not be prosecuted because the relatively low existing penalties may not merit the expenditure of scarce prosecutorial resources.” *See* Written Testimony of Richard Hertling, Dep’t of Justice, Before the U.S. Sent’g Comm’n, at 3-4 (Mar. 15, 2006). The Department got what it wanted in 2006. Five years later, it has returned with new unsupported claims that even higher penalties are required for cases involving illegal firearms transactions. The Commission should view these claims with great skepticism.

¹⁰ *See generally* Todd Lochner, National Center for State Courts, *Strategic Behaviors and Prosecutorial Agenda Setting in United States Attorneys’ Offices: The Role of U.S. Attorneys and their Assistants*, 23 *Just. Sys. J.* 271, 286 (2002) (interviewees in U.S. Attorney’s offices “suggested that many career assistants will seek the easiest types of cases that require the least work”); *id.* at 291 (discussing how some U.S. Attorney’s use media attention as a reward incentive).

¹¹ We do not here suggest in any way that ATF should turn a “blind eye” to straw purchases. The ATF’s “Fast and Furious” program shows the dangers associated with such a strategy.

firearms. Other sources include thefts from interstate shipments, burglaries, and purchases at gun shows.¹² Gun shows and flea markets – legal in Texas, Arizona, New Mexico, and elsewhere – are largely unregulated. Sales at such shows are not subject to the same recordkeeping requirements as sales from gun shops. The purchaser need only present a driver’s license showing residence in the same state as the point of sale. *See generally* Chu & Krouse, *supra* note 3, at 11.¹³ Sellers have been known to bypass even this minimal requirement. As a result, weapons, including semi-automatic firearms, such as the AR-15 and AK-47, can be purchased for cash with no paper trail that permits tracing of the firearm to the seller or purchaser. *See* Brady Campaign to Prevent Gun Violence, *Undercover Video Exposes Irresponsible Dealings at Gun Shows*.¹⁴

Because stiffer penalties on straw purchasers could have unintended consequences that interfere with the overall goal of reducing gun trafficking and that are incompatible with the purposes of sentencing set forth in 18 U.S.C. § 3553(a), we believe the Commission should move cautiously before increasing penalties for straw purchasers or those who transfer firearms to a prohibited person.

No Sound Evidence Exists that the Severity of a Sentence Serves as a Deterrent.

Much of the Department’s push for longer and longer sentences stems from a myth that more severe sentences serve as a general deterrent to crime. This theory is premised on the view that offenders are rational actors who weigh the costs and benefits of engaging in crime before doing so, and that they perceive that severity before committing a crime. Research, however, refutes that theory. Indeed, there is “no real evidence of a deterrent effect for severity.” Raymond Pasternoster, *How Much Do We Really Know About Criminal Deterrence*, 100 J. Crim. L. & Criminology 765, 817 (2010). Lengthy sentences do not provide meaningful deterrence because most offenders do not think about the criminal consequences of their actions.

¹² *Commerce, Justice, Science, and Related Agencies Appropriations for 2011: Hearing Before a Subcomm. of the Comm. on Appropriations, House of Representatives*, 111th Cong. 289 (2010) (statement of Kenneth Melson, Deputy Director, Bureau of Alcohol, Tobacco, Firearms, and Explosives).

¹³ *See also Money, Guns, and Drugs: Are U.S. Inputs Fueling Violence on the U.S./Mexico Border?: Hearing Before the Subcomm. on National Security and Foreign Affairs of the Comm. on Oversight and Government Reform, House of Representatives*, 111th Cong. 48 (2009) (statement of Tom Diaz, Senior Policy Analyst, Violence Policy Center).

¹⁴ Available at http://www.youtube.com/watch?v=baPgr_tw79Q&feature=channel (video documentary of gun show purchases of various assault style rifles without background check, identification, or paperwork).

See Anthony N. Doob & Cheryl Marie Webster, 30 *Crime & Just.* 143, 182-83 (2003).¹⁵ To the extent that offenders weigh the perceived costs and benefits, “in virtually every deterrence study to date, the perceived certainty of punishment was more important than the perceived severity.” Pasternoster, *supra*, at 812; Doob & Webster, *supra* at 189 (“no consistent and plausible evidence that harsher sentences deter crime”).

With regard to gun crimes, some studies show that increased penalties for gun violations “have produced little in the way of deterrence for arrestees, who continue to obtain and use firearms with ease.” Scott Decker, Susan Pennell, & Ami Caldwell, National Institute of Justice, *Illegal Firearms, Access and Use by Arrestees* 4 (1997). Other data show that stepped up enforcement, tighter controls on gun show sales, background checks for all handgun sales at gun shows, purchase permits, and required reporting of lost or stolen firearms will have a greater impact on trafficking than sentence severity. See generally Mayors Against Illegal Guns, *The Movement of Illegal Guns in America: The Link between Gun Laws and Interstate Gun Trafficking* (2008) (discussing how local control of firearms regulations, and state inspections of gun dealers have a significant impact on illegal gun trafficking).

We encourage the Commission to carefully consider the existing research on deterrence theory and reject the bare assertion that more severe sentences will deter illegal firearm purchases and transfers or otherwise serve any of the purposes of sentencing.

Increased Prison Sentences for First-Time Offenders May Well Increase the Risk of Recidivism.

We are also gravely concerned about the consequences of sending first-time offenders to prison,¹⁶ where they will learn new anti-social skills,¹⁷ and then returning them to society, where they will face numerous barriers to reentry and long-lasting collateral consequences. See, e.g., Erik Luna, *Punishment Theory, Holism, and the Procedural Conception of Restorative Justice*, 2003 *Utah L. Rev.* 205, 207-42. The consequences of incarceration cannot be overstated. Scholars have identified numerous “criminogenic” effects of incarceration, including how prison

¹⁵ See generally Paul H. Robinson & John M. Darley, *The Role of Deterrence in the Formulation of Criminal Law Rules: At its Worst When Doing its Best*, 91 *Geo. L. J.* 949, 953 (2003); A. Mitchell Polinsky & Steven Shavell, *On the Disutility and Discounting of Imprisonment and the Theory of Deterrence*, 28 *J. Legal Stud.* 1, 4-7 (1999).

¹⁶ These are mostly persons with no felony record. In FY 2009, 73% of the defendants convicted under 18 U.S.C. §§ 922(d), 924(a)(1)(A) or 922(a)(6) fell within Criminal History Category I. USSC, FY 2009 Monitoring Dataset.

¹⁷ Edward J. Latessa & Christopher Lowenkamp, *What Works in Reducing Recidivism?*, 3 *U. St. Thomas L. J.* 521, 522 & n.2 (2006) (discussing how prison exposes lower risk offenders to “anti-social behavior” and disrupts “pro-social networks,” such as “school, employment, family”).

serves as a school for criminals; severs ties to family and community; diminishes employment options upon release; and reduces rather than increases the inmate's willingness or ability to conform to social norms.¹⁸

The Supreme Court itself freely acknowledged: “[p]risons are dangerous places.” *Johnson v. California*, 543 U.S. 499, 515 (2005). The more crowded they are, the more dangerous they become. By the end of FY 2011, “[t]he system-wide crowding level in BOP facilities is estimated to climb to 43 percent above rated capacity,” a 7% increase from last year. See U.S. Dep’t of Justice, *Federal Prison System FY 2011 Performance Budget*, at 3. As a result of this crowding, “as of May 2009, 18,630 (93 percent) high security inmates were double bunked, and 14,180 (26 percent) of medium security inmates and almost 35,000 (81 percent) of low security inmates were triple bunked.” *Id.* at 2.

In addition to the very real physical dangers of prison life, there are numerous psychological risks. As one prominent psychologist puts it: “The adaptation to imprisonment is almost always difficult and, at times, creates habits of thinking and acting that can be dysfunctional in periods of post-prison adjustment [F]ew people are completely unchanged or unscathed by the experience.”¹⁹ The psychological consequences of imprisonment “may represent significant impediments to post-prison adjustment. They may interfere with the transition from prison to home, impede an ex-convict’s successful re-integration into a social network and employment setting, and may compromise an incarcerated parent’s ability to resume his or her role with family and children.”²⁰

Given the risks of recidivism associated with prison sentences and the other detrimental consequences of imprisonment, including the fiscal impact on taxpayers, we think it unwise to promulgate guidelines that would advise judges to impose longer prison sentences for persons who are typically first-time offenders.

¹⁸ See generally Martin H. Pritikin, *Is Prison Increasing Crime*, 2008 Wis L. Rev. 1049, 1054-72 (cataloging eighteen criminogenic effects of incarceration); Lynne M. Vieraitis, Tomaslav V. Kovandzic, Thomas B. Marvel, *The Criminogenic Effects of Imprisonment: Evidence from State Panel Data 1974-2002*, 6 *Criminology & Pub. Pol’y* 589, 614-16 (2007); see also USSC, Staff Discussion Paper, *Sentencing Options under the Guidelines* 19 (1996) (recognizing imprisonment has criminogenic effects including: contact with more serious offenders, disruption of legal employment, and weakening of family ties).

¹⁹ Craig Haney, *The Psychological Impact of Incarceration: Implications for Post-Prison Adjustment* 4 (2001), <http://aspe.hhs.gov/hsp/prison2home02/haney.pdf>.

²⁰ *Id.*

II. Proposed Amendments to §2M5.2 (Exportation of Arms, Munitions, or Military Equipment or Services Without Required Validated Export License)

The proposed amendments to §2M5.2 (1) narrow the scope of the alternative base offense level of 14 for offenses involving small arms, by reducing the maximum number of small arms from no more than ten to [two]-[five], and further requiring that the arms be “possessed solely for personal use”; and (2) specifically address ammunition, on which the current guideline is silent, by providing that small quantities ([200]-[500] rounds for small arms) possessed solely for personal use receive the alternative base offense level of 14.

Section 2M5.2 has only 2 possible base offense levels, 26 or 14, and contains no specific offense characteristics. The proposed changes to § 2M5.2 would have the effect of both raising the guideline range for low-level offenders currently subject to a base offense level 14, and expanding even further the wide range of culpability that is punished under base offense level 26.

We oppose these amendments because there is not sufficient empirical evidence that higher sentences are necessary or appropriate for this class of offenders, and the amendments will increase sentencing disparity by applying a single base offense level to an even broader group of quite different defendants. As one judge has already noted: “It is clear by the divergent set of materials included within and the history and justification for the amendments that the sentencing commission did not act within its ‘characteristic institutional role’ when it established the current guidelines under §2M5.2. It would be logical for there to be a sliding scale (such as exists for different drug types and weights) based on the lethal nature or technical sophistication of different munitions: no such scale exists, however.” *United States v. Oldani*, 2009 WL 1770116, *16 (S.D. W.Va. June 16, 2009).²¹ When one considers the genesis and evolution of §2M5.2 it becomes apparent that the proposed amendment only moves the guideline further away from its original intent.

A. The Current Guideline Provides for Sentences That Are Sufficiently Long.

The current guideline provides more than adequate punishment and deterrence. The Commission’s data confirm this. The statistics from 2009 show that United States District Court Judges believe the current guideline is at least sufficiently punitive, if not too punitive. Of the 63 cases sentenced under §2M5.2 in 2009, the majority (62%) received sentences *below* the current guideline range. USSC, *2009 Sourcebook of Federal Sentencing Statistics* tbl. 28 (2009) (hereinafter *2009 Sourcebook*). In 46% of the cases, judges imposed sentences below the

²¹ Instead of a sliding scale that would complicate the guideline by adding more finely tuned base offense levels, as discussed below, we propose adding departure language to the Commentary.

guideline range when the below guideline sentence was not sponsored by the government. *Id.*²² In contrast, judges imposed above guideline sentences in only 2 of the 63 cases (3%). *Id.* They imposed within guideline sentences in 35% of cases. *Id.* While this data would support a *reduction* in guideline ranges for many offenders subject to §2M5.2, the Commission’s proposed amendments would *increase* the guideline range to a level 26 for a number of defendants currently subject to a level 14. There is no need to increase sentences for lower level offenses involving no more than ten non-fully automatic small arms.

B. The Proposed Amendment Would Serve to Increase Disparity Within a Guideline that Already Lumps Together Very Different Offenses and Defendants Under a Single Base Offense Level.

By further limiting the applicability of level 14 to very small quantities of small arms, and/or ammunition for small arms only when they are for personal use, the proposed amendments would have the effect of putting the vast majority of cases, with widely different degrees of culpability, at a much higher base offense level 26.

The current guidelines already treat different defendants the same by grouping a wide variety of offenses under a single base offense level of 26. U.S. Immigration and Customs Enforcement (“ICE”) commented on this at a regional hearing: “right now, the main base offense level treats ten firearms the same as it would 150 hand grenades or highly sensitive technology.”²³ ICE informed the Commission that it “would like to see [§2M5.2] amended to better differentiate the various type of weapons and again the numbers smuggled. . . . And while the base offense level is fairly strong, there is no differentiation between quite, quite different offenses and levels of seriousness.” *Id.*; *see also Oldani*, 2009 WL 1770116 at *16 (noting it would be “logical” to punish the “the divergent set of materials” included within the guideline on a sliding scale, rather than group them together under a single base offense level).

The range of offenses that fall within the higher base offense level of 26 has expanded over the years. Originally, §2M5.2 provided for a base offense level of 22, if sophisticated weaponry was involved; or if not, a base offense level of 14. USSG §2M5.2 (1987). In 1990, the guideline was amended to expand the level 22 base offense level beyond “sophisticated weaponry” to include *all* offenses except that level 14 would apply in a very narrow class of cases where the offense “involved only fully-automatic small arms (rifles, handguns, or

²² Both rates are significantly higher than the rates for below guideline sentences across all offenses: In 2009, judges imposed sentences below the guideline range in 41% of the cases, and non-government sponsored below guideline sentences in 16% of the cases. *Id.*, tbl. N.

²³ Transcript of Public Hearing Before the U.S. Sentencing Comm’n, Phoenix, Ariz., at 16 (Jan. 20, 2010) (John T. Morton, Assistant Secretary of Homeland Security for the United States Immigrations and Customs Enforcement (ICE)).

shotguns), and the number of weapons did not exceed ten.” USSG App. C, Amend. 337 (Nov. 1, 1990). Then in 2001, when Congress expressed concern about inadequate penalties for weapons of mass destruction (nuclear, chemical, and biological weapons), “[r]ather than adopting some specific offense characteristics (such as the number of articles exported, their technical sophistication, the capability to cause harm, etc.),” *Oldani*, 2009 WL 1770116 at *16, the Commission simply raised the base offense level for *all* offenses from 22 to 26, excepting only the narrow class of defendants it had already defined as subject to the lower level 14. USSG App. C, Amend. 633 (Nov. 1, 2001).

As a result, we see a wide range of culpability among these defendants, but the guidelines punish them identically at a level 26. With the exception of the small number of items covered under offense level 14, offense level 26 covers a wide range of items on the United States Munitions List, including materials for chemical, biological, and nuclear weapons; bombs; rockets; torpedoes; flame throwers; warships; tanks, military aircraft; fully automatic firearms; rifle scopes; silencers; and optical equipment like night vision goggles. *See* 22 C.F.R. § 121.1 (2009). Because of the variety of items on the munitions list, offenses falling under level 26 range from lower-level offenses such as those involving small numbers of night vision goggles to much more serious munitions and quantities. *See, e.g., United States v. Garcia-Nevarez*, No. 09-cr-03418 (W.D. Tex. 2009) (a courier case involving four night vision goggles, where 54-year old courier with no criminal history refused to carry ammunition, and the charged conduct occurred when his wife was sick and required financial support); *United States v. Oldani*, 2009 WL 1770116 (S.D. W.Va. June 16, 2009) (defendant, a Marine Corps veteran suffering from Post Traumatic Stress Disorder and mild traumatic brain injury, involved in shipping stolen night vision optics to Taiwan, Japan and Hong Kong); *United States v. Carter*, 550 F. Supp. 2d 148 (D. Me. 2008) (defendant purchased eighteen non-fully automatic firearms for a Canadian citizen he knew would bring the firearms from the United States to Canada); *United States v. Tostado-Gonzalez*, No. 09-cr-01339 (W.D. Tex.) (defendant involved in attempting to purchase almost two million dollars worth of various makes, models, and calibers of firearms and ammunition, including high caliber rifles); *United States v. Tsai*, 954 F.2d 155 (3d Cir. 1992) (defendant involved in exporting to Taiwan parts for guidance of infra-red military missile systems such as the Sidewinder missile or the Maverick missile); *United States v. Pedrioli*, 978 F.2d 457 (9th Cir. 1992) (involving smuggling of 800 handguns to the Philippines); *United States v. Hendron*, 43 F.3d 24, 25 (2d Cir. 1994) (involving attempt to illegally sell 100 AK-47’s to Iraq).

Further narrowing the class of cases subject to level 14, by reducing the threshold number of guns from 10 to [two]-[five] would only further expand the range of culpability under base offense level of 26. By grouping dissimilarly situated offenses into one category, the proposed guideline would only add to unwarranted disparity.

Similarly, the addition of a personal use requirement to be eligible for level 14 further restricts the number of cases that fall under the lower base offense level and increases not only the number of cases subject to the higher base offense level of 26, but also the range of culpability subject to that level. There are defendants involved in illegally exporting firearms and ammunition who may be more culpable than those who export solely for personal use, but are significantly less culpable than those who illegally export weapons to arm drug trafficking organizations. For example, sometimes firearms and ammunition are intended for hunting or sport, and sometimes for local police, who are typically armed with nothing more than old revolvers and a few rounds of ammunition.²⁴ Additionally, firearms and ammunition are sometimes smuggled into Mexico for sale not to drug cartels, but to individual Mexican citizens who want guns in calibers that are illegal in Mexico to use for self-defense.²⁵ Under the current structure, and the proposed amended structure, less culpable offenders are treated the same as those who seek to illegally export millions of dollars of weapons for the drug cartels, or even weapons of mass destruction.

While we would prefer that the Commission not include the personal use limitation, if it decides to promulgate this amendment, we propose that it at least omit one of the proposed criteria for determining personal use: “the extent to which possession was restricted by local law.” First, assuming local law refers to local law in the United States where the defendant was apprehended, it would preclude every prohibited person from establishing that the firearms and ammunition were for personal use. Take, for example, the situation of a Mexican national who is in the United States illegally, smuggling a single small handgun from the United States to Mexico to use for self-defense. That individual’s possession of that weapon – which is restricted by local law in the United States under 18 U.S.C. § 922(g)(5) – could preclude a finding of personal use, and thus subject the individual to the higher base offense level. Second, if “local law” means the place to which the weapons were being exported, in almost every case where the firearms and ammunition are being exported to Mexico, the defendant will not qualify for the personal use criteria because Mexican gun laws are so restrictive. *90 Percent Myth, supra*.

Finally, the Commission’s proposal to specify that small amounts of ammunition for small arms will be subject to level 14 instead of level 26 does not help the disparity problem created by this guideline because this category of ammunition cases exists in theory only. We have not been able to locate a single defendant who would meet the extremely narrow

²⁴ Colby Goodman and Michel Marizco, *U.S. Firearms Trafficking to Mexico: New Data and Insights Illuminate Key Trends and Challenges* 21 (2010).

²⁵ STRATFOR, *Mexico’s Gun Supply and the 90 Percent Myth* (Feb. 10, 2011), <http://www.stratfor.com/print/183871> (hereinafter *90 Percent Myth*) (“[T]here is an entire cottage industry that has developed to smuggle such weapons, and not all the customers are cartel hit men. There are many Mexican citizens who own guns in calibers such as .45, 9 mm, .40 and .44 magnum for self-defense – even though such guns are illegal in Mexico.”).

ammunition exception set forth in the proposed amendments. Accordingly, the proposed amendment leaves if not all, almost all, defendants exporting only ammunition in the same base offense level as those exporting the chemical, biological, and nuclear weapons originally targeted by offense level 26 in §2M5.2(a)(1).

We oppose the proposed amendments to §2M5.2 because they essentially eliminate the lower base offense level, and group the vast majority of cases under a single base offense level regardless of whether the defendant was exporting weapons of mass destruction, or five handguns to help his neighbors protect themselves.

C. The Proposed Amendments Would Also Increase Inter-Guideline Disparity.

In addition to treating differently situated defendants the same under §2M5.2 itself, the proposed amendments would also increase disparity across guidelines, such that defendants with very different levels of culpability would be subject to the same base offense level. For example, under the proposed amendments, a defendant who illegally exported from the United States to Canada a single small firearm with 520 rounds of small ammunition would be subject to base offense level 26, the same as someone who committed a robbery where the victim received permanent or life-threatening bodily injury, and almost the same as someone convicted of attempted second degree murder. *See* USSG §2B3.1(b)(3)(C); *id.* §2A2.1. It also would treat such a defendant more harshly than one convicted of transferring biological weapons under 18 U.S.C. 175 or 175b. *See* USSG §2M6.1(a)(3) (offense level 22) or §2B6.1(a)(4) (offense level 20). When different degrees of culpability are treated similarly, that disparity creates disrespect for law and should be avoided whenever possible. The proposed amendments are a step in the wrong direction in this regard.

D. An Alternative Amendment

In light of the history of §2M5.2, feedback from sentencing judges that the guideline is already set too high for many offenders, and the criticism that it does not adequately differentiate between quite different offenses and degrees of seriousness, we encourage the Commission to consider a different change to §2M5.2.

Specifically, we suggest the Commission leave the threshold number of small arms for level 14 at ten, and not add a personal use requirement. In addition, we suggest that the Commission specifically address ammunition by including it, in any quantity, in the lower base offense level 14. This would remove some of the least culpable defendants currently subject to level 26. We suggest that under this approach, the more serious ammunition cases could be addressed by adding an Application Note that invites a departure for a particularly egregious offense.

- (a)(2) **14**, if the offense involved (A) only non-fully automatic small arms (rifles, handguns, or shotguns), and the number of weapons did not exceed ten, or (B) only ammunition, or (C) both.

Application Notes

3. *In some cases where section (a)(2) applies, the court may find that the resulting base offense level does not adequately reflect the seriousness of the offense (e.g., the offense involved firearms or ammunition in a quantity or type typically used by a criminal enterprise, and the defendant knew or intended that the firearm or ammunition would be transferred to an organized criminal enterprise). In such cases, an upward departure may be warranted.*

We believe this alternative amendment is more consistent with the purpose of §2M5.2, and provides better differentiation between the wide range of offenses that fall under this guideline.

III. Proposed Amendments to §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition)

A. Straw Purchasers

In its request for comment, the Commission asks first whether the guidelines are adequate as they apply to straw purchasers. If not, the Commission asks if it should provide higher penalties by (a) raising the alternative base offense levels for straw purchasers by 2 levels, and (b) increasing alternative base offense levels for straw purchasers convicted under 18 U.S.C. § 922(a)(6) or § 924(a)(1)(A) where there is a preponderance of the evidence that the offense was committed with knowledge, intent, or reason to believe that the offense would result in the transfer of a firearm or ammunition to a prohibited person, even though the person was not convicted of violating 18 U.S.C. § 922(d), which specifically addresses that situation.

In the Staff Preliminary Discussion Draft of the Proposed Amendments provided to defenders on February 24, 2011, specific changes to §2K2.1 to increase the guidelines for straw purchasers are proposed. These proposed amendments have not been published in the federal register. The first change raises by two levels the base offense levels for defendants convicted under the three different statutes commonly used to prosecute straw purchasers: 18 U.S.C. § 922(d), 18 U.S.C. § 922(a)(6) and 18 U.S.C. §924(a)(1)(A).²⁶

²⁶ Section 922(d) prohibits a person from selling or otherwise disposing of any firearm or ammunition to any person knowing or having reasonable cause to believe that such person is a prohibited person. The other two statutes prohibit making false statements in connection with the purchase of a firearm.

For those convicted under § 922(d), the proposed two-level increase would raise the base offense level from 14 to 16. For those convicted under the two false statement statutes, the two-level increase would raise the base offense level from 12 to 14. The second change would further increase the guideline range from the proposed new level 14 to a level 16 for those individuals convicted under the false statement statutes, “but who engaged in the offense with knowledge, intent, or reason to believe that the offense would result in the transfer of the firearm to a prohibited person.”

We oppose the proposed changes. Defendants convicted under these three statutes are overwhelmingly first time, non-violent offenders for whom prison should be “generally” inappropriate. 28 U.S.C. § 944(j). In 2009, 73% of the defendants convicted of violating these statutes fell within criminal history category one.²⁷ And, although women comprise only 3.4% of the defendants convicted of firearm offenses generally, they are 13% of the defendants convicted under these three statutes.²⁸ These cases often involve the purchase of firearms for a spouse, partner or other family member, for no remuneration, motivated by an intimate relationship or fear. For example, in one 2009 case from the Eastern District of Pennsylvania, a twenty-year-old woman was charged with violating § 924(a)(1)(A) when she purchased six firearms for her then-boyfriend and two others. Her boyfriend, who was ten years older, was violent, and she was intimidated by him. She had been repeatedly raped at the age of twelve by her mother’s boyfriend, and believed her mother knew about and tolerated the rape. She then stayed with different relatives and dropped out of school. She never enrolled in high school. Before she purchased the guns for her boyfriend, she had never engaged in any criminal activity. *See also Dixon v. United States*, 548 U.S. 1, 4 (2006) (defendant purchased firearms for her boyfriend after he “threatened to kill her or hurt her daughters if she did not buy the guns for him”); *United States v. Flory*, 2007 WL 1849452, *1 (7th Cir. 2007) (year and a day sentence for defendant who purchased 3 firearms for her boyfriend); *United States v. Pierre*, 71 Fed. App’x 187, 190 (4th Cir. 2003) (wife sentenced to 15 months imprisonment for purchasing two firearms for her husband).

Specifically, § 922(a)(6) provides it is unlawful for a person in connection with the acquisition or attempted acquisition of any firearm or ammunition from licensed importers, manufacturers, dealer or collectors, “knowingly to make any false or fictitious oral or written statement . . . intended or likely to deceive . . . with respect to any fact material to the lawfulness of the sale.” Similar, but not identical, is § 924(a)(1)(A) which prohibits a person from knowingly making “any false statement or representation with respect to the information required by this chapter to be kept in the records of a person licensed under this chapter.”

²⁷ USSC, FY 2009 Monitoring Dataset.

²⁸ *Compare* USSC, FY 2009 Monitoring Dataset with 2009 *Sourcebook* tbl. 5. The percentage of women convicted of violating § 922(d) is even higher, at 16%. USSC, FY 2009 Monitoring Dataset.

In addition, the proposed changes are not narrowly targeted at the border problem, though the Department of Justice asked the Commission to raise penalties for straw purchasers to address that problem.²⁹ A significant number of these cases occur far away from the Southwest border region.³⁰ In 2009, 74% of the convictions under these statutes occurred *outside* the Southwest border region, and while the Southern District of Texas did have a relatively high concentration of cases (15%), so did the Eastern District of Pennsylvania (11%).³¹

1. There is No Need to Raise Sentences Recommended by the Current Guideline.

As discussed above, raising sentences for straw purchasers would be a politically expedient measure, without any basis in empirical evidence that it is necessary. This guideline already demonstrates a relentless march toward increasing severity without an empirical basis for doing so, and the Commission should not compound the problem.

That the current guideline is more than adequate is borne out by (a) the Commission's data showing the high rate at which judges impose sentences below the current guideline range for offenses under the three statutes; (b) the history of the guideline; and (c) the plethora of enhancements, cross-references and invited departures which amply provide for severe sentences for the most culpable.

a. The Data

In 2009, judges imposed sentences below the guidelines for defendants convicted under the three straw purchaser statutes more often than not (57%).³² The government sponsored below guideline sentences in 29% of cases, a higher rate than for all offenses nationally (25%).³³ Similarly, for these offenses, judges imposed non-government sponsored below guideline

²⁹ Letter from Jonathan J. Wroblewski, Director, Office of Policy and Legislation, U.S. Dep't of Justice, to the Honorable William K. Sessions, III, Chair, U.S. Sentencing Comm'n, at 8-9 (June 28, 2010).

³⁰ ATF defines the Southwest border region to include all of Texas, New Mexico and Arizona and the southern part of California. *OIG Review of Gunrunner, supra*, at 3. Accordingly, we here use the term to include all of the federal districts of Texas, the District of Arizona, the District of New Mexico and the Southern District of California.

³¹ USSC, FY 2009 Monitoring Dataset.

³² USSC, FY 2009 Monitoring Dataset.

³³ Compare USSC FY 2009 Monitoring Dataset with 2009 Sourcebook tbl. N.

sentences in 28% of cases, compared with a much lower rate of 16% for all offenses nationally.³⁴ Above guideline sentences were imposed in only 1% of the cases.³⁵

And, although it is not a consideration relevant to the statutory purposes of sentencing, the current guidelines do not hinder law enforcement efforts to gain cooperation from defendants to assist in investigating other cases. The government filed §5K1.1 motions in 25% of these straw purchaser cases, a rate almost double the national rate for all offenses (13%).³⁶

The guidelines for violations of these statutes appear to be sufficiently high even in the Southwest border region. In 27% of cases, the government sponsored a below guideline sentence.³⁷ In another 26% of cases judges imposed non-government sponsored below guideline sentences.³⁸

Sentences for those convicted under §§ 922(a)(6) or 924(a)(1)(A) are also adequate and do not need to be enhanced, as the Commission proposes, when there is evidence they “engaged in the offense with knowledge, intent, or reason to believe that the offense would result in the transfer of the firearm to a prohibited person.” First, if there really is sufficient evidence of such conduct, the Government can seek a conviction under § 922(d) which carries a higher base offense level.³⁹ Second, defendants convicted under those two statutes are given government sponsored below guideline sentences in 31% of cases, and other below guideline sentence in 26% of cases, with above guideline sentences imposed in only .6% of cases.⁴⁰

This data shows, at minimum, that there is no need to increase guideline ranges for these offenses. See USSC, *Report to Congress: Downward Departures from the Federal Sentencing Guidelines* 66-67 (2003) (“departures serve as an important mechanism by which the

³⁴ Compare USSC FY 2009 Monitoring Dataset with 2009 Sourcebook tbl. N.

³⁵ USSC, FY 2009 Monitoring Dataset.

³⁶ Compare USSC, FY 2009 Monitoring Dataset with 2009 Sourcebook tbl. N.

³⁷ USSC, FY 2009 Monitoring Dataset.

³⁸ USSC, FY 2009 Monitoring Dataset.

³⁹ For this reason, the proposed enhancement for these convictions is a perfect example of what one judge has referred to as “criminaliz[ing] activity ‘on the cheap.’” *United States v. Grier*, 475 F.3d 556, 574 (3d Cir. 2007) (Rendell, J., concurring) (criticizing how “we continue to allow sentencing judges, once a jury has found beyond a reasonable doubt that a defendant has committed *one* crime, then to find him guilty by a preponderance of the evidence of *other* crimes for which he was *not* tried-or worse, tried and acquitted-and to sentence him as if he had been convicted of *them* as well”).

⁴⁰ USSC, FY 2009 Monitoring Dataset.

Commission could receive and consider feedback from courts regarding the operation of the guidelines”).⁴¹

b. The History

The guidelines for straw purchasers are already significantly higher than they were when the guidelines were enacted. Originally the guidelines for firearm offenses were based on the Commission’s study of past practices.⁴² When first enacted, those who “knew or had reason to believe that a purchaser was a person prohibited by federal law from owning a firearm” were assigned an offense level 8, and other straw purchasers were subject to a base offense level of 6. USSG §2K2.3 (1987). Quickly and without any stated empirical basis for doing so, the Commission made major revisions which “resulted in significant severity increases over historic levels.”⁴³ In 1991, the Commission doubled the base offense level from 6 to 12 for many firearm offenses, including § 922(a)(1). USSG App. C, Amend. 374 (Nov. 1, 1991). That same year the Commission also increased the offense level for those convicted under § 922(d) from 12 to 14, having only two years earlier increased it from 8 to 12. *Id.*; USSG App. C, Amend. 189 (Nov. 1, 1989).

c. Enhancements, Cross-References, and Invited Departures

The ample number of enhancements, cross-references and invited departures under the current guideline to address more serious straw purchaser offenders demonstrates that the current guideline is adequate. For example:

- §2K2.1(b)(1) raises offense levels by 2 to 10 levels based on the number of firearms involved.
- §2K2.1(b)(4) increases the offense level by 2 for stolen firearms, and by 4 for altered or obliterated serial numbers, with no *mens rea* requirement.
- §2K2.1(b)(5), added in 2006, increases the offense level by 4 for trafficking in firearms, defined as transferring or receiving with intent to transfer two or more firearms regardless of whether anything of value was exchanged, with knowledge

⁴¹ “The Commission’s work is ongoing. The statutes and the Guidelines themselves foresee continuous evolution helped by the sentencing courts and courts of appeals in that process. . . . The Commission will collect and examine” sentencing data and judges’ stated reasons for sentences outside the guideline range and “can revise the Guidelines accordingly.” *Rita v. United States*, 551 U.S. 338, 350 (2007); *see also Pepper v. United States*, 2011 WL 709543, *23 (Mar. 2, 2011) (Breyer, J. concurring).

⁴² USSC, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* 66 (2004) (hereinafter *Fifteen Year Review*).

⁴³ *Fifteen Year Review* at 66.

or reason to believe that the transferee's possession would be unlawful or the transferee intended to use or dispose of the firearm unlawfully.

- §2K2.1(b)(6) increases the offense level by 4, and sets a floor of 18 if the defendant used or possessed any firearm or ammunition in connection with another felony, or transferred any firearm or ammunition with knowledge, intent, or reason to believe that it would be used in connection with another felony offense.
- §2K2.1(c) contains a cross-reference that may be applied to violations of the export laws. Under the expansive smuggling statute passed five years ago, 18 U.S.C. § 554, the government can prosecute those who facilitate the transportation, concealment or sale of an item, including a firearm, knowing it would be illegally transferred to a foreign country. Violations of this statute are sentenced under USSG §2M5.2.
- §2K2.1, cmt. n.11 invites upward departures for offenses involving (A) a large number of firearms, (B) military type assault rifles, (C) large quantities of armor-piercing ammunition, or (D) a substantial risk of death or bodily injury to multiple individuals.

These provisions provide a wide variety of ways to secure severe penalties for the most culpable straw purchasers, while leaving some room for the less culpable to receive appropriately less severe sentences. For example, a defendant who lied on a form when purchasing three handguns, and provided them to someone she had reason to believe intended to export them illegally, would already find herself at an offense level 18, or even a 22 if the court applied the 4-level enhancement for trafficking and the 4-level enhancement for transfer with reason to believe it would be possessed in connection with another felony offense.⁴⁴ This is a higher offense level than what she would receive if prosecuted under the smuggling statute and sentenced under §2M5.2. The offense level under §2K2.1 would rapidly increase with additional weapons and/or obliterated serial numbers. A serious trafficker who purchased 100 or more weapons that he then transferred to someone he had reason to believe would export them illegally, where any one of the firearms had an obliterated serial number, would reach offense level 28. In contrast, a woman suffering from battered women's syndrome who was threatened or otherwise cajoled into purchasing a firearm for her partner who did not want his name associated with the transaction would remain, appropriately so, at level 12.

⁴⁴ As discussed in Section IV, *infra*, the Fifth Circuit recently determined that subsection (b)(6) applies where the other felony offense is another firearms possession or trafficking offense. We believe this decision relies on a clerical error in the Commentary and request the Commission amend the Commentary to make clear that (b)(6) does *not* apply in such circumstances.

Raising the base offense level, as the Commission proposes to do, will dramatically impact the least culpable of the straw purchasers in every corner of this country. It will punish these often first time offenders with sentences far longer than necessary, at great cost to them, the Bureau of Prisons, and society at large.

2. Increasing Base Offense Levels Would Increase Disparity, Not Reduce It.

Further increasing the base offense levels for these non-violent offenses, committed most frequently by individuals with little to no criminal history, would result in defendants with very different levels of culpability being treated similarly. For example, a defendant with no criminal history who bought a gun for a husband or boyfriend would be subject to the same base offense level 14 as someone who committed an aggravated assault or criminal sexual abuse of a ward. *See* USSG §§2A2.2, 2A3.3.

The Commission asserts that its proposed increases would bring the firearms guideline into greater conformity with the explosives guideline, §2K1.3. While that is true, the severity of the explosives guideline provides no basis for ratcheting up the firearms guideline. First, explosives and firearms are quite different: explosives are inherently dangerous and can be severely harmful to a large number of people even if only because they are stored improperly. Firearms, while also dangerous, are categorically less so.⁴⁵ Second, the Commission's data indicate that the explosives guideline is much too high. The government sponsored below guideline rate, for reasons other than USSG §5K, is 22%, more than five times the rate for such departures nationally across all offenses (4%).⁴⁶ Similarly, judges impose non-government sponsored below guideline sentences in 26% of cases under §2K1.3, compared with 16% nationally across all offenses.

Finally, the Department of Justice urges the Commission to compare the sentence the guidelines provide for a violation of § 922(a)(6) by someone in criminal history category one with the statutory maximum sentence for that offense.⁴⁷ There are several reasons that

⁴⁵ While we do not believe politically derived mandatory minimums and maximums provide particularly meaningful information about culpability, those who find that information relevant should note that under 18 U.S.C. § 844(h)(2), anyone who “carries an explosive during the commission of any [federal] felony” is subject to a ten-year mandatory minimum sentence, while the parallel statute for firearms, 18 U.S.C. §924(c), requires a five-year mandatory minimum sentence.

⁴⁶ 2009 *Sourcebook* tbls. N and 28. Similarly, the rate of below guideline sentences for explosives was significantly higher than for drug trafficking, which was much closer to the national numbers across all offenses. For drug trafficking the rate of government sponsored below guideline sentences for reasons other than §5K is 4%, and the rate of non-government below guideline sentences is 17%. *Id.* tbl. 27.

⁴⁷ Letter from Jonathan J. Wroblewski, Director, Office of Policy and Legislation, U.S. Dep't of Justice, to the Honorable William K. Sessions, III, Chair, U.S. Sentencing Comm'n, at 8-9 (June 28, 2010).

comparison is not instructive. Statutory maximum penalties are a poor proxy for the seriousness of an offense because they are driven by politics rather than empirical data or proportionality. At best, a statutory maximum reflects the appropriate punishment for the most serious offense committed by the most dangerous offender that could arise under the statute. The ten-year statutory maximum for § 922(a)(6), set forth in 18 U.S.C. § 924(a)(2), covers a wide range of offenses under the firearms statute, including possession of a firearm by a prohibited person, shipment of stolen firearms, trafficking in stolen firearms, and possession of a machine gun. Of those, straw purchasers who make false statements during the purchase of a firearm are the least culpable and should receive a sentence well below the statutory maximum penalty. Moreover, those with little to no criminal history need to be sentenced far below the statutory maximum to allow room for more serious offenders, with more extensive criminal history to be proportionately sentenced.⁴⁸ Finally, while the Department points specifically to this straw purchaser statute in connection with addressing violence in the Southwest border region, that region actually obtains far more convictions for the similar violation under § 924(a)(1)(A), which has a much lower five-year statutory maximum. Specifically, in 2009, there were 30 convictions under § 922(a)(6) in the Southwest border region (out of 166 nationally), and more than double that (68) under § 924(a)(1)(A) (out of 154 nationally).⁴⁹

B. Firearms Crossing the Border

The Commission also seeks comment on (1) whether the crossing of a border should be incorporated as a factor in §2K2.1, and if so (2) whether the Commission should provide for a new enhancement of [two]-[five] levels “if the defendant possessed any firearm or ammunition while crossing or attempting to cross the border or otherwise departing or attempting to depart the United States, or possessed or transferred any firearm or ammunition with knowledge, intent, or reason to believe that it would be transported out the United States.”

In the more recent Staff Preliminary Discussion Draft of the Proposed Amendments, there are two proposed options for addressing offenses involving firearms crossing the border or otherwise leaving the United States. These proposed amendments have not been published in the federal register. Option 1 would create a new [2]-level enhancement if the defendant possessed any firearm or ammunition while leaving or attempting to leave the United States, or possessed or transferred any firearm or ammunition with knowledge, intent or reason to believe that it would be transported out of the United States. Option 2 includes identical language, but would

⁴⁸ Although the vast majority of straw purchasers fall into criminal history category one, in 2009, 27% of defendants convicted of at least one of these statutes fell in criminal history categories two through six. USSC, FY 2009 Monitoring Dataset.

⁴⁹ USSC, FY 2009 Monitoring Dataset.

direct that the existing 4-level enhancement for using or possessing a firearm in connection with another felony offense applies.

We oppose both of the options the Commission proposes because we believe the guideline already adequately addresses the Commission's concerns.⁵⁰ Adding specific language about offenses involving border crossings would only add unnecessary complexity to the guideline. Such an amendment typifies the danger of "factor creep," where "more and more adjustments are added" and "it is increasingly difficult to ensure that the interactions among them, and their cumulative effect, properly track offense seriousness."⁵¹

1. The Current Guidelines Adequately Address the Issue of Firearms Crossing the Border.

We do not believe the proposed changes are necessary because the government already has ample tools to obtain lengthy sentences for offenses related to firearms and ammunition crossing the border. As ICE has informed Congress: "I think that we have the laws we need. We just need to more effectively and more aggressively pursue them." *Responses to Mexican Drug Cartels*, *supra* note 4, at 21 (statement of Kumar C. Kibble, Deputy Director, Office of Investigations, Immigration and Customs Enforcement).

Significantly, §2K2.1 was amended in 2006 to add a significant 4-level enhancement for firearm trafficking. This factor already addresses the core of the conduct the proposed amendment seeks to address: trafficking in firearms, which the guideline defines quite broadly to apply to the transfer of as few as two firearms, even when nothing of value is exchanged, where the defendant simply has reason to believe the transfer will be to someone whose possession of the firearms is illegal, or whose intended use is unlawful. Cases applying this 4-level enhancement are routinely affirmed. *See, e.g., United States v. Juarez*, 626 F.3d 246 (5th Cir. 2010) (affirming application of §2K2.1(b)(5) in sentence for violation of 18 U.S.C. § 924(a)(1)(A) based on evidence that defendant purchased and delivered over two dozen

⁵⁰ As with straw purchasers, we strongly urge the Commission to take a deliberative approach based on empirical evidence in deciding whether to amend the guidelines to specifically address firearms and ammunition crossing the border. We believe that at the moment there is simply too much confusion, and inadequate information, about the nature of the problem and the actions necessary to stop the violence. Accordingly, we believe the Commission should wait to address this issue until a later time. Rash steps now, we caution, will result in bad sentencing policy for years to come at a real cost to the lives and liberty interests of our clients

⁵¹ *Fifteen Year Review* at 137 (citing Barry Ruback & Jonathan Wroblewski, *The Federal Sentencing Guidelines: Psychological and Policy Reasons for Simplification*, 7 *Psychol. Pub. Pol'y & L.* 739, 742 (2001) (Complexity of Guidelines has created a "façade of precision" which "undermines the goals of sentencing.")).

weapons, most of which were military-style assault rifles to a man she knew only by a nickname who showed he was unwilling to purchase the guns himself and paid defendant \$200 above retail for each firearm); *United States v. Marceau*, 554 F.3d 24 (1st Cir. 2009) (affirming application of §2K2.1(b)(5) in sentence for stealing guns from a Maine firearms dealer based on (a) defendant's pre-robbery statements of his intent to steal firearms, remove serial numbers and exchange them for money to buy drugs, (b) sentencing court's finding that defendant "probably obliterated the serial numbers from the guns that he transferred to the individual he would not name"); *United States v. Mena*, 342 Fed. App'x 656 (2d Cir. 2009) (affirming application of §2K2.1(b)(5) in sentence for unlawfully dealing in firearms where evidence that defendant twice delivered guns in plastic bag in exchange for cash on a street in Manhattan established by a preponderance of the evidence that defendant knew or had reason to believe delivered firearms to someone intended to use or dispose of them unlawfully).

The guideline also already contains a cross-reference that may be applied to violations of export laws, which carry serious penalties under §2M5.2. *See* USSG §2K2.1(c).

In addition, other enhancements may apply in border cases which, in combination, drive the guideline range higher than necessary. For example, as discussed above, enhancements as high as 10 levels apply where large quantities of firearms are at issue, and 2- and 4-level increases apply to stolen firearms and obliterated serial numbers, respectively. *See* USSG §2K2.1(b)(1), (b)(4).

Relevant-conduct rules also have the effect of significantly increasing sentences under the current guidelines. Sometimes the number of firearms is based, not on the number of firearms the defendant purchased, but on the number of weapons purchased by others as part of a much broader operation in which the defendant played only a small part, as the defendant's "relevant conduct." Probation then uses this number to apply number-driven enhancements such as §2K2.1(b)(1) and (b)(5).

In addition to these adjustments, invited upward departures under Application Notes 11 and 13(C) have been used in unusually serious border smuggling cases. *See, e.g., United States v. Hernandez*, 2011 WL 438828 (5th Cir. Feb. 9, 2011) (affirming above-guideline sentence: defendant described as one of the most prolific purchasers for an organization involved in illegal firearms trafficking that had purchased at least 328 firearms, with defendant himself having purchased at least 23 firearms that were "military in style and utility," and evidence that defendant could reasonably foresee he was arming Mexican drug cartels).

Finally, but significantly, there is one additional enhancement in §2K2.1 that has recently been interpreted to address the same conduct the Commission seeks to address through this proposed amendment. Subsection (b)(6) requires a 4-level enhancement, and a floor offense level of 18, when a defendant used or possessed a firearm or ammunition in connection with

another felony.” In *United States v. Juarez*, the Fifth Circuit decided that “another felony” can be an offense involving firearms trafficking, including firearms smuggling. 626 F.3d 246, 253-55 (5th Cir. 2010). What that meant for Ms. Juarez is that the same conduct was used for a 4-level enhancement under subsection (b)(6) *and* another 4-level enhancement under the trafficking provision in subsection (b)(5). For reasons discussed in detail below, we believe the case was wrongly decided, and ask the Commission to correct what we believe was a clerical error that led the Fifth Circuit to its conclusion.

2. The Commission’s Proposed Options Are Too Broad and Would Inject the Guideline With Additional and Unnecessary Complexity and Disparity.

A new enhancement – under either of the proposed options – would apply when even a single firearm or a handful of bullets crosses the border, or is transferred to someone else with reason to believe it would cross the border, any border, for any reason. It is not at all clear that even the 2-level enhancement contemplated by Option One is appropriate in all such situations. There is no evidence, for example, that higher penalties are warranted when a straw purchaser at a gun show in Flint, Michigan takes the shortest path to her boyfriend’s home in Rochester, New York, simply because she passed through Canada. Indeed, in light of the confusion over the source of, and solution for, the violence in the Southwest border region, it would be a mistake to assume we know it is always a worse offense when a gun crosses our border with Mexico. And so, once again, we urge the Commission to exercise restraint and caution. Both options would make an already complex guideline even more so. And with either option there are questions about how the amendment would interact with existing enhancements. With Option One, can the 2-level enhancement be stacked with the 4-level enhancement for trafficking, leading to a 6-level increase for conduct that in most cases already falls within the definition of trafficking? And, in light of the Fifth Circuit’s decision in *Juarez, supra*, could Option One be stacked not only with §2K2.1(b)(5), but also §2K2.1(b)(6), leading to a 10-level increase for conduct that in most cases has been adequately addressed by the trafficking enhancement alone?

Similarly, Option Two would present myriad problems with proportionality and inject unwarranted disparity. Is a 4-level increase appropriate for someone who crossed the border with a single gun? Is that person really as culpable as someone who traffics in firearms? Or as culpable as someone who transfers a gun with the knowledge it will be used in connection with another felony? If the person instead has three firearms, will he receive enhancements under Option Two *and* subsection (b)(5), as well as subsection (b)(1), for a total of a 10-level increase?

Given these and other permutations presented by the possible addition of another specific offense characteristic in §2K21.1, it is entirely possible that the Commission’s proposal would have an unintended effect of ratcheting up sentences for low-level, first-time offenders far beyond what is sufficient to satisfy the statutory purposes of sentencing. There is no evidence

that this already complicated guideline needs to be made more so, or that its already long sentences need to be lengthened further. The current guideline is adequate.

3. Of the Commission’s Two Specific Proposals, the First Option is the Least Detrimental, But Only with Changes to the Application Notes.

While we believe neither of the Commission’s proposed options is appropriate or necessary, if asked to choose the lesser of two evils, we prefer Option One (adding a 2-level increase as part of a new special offense characteristic that addresses border crossing), but only if it is accompanied with an amendment to Application Note 13(D) and an amendment to Application Note 14(C). Because we believe conduct targeted by the Commission’s first Option is already addressed in most cases by the trafficking enhancement in §2K2.1(b)(5), if the Commission decides to proceed with Option One, we ask that it amend Application Note 13(D) to specify that if the trafficking enhancement in current §2K2.1(b)(5) is applied, the new border crossing enhancement should not also be applied. In addition, for the reasons set forth in Part IV, *infra*, we ask that Application Note 14(C) also be amended to replace the word “the” with the word “an” to make clear that the current §2K2.1(b)(6) does not apply when the other felony offense, or other offense, is an explosive or firearms possession or trafficking offense.

IV. The Definition of “Another Felony Offense” in Application Note 14(C)

As mentioned above, the Fifth Circuit recently determined that subsection (b)(6), which provides a 4-level increase and a floor offense level of 18 where a “defendant used or possessed any firearm or ammunition in connection with another felony offense,” applied where the other felony offense was another “firearms possession or trafficking offense.” *United States v. Juarez*, 626 F.3d 246, 253-55 (5th Cir. 2010). The Court reached this conclusion based on the presence of the word “the” in Application Note 14(C) which defines “another felony offense,” *id.* at 255, as “any federal, state, or local offense, other than *the* explosive or firearms possession or trafficking offense.” USSG §2K2.1, comment. (n.14(C)) (emphasis added). The Fifth Circuit’s interpretation of the word “the” has a serious impact on our clients by providing a substantial guideline increase for something we do not believe the Commission intended (and rightly so, since there is no justification for such an enhancement). The impact is particularly serious for defendants such as Ms. Juarez, who in addition to receiving an unintended 4-level increase pursuant to subsection (b)(6), received an additional 4-level enhancement for trafficking under subsection (b)(5). Before other defendants are sentenced under an unintended and unwarranted guideline range, we ask the Commission address the problem by changing the word “the” to “an”

in Application Note 14(C) so it reads “other than *an* explosive or firearms possession or trafficking offense.”⁵²

Application Note 14(C) was added to the guideline in 2006 as part of an amendment that among other things modified four base offense levels and added a new specific offense characteristic that required renumbering of §2K2.1(b) and related application notes. USSG App. C, Amend. 691 (Nov. 1, 2006). Prior to this amendment, the definition of “another felony offense” was located in Application Note 15. *Id.* It provided:

As used in subsections (b)(5) and (c)(1), ‘*another felony offense*’ and ‘*another offense*’ refer to offenses other than explosives or firearms possession or trafficking offenses. However, where the defendant used or possessed a firearm or explosive to facilitate another firearms or explosives offense (e.g., the defendant used or possessed a firearm to protect the delivery of an unlawful shipment of explosives), an upward departure under §5K2.6 (Weapons and Dangerous Instrumentalities) may be warranted.

Id. (emphasis added).⁵³ As part of the 2006 amendments, the Commission separated the definitions “another felony offense” and “another offense” and as a result the relevant sentence switched from plural references to singular. USSG App. C, Amend. 691 (Nov. 1, 2006). As amended, the definitions now read:

‘Another felony offense’, for purposes of subsection (b)(6), means any federal, state, or local offense, other than the explosive or firearms possession or trafficking offense, punishable by imprisonment for a term exceeding one year, regardless of whether a criminal charge was brought, or a conviction obtained.

‘Another offense’, for purposes of subsection (c)(1), means any federal, state, or local offense, other than the explosive or firearms possession or trafficking offense, regardless of whether a criminal charge was brought, or a conviction obtained.

Id.

⁵² While this discussion focuses on the definition of “another felony offense,” the analysis applies with equal force to the definition of “another offense” and we ask that in both definitions, the Commission substitute the word “an” for “the.”

⁵³ This definition was first provided in 1992 as Application Note 18. USSG App. C, Amend. 471 (Nov. 1, 1992).

Before the 2006 amendment, courts routinely interpreted the definition of “another felony offense” to exclude *any* other firearms possession or trafficking offenses, not just the one charged. *See, e.g., United States v. Valenzuela*, 495 F.3d 1127, 1133-34 (9th Cir. 2007); *United States v. Harper*, 466 F.3d 634, 650 (8th Cir. 2006); *United States v. Lloyd*, 361 F.3d 197, 201 (3d Cir. 2004); *United States v. Boumelhem*, 339 F.3d 414, 427-28 (6th Cir. 2003); *United States v. Garnett*, 243 F.3d 824, 827 (4th Cir. 2001). Indeed, the Fifth Circuit in *Juarez* acknowledged these decisions, but concluded that the “addition of the word ‘the’ in the amendment indicates the Sentencing Commission’s intention to no longer exclude all explosives or firearms possession or trafficking offenses from the definition of ‘another felony offense’.” *Juarez*, 626 F.3d at 255.

The conclusion that the use of the word “the” in Application Note 14(C) evidenced the Commission’s intentional effort to change the definition of “another felony offense” that had been in use for over a decade is not consistent with other information available from that amendment cycle. First, the reasons for amendment do not discuss this definition. *See* USSG App. C, Amend. 691 (Nov. 1, 2006). If the Commission had really intended this single word to make such a substantive change to the definition, it would undoubtedly have provided an explanation for the change.

Second, during that same amendment cycle, the Commission added new Application Note 13(D), which specifies how the then-new trafficking enhancement in subsection (b)(5) should interact with other subsections and includes language that is consistent with the long-standing definition of “another felony offense” as excluding all other firearm possession or trafficking offenses. *See* USSG App. C, Amend. 691 (Nov. 1, 2006). That note provides:

In a case in which three or more firearms were both possessed and trafficked, apply both subsections (b)(1) and (b)(5). If the defendant used or transferred one of such firearms in connection with another felony offense (i.e., an offense other than *a* firearms possession or trafficking offense) an enhancement under subsection (b)(6) also would apply.

Id. (emphasis added). If the Commission had intended to make a substantive change without explanation, one would at least expect the two new provisions to be the same.

The better interpretation of what happened in 2006 is that the Commission did not intend to change the definition of “another felony offense,” and use of the word “the” was a clerical error. Following the *Juarez* decision, this single word clerical error is of great consequence to our clients. We strongly urge the Commission to replace the word “the” with the word “an” in the definitions of “another felony offense” and “another offense” in Application Note 14(D).

V. CONCLUSION

We understand that the current political situation may lead the Commission to feel pressure to “do something” about the violence in Mexico. We urge it to stand back, let the political rhetoric surrounding the situation in Mexico settle down, and collect all the facts before deciding to increase guideline ranges for hundreds of defendants. The Commission has the duty to revise the guidelines “[b]y collecting trial courts’ reasons for departure (or variance), by examining appellate court reactions, by developing statistical and other empirical information, [and] by considering the views of expert penologists and others.” *Pepper v. United States*, 2011 WL 709543, at *23 (Mar. 2, 2011) (Breyer, J., concurring). It should not truncate or set aside these procedures on such an important national issue.