

TESTIMONY OF THE UNITED STATES DEPARTMENT OF JUSTICE

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FIREARMS TRAFFICKING

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BEFORE THE UNITED STATES SENTENCING COMMISSION

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MARCH 15, 2006

## INTRODUCTION

Good morning, Mr. Chairman and Commissioners –

My name is Richard Hertling, and I serve as Principal Deputy Assistant Attorney General for the Office of Legal Policy at the United States Department of Justice. I appreciate the opportunity to appear today to provide the Department's views on the United States Sentencing Commission's proposed changes to the Federal Sentencing Guidelines relating to offenses involving firearms. I would specifically like to acknowledge the work of the Commission's excellent staff and note particularly the leadership of Alan Dorhoffer and his team on the firearms issues I am here to discuss.

### Firearms Trafficking

I will begin by addressing the Commission's proposed amendment to Guideline §2K2.1 to provide enhancements for defendants engaging in firearms trafficking. The Department strongly supports a significant enhancement in the penalties applicable to illegal firearms trafficking and believes that such an increase in penalties would aid the Department's efforts to reduce gun crime.

Firearms trafficking can be generally described as the illegal diversion of firearms out of lawful commerce. It is frequently the source of firearms used in violent crimes, especially violent crimes committed by gang members and drug dealers. 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 felons, drug dealers, gang members, and other prohibited persons. A June 2000 report by the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF), entitled "Following the Gun: Enforcing Federal Laws Against Firearms Traffickers," noted that fully one half of the investigations classified as trafficking conducted by ATF between July 1996 and December 1998 involved at least one firearm recovered during a crime; 17 percent of these firearms were associated with homicide or robbery. The strong tie between trafficked firearms and violent crimes underscores the great harm of firearms trafficking.

The Sentencing Guidelines, however, currently treat firearms trafficking in a way that neither recognizes the harm caused by nor deters sufficiently those who traffic illegally in firearms. As a result, firearms traffickers may often receive sentences that do not match the seriousness of the harm caused by their offenses. Worse, such cases may simply not be prosecuted because the relatively low existing penalties may not merit the expenditure of scarce prosecutorial resources. The Department therefore supports changes to the Sentencing Guidelines providing for substantial enhancements for offenses related to firearms-trafficking schemes.

In deciding how to design such enhancements, it is important to recognize that the great majority of gun trafficking schemes are carried out through transactions involving relatively

small numbers of guns. There are a number of possible reasons for this pattern. Law enforcement may catch offenders with only a few guns in a scheme that has successfully trafficked a significant number of guns through multiple small sales. Law enforcement may intervene and stop trafficking operations early before large numbers of firearms can be trafficked. There is also an incentive for traffickers to restrict transactions to smaller numbers of handguns (the usual choice of guns used to commit crimes), in order to avoid possible detection through the multiple sales reports that FFLs must submit to ATF under the Gun Control Act when two or more handguns are sold to a transferee within 5 business days. In addition, a trafficker caught with small numbers of guns may believe he has a more credible claim that the guns are his personal firearms.

Another important point to recognize is that gun traffickers are frequently persons with no criminal background. Because of their lack of prohibiting background, such persons have easier access to firearms from lawful sources, thereby facilitating their trafficking schemes. For example, straw purchasers are individuals capable of passing a background check, who buy firearms not for their own use but for the purpose of supplying the firearms to another person who, generally, would fail a background check because of a prohibiting criminal record. Thus, straw purchasers who engage in firearms trafficking will generally not have a criminal history that would enhance their sentence.

Because the current Sentencing Guidelines base longer sentences for firearms offenses on the involvement of high numbers of firearms or the criminal background of the offender, traffickers can engage in schemes to transfer relatively small numbers of guns in the illegal firearms market with little fear of a substantial sentence. To provide one example, one of the

criminal statutes used for straw-purchase cases, 18 U.S.C. § 922(a)(6) (making it unlawful to lie to a gun dealer about the lawfulness of the sale), carries a maximum penalty of 10 years imprisonment. Under Sentencing Guidelines §2K2.1 and §2E1.1, however, in cases involving three to seven guns, a straw purchaser with a minimal record who knowingly provides false information in order to supply firearms to another, most likely prohibited, person, and who accepts responsibility by pleading guilty is subject to a sentence range of 10 to 16 months. A straw purchaser selling two guns to two different convicted murderers, who each have other drug convictions, would face a guideline range of six to 12 months after a guilty plea, while those to whom he sold the weapons would face a mandatory minimum of 15 years.

The disparity in punishment under the existing Guidelines for those who illegally possess the firearms, regardless of whether the possession is connected to any other illegal conduct, and those who wilfully supply them in small numbers to prohibited persons does not provide a sufficient deterrent to illegal trafficking in firearms. In addition, this disparity results in the prosecution of fewer gun trafficking cases because, under the current Guidelines, such offenders would receive little, if any, incarceration unless large numbers of guns are involved and/or the trafficker has a prohibiting record. Given limited resources, investigators and prosecutors must necessarily focus most of their time on cases in which there is a potential for substantial incarceration. The disparity in sentences available under the existing Guidelines between those who illegally possess the firearms (regardless of whether the possession is connected to any other illegal conduct) and those who willfully supply them in small numbers to prohibited persons, explains in large part why investigations and prosecutions focus on the possessory offenses.

The fact that far more possession cases than trafficking cases are prosecuted does not

mean, however, that the offenders in the trafficking cases are any less culpable than the unlawful possessors. In most cases, those illegally possessing firearms will have a prior felony conviction (because that is a crime itself under 18 U.S.C. §§ 922(g) and 924(e)), while those doing the trafficking, such as corrupt firearms licensees or straw purchasers, generally do not have a criminal history. By unlawfully supplying guns to several violent criminals, however, an individual trafficker can be even more instrumental in causing gun violence than a single unlawful possessor who is subject to higher penalties. ATF has encountered trafficking schemes involving several individual straw purchasers, who each acquires small numbers of firearms as part of a scheme that, in the aggregate, supplies large numbers of firearms to the illegal market, with several of the trafficked firearms later being recovered from crime scenes with a “time to crime” of only six to eight weeks from the date of retail purchase.

In summary, to account for the fact that most firearms-trafficking cases involve persons with no criminal history and relatively small numbers of guns, and to reflect the harm to public safety caused by firearms trafficking, as demonstrated by trace data showing that trafficked firearms frequently are used in crimes, the Department believes that a separate scale of significant sentencing enhancements based on lower numbers of trafficked firearms specifically applicable to offenses that were part of a gun trafficking scheme should be created. With higher penalties, more trafficking cases can be investigated and prosecuted, and law enforcement will have a greater impact on illegal gun-trafficking activity.

I turn now to the Commission’s specific proposal to amend the Sentencing Guidelines to include a sentencing enhancement for firearms trafficking.

### Definition of Firearms "Trafficking"

The Commission's proposal defines firearms "trafficking" as a simple firearm transfer that meets certain conditions. The proposal seeks comment on whether it should apply to a single firearm or to more than one firearm. On this question, the Department favors having the definition apply only to instances involving more than one firearm, as the unlawful transfer of more than one firearm can demonstrate that the defendant knew he or she was participating in a scheme that is part of the unlawful market in guns. Transfer of a single firearm typically will not reflect conscious participation in a scheme, such as would justify a steep enhancement of a sentence.

The Commission's proposal also seeks comment on whether the transfer should be as consideration for anything of value or solely for pecuniary gain in order to qualify as a trafficking offense under the proposed enhancement. The Department favors an approach providing that trafficking covers transfers for anything of value, such as drugs, for example, and not simply pecuniary gain. The Department also supports the proposed provision clarifying that the trafficking enhancement applies to illegal transfers that are part of an unlawful scheme, even if nothing of value was exchanged.

The Department is concerned, however, about the proposal being overly broad in some respects and under-inclusive in one respect. With respect to the proposal being overly broad, the Department notes that the proposal requires only a showing of an ongoing unlawful scheme when nothing of value was exchanged; showing an unlawful scheme, however, is not required when the transfer is for something of value. The proposal also does not require any showing that the defendant knew, had reason to believe, or was wilfully blind to the fact that the transfer would be

to a person whose possession or receipt would be unlawful or who intended to use or dispose of the firearm unlawfully. Under the Commission's proposed definition, proving the existence of a "trafficking" offense may be simpler, but the Department notes that the definition leaves the potential for covering conduct that is broader than what is regarded as the genuine gun-trafficking problem. For example, under the Commission's proposed definition, a prohibited person with an old felony conviction who has a gun collection (itself prohibited by law) and sells a gun to a non-prohibited friend or relative would be considered a gun trafficker. Also, a person regularly selling firearms who is found to be dealing without a license would automatically be considered a gun trafficker, without any showing that he knew he was selling, had reason to believe he was selling, or was wilfully blind to the fact that he was selling the guns to prohibited persons. The Department does not think that the definition should result in all dealing-without-a-license cases being considered "gun trafficking" cases. The Department likewise does not believe that any transfer of a firearm by a prohibited person for value should automatically be considered firearms "trafficking."

On the other hand, the Commission's proposed definition is under-inclusive in that it covers only the transfer and not the receipt of a firearm, even when the recipient is part of a gun-trafficking scheme. 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 by the definition ultimately adopted by the Commission.

If the conduct covered by the trafficking definition is better tailored to the core trafficking conduct involving unlawful schemes to divert firearms from lawful commerce to facilitate the acquisition of firearms by prohibited persons or others for unlawful purposes, then the



Department believes a substantial increase in the penalty is justified. With this goal in mind, the Department recommends that the Commission consider revising the proposed definition of trafficking to cover the following conduct:

“transporting, transferring, or otherwise disposing of two or more firearms to another individual, as part of an unlawful scheme to transfer firearms, or receiving two or more firearms in furtherance of such a scheme, regardless of whether anything of value was exchanged, and the defendant knew, had reason to believe, or was wilfully blind to the fact that the scheme would result in a transfer of a firearm to an individual whose possession or receipt would be unlawful.”

#### Proposed Firearms Trafficking Enhancements

The Commission’s proposed enhancement for firearm trafficking breaks the enhancement into two categories: two–24 firearms and 25 or more firearms. Because, as I have noted, most trafficking takes place through transactions involving small numbers of firearms, the Department believes that the enhancements should be further compressed by providing for additional incremental increases between two and 25 firearms. For example, increases could be made for cases involving two–seven firearms; eight-15 firearms; 16-24 firearms; and 25 or more firearms, or for some formulation akin to the Guidelines’ existing enhancements. The Department believes the enhancement should be four levels for the lowest increment, with an additional two level-increase for each additional increment, with the highest increment having a 10-level enhancement. Together with the existing table of enhancements in §2K2.1 for the number of firearms involved in the offense, these new enhancements will provide an appropriate increase in punishment for offenses involving a gun-trafficking scheme that meets the criteria set forth in the

definition provided above.

Finally, I would like to note that, in light of the proposed enhancements for firearms trafficking, the Commission should consider whether the application note under §2K2.1 regarding upward departures should be amended to provide that an upward departure may be warranted when, in the case of an offense involving firearms trafficking, the number of trafficked firearms substantially exceeded 25.

#### Stolen and Altered or Obliterated Serial Numbers

In addition to my comments on the firearms trafficking proposal, I would like to express the Department's strong support of the Commission's proposal to increase the enhancement from two levels to four levels for offenses involving a firearm that had an altered or obliterated serial number. Serial-number obliteration is a clear indicator of firearms trafficking or an intent to otherwise use the firearm unlawfully, because the intentional obliteration of a serial number can be intended only to make it more difficult for law enforcement to trace the firearm through a licensed seller to the firearm retail buyer. Therefore, the Department believes the higher enhancement better reflects the culpability of this conduct.

#### Enhancement for Use of High-capacity Semiautomatic Firearms

I would also like to express the Department's support for the Commission's proposal to create an upward departure based on an offender's possession of a high-capacity semiautomatic firearm. While the possession of large-capacity ammunition-feeding devices and semiautomatic assault weapons is no longer prohibited, the potential for harm created by the possession of a

high-capacity semiautomatic firearm by those who would misuse them or otherwise illegally possess them is significant. Accordingly, the Department believes that the void in the current Guidelines with respect to such firearms should be addressed by the Commission.

A provision allowing for an upward departure will afford the sentencing judge the opportunity to consider the characteristic of the weapon and the offense on a case-by-case basis without requiring the judge to do so as part of the offense-level calculation. The Department favors this upward-departure approach over the offense-level approach in light of the fact that possession of such firearms is no longer illegal *per se*.

The Department also believes that the Commission's proposed definition adequately covers the types of firearms of greatest concern, specifically those capable of rendering significant harm through the rapid discharge of large numbers of rounds without a need to reload.

#### "Lesser Harms"

The Department supports the proposed amendment to §5K2.11 regarding "Lesser Harms." The amendment would prohibit the use of the section in felon-in-possession cases. The Department believes this proposed change most accurately captures the purpose behind the Lesser Harms provision. §5K2.11 allows a sentencing judge to depart when a defendant commits a crime that did not cause or threaten the harm sought to be prevented by the law at issue. Applying §5K2.11 in felon-in-possession cases directly contravenes the fundamental purpose for the statutory prohibition: to prevent persons who have demonstrated an inability to conform their conduct to the requirements of the law from having control of lethal weapons. The application of §5K2.11 should therefore not be permitted in felon-in-possession cases. The

proposed amendment serves the purpose of the law, and the Department supports it.

“In Connection With”

The Commission proposes to remedy a split among the Courts of Appeals in applying the “in connection with” requirement for possessing a firearm in burglary and drug cases. The Department supports the objective of remedying the split among the circuits, but questions whether the proposal will accomplish that objective. The Department is still studying the three options outlined by the Commission and has no specific comment to offer with respect to any of them. The Department does note a potential drafting error, because subsequent to redesignation, it appears that the Application Note should be “13” rather than “14.”

Clarification of “Brandishing” and “Otherwise Used”

Finally, I would like to express the Department’s support for the Commission’s proposal to elevate the offense level for “brandishing” a firearm during the commission of another offense to the same level currently applied for “otherwise using” a firearm during the offense. The proposal is consistent with the definition of “brandishing” set out in 18 U.S.C. § 924(c) and appropriately elevates the offense level to the same applied for “otherwise used.” The higher enhancement for “brandishing” to make it consistent with the enhancement for “otherwise using” better reflects the culpability of the conduct than does providing the same offense level as mere possession of the firearm during the offense. Indeed, the Department believes that the proposal should be extended to other Guidelines addressing “brandishing” and “otherwise using” a firearm during the commission of an offense.

## CONCLUSION

The Department appreciates the work of the Commission and its attention to the firearms issues addressed in its proposals, especially in light of the global issues confronting the Commission. The Department looks forward to continuing to work closely with the Commission and its staff to promote the goals of the Sentencing Reform Act.

I thank you for your attention and will be pleased to try to respond to any questions that Commissioners may have on the firearms proposals.