

STATEMENT OF
LAURA E. DUFFY
UNITED STATES ATTORNEY
SOUTHERN DISTRICT OF CALIFORNIA

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BEFORE THE
UNITED STATES SENTENCING COMMISSION

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HEARING ON
PROPOSED AMENDMENTS TO THE FEDERAL
SENTENCING GUIDELINES

WASHINGTON, D.C.

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Madam Chair and Members of the Commission:

Thank you for the opportunity to testify on behalf of the Department of Justice and federal prosecutors across the country regarding the Commission's proposed amendments and issues for comment related to drugs and firearms offenses. I am the United States Attorney for the Southern District of California. I have been a federal prosecutor for my entire 18-year legal career, which I began in Washington, D.C. as a member of the Attorney General's Attorney Honors Program. I first joined the Criminal Division's Money Laundering Section and

later moved to the Narcotic and Dangerous Drug Section (NDDS). As a trial attorney in NDDS, I participated in large drug trafficking investigations all around the country. Initially, my work involved prosecutions against U.S.-based trafficking organizations that were distributing narcotics imported from Colombia and Mexico. Then, in 1995, I was detailed to the U.S. Attorney's Office for the Southern District of California in San Diego, which was a major hub of narcotics importation by Colombian and Mexican drug organizations – including the Tijuana Cartel (also known as the Arellano-Felix Organization or AFO), a ruthless drug trafficking organization controlling the Tijuana, Baja California Norte corridor.

From the mid-1990s through 2006, the AFO is believed to have been responsible for importing thousands of tons of cocaine and marijuana into the United States and murdering hundreds of people. From 1997 through 2008, I was the lead prosecutor in several Southern District of California cases against members of the AFO and Mexican Mafia gang members who killed and maimed in Mexico and the United States on behalf of the AFO. I led cases against AFO leadership figures, including the Arellano-Felix brothers and several of the AFO's highest-ranking members. All of these targets were charged with racketeering, including homicides and other acts of violence, drug trafficking, money laundering, extortion, and criminal forfeiture.

Through the narcotics, money laundering, and firearms trafficking cases that I prosecuted over the years as an Assistant U.S. Attorney, and in my current role as U.S. Attorney, I have become intimately familiar with the unique and significant challenges faced by law enforcement and citizens within communities on both sides of the U.S.-Mexican border as the result of cartel-related activity.

Despite falling violent crime rates nationally, drug and firearms offenses continue to present serious public safety challenges. A successful campaign to curb these offenses – and the violence that so often goes hand-in-hand with their commission – requires not only a strong federal law enforcement response, but also an appropriately strong federal sentencing policy. The Department is eager to work with the Sentencing Commission as it continues its efforts to advance fair, tough, and smart sentencing policies relating to drug and firearms offenses.

Drug-related violence, increasingly including gruesome murders, has skyrocketed in recent years in Mexico and particularly along its border with the United States. A tragic example of this violence hit home last month when Mexican gunmen believed to be members of an international drug syndicate ambushed and killed Immigration and Customs Enforcement (“ICE”) Agent Jaime Zapata and wounded ICE Agent Victor Ávila, Jr., while the two were working in

Mexico. Although drug-related violence has long existed in Mexico, the bloodshed has escalated in recent years to unprecedented levels as the drug cartels vie for trafficking routes; use violence as a tool to undermine public support for the Mexican government's vigorous counter-drug efforts; and use violence to intimidate the public, government officials, and rival cartels. Thousands of men, women and children are being killed in Mexico each year.

Unfortunately, along the border, seeing and hearing about the violence in Mexico is far too familiar. I am regularly briefed on massive gun battles erupting in the streets of neighboring Tijuana or other border cities. Warring cartels often are armed with everything from semi-automatic handguns and assault-style weapons to truck-mounted .50-caliber rifles. This goes on just a few miles from San Diego, and this level of firepower means that local police forces in Mexico are outgunned, leaving only the thinly stretched Mexican Army with the capacity to disrupt and prevent some of this brutality.

The cartel-related violence is not limited to Mexico. Although Mexican drug traffickers and their enforcement squads commit violent crimes (including kidnappings and home invasion robberies) primarily in Mexico, some of their criminal activity extends to and affects U.S. communities as well. For example, in

January of last year, members of a Tijuana-based drug trafficking organization, who are being prosecuted in the Southern District of California, unsuccessfully targeted an individual for murder in San Diego because the individual “disrespected” a senior member of the criminal organization. In February of last year, another member of this drug trafficking organization, also being prosecuted in the Southern District of California, provided a confidential informant with a “hit list” naming four individuals living in San Diego who were to be targeted for assassination. And, just last week, a Mexican cartel member housed at a federal prison in downtown San Diego put out a “hit” on a witness who is testifying for the government in his trial, requiring the FBI to take immediate steps to protect and relocate the witness.

According to the National Drug Intelligence Center’s 2009 National Drug Threat Assessment, of all drug trafficking organizations, Mexican drug trafficking organizations represent the “greatest organized crime threat to the United States,” with cocaine trafficking being the leading drug trafficking threat. Mexican and Colombian drug trafficking organizations generate, remove, and launder between \$18 billion and \$39 billion in wholesale drug proceeds from the United States annually, a large portion of which is believed to be smuggled in bulk cash across

the border into Mexico. This currency further fuels the drug trade and its attendant violence.

It is no secret that these drug trafficking organizations often carry on their campaigns of violence, intimidation, and smuggling with firearms illegally trafficked from the United States, where firearms can be purchased or obtained in a variety of legal and illegal ways.

In diverting firearms from lawful commerce, firearms traffickers deliberately use so-called “straw purchasers” to circumvent the background check and record-keeping requirements that otherwise apply in order to supply firearms to persons prohibited by U.S. law from possessing them. The same tactics are commonly used to obtain firearms for transmission to members of Mexican drug cartels. For example, this month, the Southern District of California will complete a DEA-supported prosecution against a firearms smuggling cell responsible for transporting nearly 100 high-powered semi-automatic pistols and semi-automatic rifles, including AR-15s and AK-47s, from the United States to Mexico. The Tijuana-based organization was led by an individual who recruited straw purchasers to accompany members of the organization from San Diego to Arizona, where they purchased firearms. The individuals purchasing firearms obtained false

Arizona drivers' licenses and used the licenses to make multiple firearms purchases over the course of a year. Once purchased, the firearms were loaded into hidden compartments in vehicles and driven back to San Diego before being transported across the border into Mexico where they were delivered to members of the Arellano-Felix Organization.

Unfortunately, this type of conduct is occurring all along the Southwest border. So, too, are our prosecutions. In fact, the U.S. Attorney's Office in the District of Arizona recently indicted 34 individuals for the same type of conduct. And just last week, the U.S. Attorney's Office in New Mexico indicted 11 individuals – including the mayor, police chief, and a village trustee of Columbus, New Mexico – with similar offenses. These cases clearly illustrate how violent Mexican drug cartels are able to shop for their weapons here in the United States. As my fellow U.S. Attorney in Arizona, Dennis Burke, said at the time that the indictment in Arizona was unveiled, “[t]he massive size of th[e Arizona] operation sadly exemplifies the magnitude of the problem.”

Notably, the cartels' appetite for obtaining high-powered firearms from the U.S. and the impact of straw purchasers who feed this appetite extends well beyond the U.S.-Mexican border. In January, for example, a federal judge in

Minnesota sentenced Paul Giovanni de la Rosa for firearms trafficking. De la Rosa had smuggled more than 100 guns into Mexico, and had crossed the U.S.-Mexican border 20 times for that purpose. De la Rosa purchased the guns from a licensed dealer in Minnesota after making false statements on the required firearms application. Of the 100 firearms smuggled, 42 were FN Herstal, model 57, 5.7-mm pistols. This type of firearm is in high demand by Mexican drug cartels because the pistols have 20-round magazines and fire small rifle rounds capable of piercing body armor. This is indicative of the kinds of crimes that demand tough sentences to ensure that these criminal networks are disrupted, dismantled, and deterred.

It is important to keep in mind that firearms trafficking – whether to Mexico or within the boundaries of the United States – poses serious public safety issues right here at home. Obtaining and transporting firearms with the intent of diverting them to illicit uses or prohibited persons is, by its nature, a dangerous activity that lends itself to violence. Moreover, historical data show that trafficked firearms frequently end up being recovered as crime guns. While legally acquired firearms can certainly be misused, the risk of misuse is far greater when the firearm was obtained illegally in the first place. Persons intent upon hunting or sport shooting do not acquire their weapons from traffickers; nor do they use false identification

or straw purchasers to acquire their guns. Rather, persons intent on covering their tracks and committing violent crimes often do.

For example, my office recently prosecuted a case in which a straw purchaser bought a shotgun in San Diego for his friend who, under federal law, was a prohibited person. Within days of the purchase, the true buyer – the prohibited person – used the shotgun to murder his work supervisor and kill himself. These cases must be prevented and prosecuted, and the Department is committed to doing both.

As federal law enforcement officers, our efforts to disrupt this violence are robust and multi-faceted. We aggressively indict drug and murder suspects in the United States, and we work closely with the Mexican security forces and the Mexican Attorney General to seek extraditions and investigate crimes. We also are collaborating with our state and local law enforcement partners at home and throughout Mexico to provide assistance and training in combating drug and gun trafficking. However, while the Department and our law enforcement partners have increased enforcement efforts, it will also take tough, targeted, and thoughtful sentencing policy to get more gun- and drug-runners off the streets and into prisons, and to deter those who might be thinking about taking their place.

One way that we can protect our citizens from violence at home while at the same time assisting our Mexican partners is through targeted increases in the penalties for certain firearms offenses here in the United States. In our view, the sentencing guidelines should more firmly and fairly treat firearms offenders in a manner that recognizes the serious harm caused by those who engage in illegal trafficking of firearms and reflects more accurately the culpability of those who attempt to facilitate the transfer of firearms across the border. Currently, many firearms traffickers receive sentences that do not reflect the seriousness of their conduct and, consequently, others are not deterred from engaging in the same conduct. Modest but meaningful increases in sentences for certain firearms offenses would address the serious harm that these offenses pose to the public, incapacitate dangerous offenders, and serve as a strong deterrent to those considering firearms trafficking.

The Department supports amendments to the sentencing guidelines this year to increase gun trafficking penalties in both Parts K and M of the guidelines. We continue to urge the Commission to act with particular focus on issues relating to straw purchasing generally and specifically on straw purchaser transfers intended to facilitate firearms export, firearms trafficking, and cross-border firearms trafficking.

In particular, the Department supports the Commission's amendment of the primary firearms guideline, USSG §2K2.1, in this amendment year. The Department recommends the following amendments in response to the questions the Commission posed for comment.

Straw Purchasers

With respect to straw purchaser issues, the Department believes that the Commission should raise, by two (2) levels, the alternative base offense levels applicable to defendants who are convicted of 18 U.S.C. §§ 922(a)(6), 924(a)(1)(A), or 922(d) . The current, relatively low base offense levels (and resulting guidelines ranges) applicable to straw purchasers likely reinforce the view of some courts and members of the public that straw purchasing offenses are non-serious cases involving technical recordkeeping or paperwork violations. Increasing the base offense level and providing guidance regarding the serious harm such offenses pose would properly reflect the true role and culpability associated with the offense. Specifically, the Department supports amending USSG §2K2.1(a)(7) to provide for an increased base offense level of 14 if a defendant is convicted under 18 U.S.C. §§ 922(a)(6) or 924(a)(1)(A).

Similarly, the Department supports amending USSG §2K2.1(a)(6) so that it provides for a base offense level of 16 and applies not only to cases where the defendant is a prohibited person or convicted of transferring to a prohibited person, but additionally to cases where a defendant is convicted under 18 U.S.C. §§ 922(a)(6) or 924(a)(1)(A) *and* committed such offense with knowledge, intent, or reason to believe that the firearm would be transferred to a prohibited person (effectively, bearing the same culpability as the defendant convicted under § 922(d)).

The Department also supports a similar amendment for straw purchasers in cases involving large-capacity, semi-automatic firearms or 26 U.S.C. § 5845(a) weapons, such as machine guns, sawed-off shotguns, grenades, and rockets – all of which are, unfortunately, being used in the kind of narco-trafficking warfare in which Mexican cartels are now engaging. However, rather than appending such an amendment to section 2K2.1(a)(4)(B) (where offenses involving such weapons already are addressed and a base offense level of 20 applies), the Department proposes amending USSG §2K2.1(a)(5). That guideline currently applies only to 26 U.S.C. § 5845(a) weapons. Under the Department’s proposal, that guideline would: (a) include offenses involving semi-automatic firearms capable of accepting a large-capacity magazine (that is, assault-style weapons); and (b) apply

to defendants convicted under 18 U.S.C. §§ 922(a)(6) or 924(a)(1)(A) who committed such offenses with knowledge, intent, or reason to believe that the firearm would be transferred to a prohibited person. This would result in a base offense level of 18 in such cases and would avoid the incongruous result of a straw purchaser who buys an assault weapon for a prohibited person being treated more harshly under the guidelines than a prohibited person who purchases the same weapon for himself at a gun show.

Firearms Crossing the Border

The Department believes that those who facilitate the trafficking of firearms across the borders of the United States, whether directly or indirectly, deserve significant prison sentences. Hence, we support an amendment of USSG §2M5.2 that lowers the threshold for increased penalties in certain cases involving cross-border trafficking of small arms and/or ammunition where all such arms and/or ammunition were possessed solely for personal use.

While USSG §2M5.2 serves to ensure that tough sentences are imposed if a firearms offense becomes an import/export offense, the Department does not believe that USSG §2M5.2 adequately accounts for all cases in which an offender smuggles, attempts to smuggle, or facilitates the smuggling of firearms across the

border. Indeed, because federal prosecutors pursue the vast majority of firearms cases under 18 U.S.C. §§ 922 and 924 – not 18 U.S.C. § 554 or 22 U.S.C. §§ 2778 and 2780 – the guideline at section 2M5.2 does not apply in a large number of relevant cases. The Department also supports, therefore, an amendment of the current USSG §2K2.1(b)(6) to provide for a three (3)-level enhancement where a defendant possessed a firearm and/or ammunition while leaving or attempting to leave the United States or possessed or transferred a firearm and/or ammunition knowing, intending, or believing that it would be transported outside of the United States. The Department also believes that the Commission should permit cumulative application of any cross-border enhancement with the guidelines currently provided in USSG §§2K2.1(b)(5)¹ (regarding trafficking) and (6) (regarding use, possession, or transfer of a firearm in connection with any other felony) as the proposed amendment addresses distinct conduct that appropriately should be considered in gauging the true nature of the offense. Cumulatively, these enhancements would bring the offense levels in Part 2K applicable in cross-border trafficking cases in line with those in Part 2M.

While the Department has suggested ways to achieve these important goals regarding firearms sentencing policy, we are committed to working with the

¹ The Department recommends extending the definition of an “individual whose possession or receipt of the firearm would be unlawful” for purposes of the trafficking enhancement to include a felony conviction of any kind.

Commission on the specifics of these proposed amendments and are eager to engage in constructive dialogue aimed at crafting firm but fair evidence-based sentencing policy for firearms offenses.

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Drug Sentencing Policy and the Fair Sentencing Act

In October 2010, the Commission promulgated a temporary, emergency amendment to the federal sentencing guidelines to implement the Fair Sentencing Act of 2010, which addressed the disparity in federal sentencing policy between offenses involving crack cocaine and powder cocaine; repealed the mandatory minimum penalty for simple possession of crack cocaine; and refocused sentencing policy for all drug trafficking offenses by emphasizing consideration of the defendant's role, attendant violence, and certain aggravating and mitigating factors. On October 8, 2010, the Department submitted a letter to the Commission, indicating the Department's support of the Fair Sentencing Act's broad reforms and detailing the Department's response to particular issues for comment posed by the Commission. The Commission now proposes to promulgate as permanent, without change, the emergency guidelines that temporarily implemented the Act. The Department supports promulgation of the

emergency amendment as a permanent guideline, to the extent it is consistent with Congressional intent.²

In addition, the Commission asks for comment on issues that arise from its continued work on the guidelines applicable to drug trafficking.³ First, the Commission seeks comment on whether with respect to *all* drugs the base offense levels of 24 and 30, rather than 26 and 32, should correspond with statutory mandatory minimum penalties.

The Department continues to recognize the Fair Sentencing Act's emphasis that sentencing considerations should focus not only on drug quantities, but on the essential nature of the criminal conduct at hand. *See* Department of Justice Comment Letter, Oct. 8, 2010, at 2-3. However, in achieving the Act's laudable goal of better differentiating the culpability of drug traffickers, the record does not indicate that Congress intended to replace a penalty scheme that factors drug

² The Department maintains its positions regarding certain aspects of the amendment as detailed in its October 8, 2010, letter commenting upon the emergency amendment proposed at the time. However, because the Commission, after due consideration, declined to implement the temporary amendment consistent with the Department's recommendations, there is no need to re-address those issues now.

³ The Commission is not, at this time, requesting responses to its inquiry regarding whether permanent guidelines implementing the Fair Sentencing Act should be included in U.S.S.G. §1B1.10(c) as an amendment that may be applied retroactively to previously sentenced defendants.

quantity into the complex calculus of determining the serious nature of a defendant's criminal conduct.

The drug quantity for which a defendant is accountable *is* a valid *initial* measure of the seriousness of the criminal conduct – regardless of specific harms for which the defendant may be accountable under the sentencing guidelines, the defendant's role in the offense, and any mitigating circumstances. In addition to contributing to more widespread drug abuse and related harms, significant drug quantities often are associated with systemic violence or other systemic harm at some point in the distribution chain.

Further, the statutory mandatory minimum sentencing scheme established at 21 U.S.C. §§ 841 and 960 similarly reflects a policy of greater punishment for involvement with a greater quantity of dangerous drugs. Those statutes do not presume a defendant's role in the offense or personal accountability for violence or other incremental harm. Likewise, the limitation of statutory minimum sentences established at 18 U.S.C. § 3553(f) (the "safety valve") affords relief based on the *absence* of certain aggravating factors or defendant characteristics, and does not presume, based on the presence of certain mitigating circumstances, that the

underlying trafficking activity is intrinsically less serious because the defendant is eligible for the relief.

In the last cycle of guideline amendments, the Commission moved Zones B and C (non-incarceration zones) down the sentencing table and made additional changes rendering alternatives to incarceration in drug cases more available. At this juncture, it makes sense for the Commission to pause and study the results of those amendments prior to incorporating an additional two-level reduction into the Drug Quantity Table.

We strongly support sentencing policy that promotes individualized sentencing under the guidelines and considers a variety of aggravating and mitigating factors. Indeed, subsequent to the Supreme Court's *Booker* decision, courts have greater flexibility in sentencing; as a result of the "Holder Memo," federal prosecutors have greater flexibility; and, as a result of last year's guideline amendments, courts have still more flexibility in cases where they believe the guidelines call for an unduly harsh sentence. In light of all of this increased flexibility – coupled with guideline sentencing policy that emphasizes consideration, in addition to drug quantity, of the defendant's role, aggravating circumstances, and mitigating circumstances – a two-level reduction in the Drug

Quantity Table is not warranted until further information is presented and can be considered. The Department urges the Commission, therefore, to retain the Drug Quantity Table as promulgated in the temporary amendments and to engage in a careful study that focuses on whether the amendments designed to implement the Fair Sentencing Act, along with other recent amendments designed to alleviate unduly harsh sentences for low-level, non-violent drug offenders, are achieving the goal of drug sentencing policy that seeks to produce fairer sentencing by gauging the true nature of drug-related conduct.

For the same reasons, the Commission should not adopt any proposal to reduce the offense level where there are no aggravating offense circumstances or offender characteristics. Although it may be appropriate to reduce a sentence for certain mitigating circumstances, a quantity-based presumptive sentence should not be viewed as requiring special circumstances (something a defendant “works up to” through aggravating conduct or characteristics).

The Department does believe, however, that additional guidance regarding application of the adjustments for both aggravating and mitigating role could be helpful. In drug cases, “role in the offense” often is the subject of contentious litigation and, possibly, is the most frequently litigated sentencing issue. Before

undertaking consideration of any specific changes to the commentary, however, we would urge the Commission to conduct an extensive review of cases and to identify any specific unwarranted disparities in the application of USSG §§3B1.1 and 3B1.2 as well as any notable conflicts in the reported case law.

The Commission also asks whether it should consider (1) expanding application of the so-called “safety valve” so that it applies to defendants who have more than one criminal history point, but otherwise meet all other safety valve criteria; or (2) providing a similar downward adjustment to drug trafficking defendants who truthfully provide to the government all information and evidence the defendant has concerning the offense.

The Department opposes adoption of any guideline proposal that would expand the application of the safety valve to defendants whose criminal history disqualifies them for statutory safety valve eligibility. The statute limits application of the safety valve to defendants with one or fewer criminal history points and the guidelines should mirror this approach. We would, however, be open to working with the Commission and Congress to consider adjustments to the statutory safety valve that might lead to expansion of its applicability to, for example, offenders with two criminal history points.

The Department also opposes adoption of any proposal that would provide a downward adjustment to defendants who provide information concerning their offense but otherwise do not qualify for safety valve application. Again, the Department believes that existing offense levels and the protections of the safety valve appropriately represent the seriousness of the offense. A reduction for accepting responsibility and/or a departure for substantial assistance provides an adequate avenue for sentence reduction in these circumstances, and there is no need to provide an additional benefit when there is no incremental mitigation.

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As we all recognize, unwarranted sentencing disparities, and even the mere perception of unwarranted sentencing disparities, undermine the core goals of sentencing reform. On the other hand, equity and public confidence in the criminal justice system are boosted when courts and prosecutors are guided by policy that promotes the justifiable differentiation between defendants based on the circumstances of their cases that have bearing on culpability. The Fair Sentencing Act of 2010, therefore, was an important step in ensuring a fairer federal criminal justice system.

The Department supports the broad reforms of the Act to (a) reduce the crack and powder cocaine penalty disparity; (b) increase penalties for offenders who use violence, prey on vulnerable victims, or maintain crack houses or drug establishments; and (c) reduce penalties modestly for non-violent drug offenders while ensuring that any offender who traffics a substantial quantity of a drug is imprisoned for at least two years. We urge the Commission to promulgate a permanent amendment implementing the Fair Sentencing Act and to revise the guidelines to increase penalties on offenders involved in the type of straw gun purchases that facilitate gun trafficking across the borders of the United States and fuel Mexican drug cartels.

The Department believes that, collectively, these amendments will improve public safety, particularly with respect to gun and drug offenses that continue to plague our nation. We also believe that this combination of measures will help control correctional populations and costs, a goal that has become essential as our nation faces austere federal budgeting that reduces federal enforcement dollars available to our investigators, prosecutors, prison system, and probation service.

Thank you for the opportunity to share the views of the Department of Justice on these important topics. We value the Commission's hard work on these matters that are so critical to law enforcement, and look forward to working with the Commission.