TESTIMONY BEFORE THE UNITED STATES SENTENCING COMMISSION

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Written Testimony Concerning Straw Purchasers, Firearms Crossing the Border and Export Offenses Involving Small Arms or Ammunition

Good Morning, my name is William Brennan, and on behalf of the Practitioners Advisory Group, thank you for the opportunity to address the Commission with respect to some of the important issues under consideration during this amendment cycle. The PAG strives to provide the perspective of those in the private sector who represent individuals and organizations charged under the federal criminal laws. We very much appreciate the Commission's willingness to listen to us and take into account our thoughts on the issues for comment with respect to amendments to the Guidelines.

This morning I will address the amendments under consideration pursuant Straw Purchasers, Firearms Crossing the Border or Otherwise Leaving the U.S., and Export Offenses involving Small Firearms and Ammunition.

I. Straw Purchasers

The PAG believes that the current guideline § 2K2.1 is adequate and that absent clear evidence showing an inability to impose sufficient punishment, as evidenced by, *inter alia*, a disproportionate number of sentences above the recommended guideline range for straw purchasers (as compared to other sentences imposed under § 2K2.1), the Commission should not make any changes to the guideline for straw purchasers.

The PAG also believes that if the Commission nonetheless makes changes to § 2K2.1 to address straw purchasers, those changes should take into account the various degrees of culpability in such cases. There are, in fact, aggravating and mitigating factors that differentiate straw purchasers. Aggravating factors include a purchaser who routinely purchases weapons as a business for resale on the black market or a purchaser who routinely engages in profiteering for the purchase of weapons. Mitigating factors include a prohibited person's girlfriend making a straw purchase as a mere accommodation to him or as a result of partial (*i.e.,* incomplete) duress. Section 2K2.1(b)(5) already accounts for black market dealers who routinely make straw purchases by imposing a 4-level enhancement for a trafficker in firearms. Thus, the PAG believes that an across-the-board enhancement for straw purchases would not adequately take into consideration the differences in culpability among defendants convicted of straw purchases and would upset the relative culpability analysis currently contained in the guideline.

II. Firearms Crossing the Border or Otherwise Leaving the United States

The PAG believes, as more fully discussed below, that § 2M5.2 does not adequately differentiate among the types of munitions exported abroad. For example, "military aircraft" or "vessels of war" are treated the same as 11 semi-automatic small arms. A base offense level of 26 applies equally to each. It makes more sense to exclude non-fully-automatic small arms completely from § 2M5.2 and address them instead in § 2K2.1. An enhancement could be added to § 2K2.1 for non-fully automatic small arms that cross the border or otherwise leave the United States. Section 2K2.1 already has enhancements under (b)(1) for the number of firearms), under (b)(4(A) for stolen firearms, under (b)(4)(B) for altered serial numbers, and under (b)(5) for trafficking in firearms. An enhancement for exportation under § 2K2.1 makes good sense. The PAG believes that an enhancement under that guideline of two levels would provide the appropriate proportional punishment.

III. Export Offenses Involving Small Arms or Ammunition

Section 2M5.2, in its current form, does not adequately distinguish the most culpable of arms traffickers from those who are much less culpable. The factors account for this failure: (1) it is not clear under § 2M5.2(a)(2) precisely which types of weapons are included within its reach, and (2) a literal application of § 2M5.2(a)(2) produces illogical outcomes that very likely were unintended.

The staff's working draft of proposed language for § 2M5.2 attempts to remedy the first of these problems by clarifying the types of arms to which the alternative base offense level applies (*i.e.*, certain small arms and ammunition, provided they are limited in number and solely for personal use). The proposed language does not solve the second problem, however, because even in its amended form the guideline would fail to account for varying degrees of culpability among arms traffickers.

Section 2M5.2's Current Problems

As currently drafted, Section 2M5.2 attempts to account all of the varying levels of culpability of arms exporters as well as their different effects on our Nation's security and foreign policy interests through only two categories. The guideline has two base offense levels and no specific offense characteristics. And the difference between the two base offense levels is dramatic: the general base offense level is 26, and the lower base offense level is 14 – a difference of 12 levels. This section fails to adequately calibrate the offense level to varying levels of culpability.

The first problem is that subsection (a)(2) provides a base offense level of 14 only for offenses involving "non-fully automatic small arms" that number fewer than ten. Under this provision, the lower base offense level applies to a defendant who ships up to nine semi-automatic rifles to a foreign country, but the higher level would apply to a defendant who mailed outside of the country a single bullet listed on the United States Munitions List. *See United States v. Sero*, 520 F.3d 187 (2d Cir. 2008). This result is illogical, and fails to adequately reflect the seriousness of each defendant's culpability – the

seemingly more serious offense receives substantially lower punishment, and vice versa. A defendant with no criminal history or other defendant-related adjustments who exported the semi-automatic rifles would have a guidelines range of 15-21 months, and a defendant with the same lack of criminal history or other adjustments who exported the single bullet would have a guidelines range of 63-78 months. The disparity is extreme and could only be remedied by a departure (under Application Note 2) or a variance. Moreover, the application note provides little guidance and appears to be intended as encouragement for *upward* departures where there are serious threats to the security or foreign policy interests of the United States. It does not recite any factors that should be considered for a downward departure from the higher base offense level.

The second problem with this guideline is that it is difficult to determine exactly which firearms are "involved" in the offense. For example, consider a defendant convicted of exporting three handguns in violation of the provisions of the U.S. Munitions list. This offense references § 2M5.2, and because the defendant's offense conduct (1) involved only non-fully automatic small arms, and (2) the number of weapons did not exceed ten, the defendant should be assigned a base offense level of 14. However, if the defendant is also convicted of exporting more than ten non-combat shotguns (a firearm not listed on the United States Munitions List, but rather, other export lists), his offense level would be calculated under a different guideline provision (either §§ 2M5.1 or 2K2.1). It is unclear whether the base offense level of 14 applies (for his exportation of three handguns) or instead level 26 (because the total number of firearms "involved" exceeds 10, even though not all of them meet the definition that triggers § 2M2.5).

Staff's Working Draft of Proposed Language to § 2M5.2 – A Partial Solution

By proposing to limit the lower base offense level to offenses involving a certain number of firearms and/or quantity of ammunition, and further limiting it to possession solely for personal use, the proposed language would help clarify the reach of the alternative base offense level. But it would do so at a cost. It is unclear, for example, why the lower base level should be tied to numerical limits if the firearms and ammunition are possessed solely for personal use. What would it matter if more than 10 weapons were exported for personal use? Or more than 500 rounds of ammunition? To be sure, as the number of weapons or rounds of ammunition increases, it becomes less likely that the defendant can show they were "solely for personal use." But it is unnecessary for the amendments to § 2M5.2 to complicate the matter by imposing these ceilings in addition to the personal use requirement.

In the end, the staff's working draft of proposed language still does not adequately distinguish between defendants with very different levels of culpability. For example, even under the proposed language, the base offense level for an arms trafficker who sold nuclear weapons to al-Qaeda operatives is the same as that of an arms trafficker who exports firearms to his family in his native country without the proper permit. This rigidity in the guideline will no doubt be cited with regularity as reason to vary from the guideline for failure adequately to distinguish between the worst of the arms traffickers and those much less culpable. The proposed language still fails to achieve reasonable gradations of culpability. Application Note 1 refers to "military aircraft, helicopters, artillery, shells, missiles, rockets,

bombs, vessels of war, explosives, military and space electronics, and certain firearms." There is a clear difference between a defendant who exports "military aircraft" or "vessels of war" and a defendant who exports only six small arms, regardless of whether they are for personal use. Yet, under the staff's proposed language, these defendants would be treated exactly the same – at the higher base offense level of 26.

Other guidelines have a much more reasonable, and ascertainable, gradation of culpability. Whatever else might be said about problems with the Loss Table in § 2B.1, the Drug Quantity Table in § 2D1.1, or the Tax Table from § 2T4.1, they at least contain multiple offense levels to separate defendants into different categories. Even § 2K2.1 contains a table which some gradation based on the number of firearms. Each of these guidelines recognizes relative degrees of culpability among defendants. The staff's proposed amendments to § 2M5.2 still do not adequately differentiate among defendants.

It would be an improvement on the current approach if § 2M5.2 were amended to follow the language and logic of § 2K2.1 for non-fully automatic small arms, a guideline that specifically designates a base offense level and specific offense characteristics for varying degrees of culpable conduct. The Number of Firearms Table from § 2K2.1 would make for a logical and reasonable approach to modifying § 2M5.2. The PAG also believes that a reasonable alternative would be to exclude completely non-fully automatic small arms from § 2M5.2 and instead address them in § 2K2.1 as stated above.

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Let me end by thanking you again, on behalf of the PAG, for providing us with this opportunity to provide input on these important issues. We look forward to continuing to work with the Commission and the Staff.