Congress of the United States

Washington, DC 20510

September 1, 2011

The Honorable Ann Birmingham Scheel Acting U.S. Attorney for the District of Arizona Two Renaissance Square 40 North Central Avenue, Suite 1200 Phoenix, AZ 85004-4408

Dear Ms. Scheel:

We understand that you are currently the Acting U.S. Attorney for the District of Arizona. As you are undoubtedly aware, many questions about your office's role in Operation Fast and Furious remain unanswered.

The level of involvement of the United States Attorney's Office for the District of Arizona in the genesis and implementation of this case is striking. Operation Fast and Furious was a prosecutor-led Organized Crime Drug Enforcement Task Force (OCDETF) Strike Force case. The congressional investigation has revealed that your office, and specifically Assistant United States Attorney (AUSA) Emory Hurley, played an integral role in the day-to-day, tactical management of the case. In fact, Mr. Hurley served as a prosecutor on this case until very recently.

Witnesses have reported that AUSA Hurley may have stifled ATF agents' attempts to interdict weapons on numerous occasions. Many ATF agents working on Operation Fast and Furious were under the impression that even some of the most basic law enforcement techniques typically used to interdict weapons required the explicit approval of your office, specifically from AUSA Hurley. It is our understanding that this approval was withheld on numerous occasions. It is unclear why all available tools, such as civil forfeitures and seizure warrants, were not used in this case to prevent illegally purchased guns from being trafficked to Mexican drug cartels and other criminals. We have further been informed that AUSA Hurley improperly instructed ATF agents that they needed to meet unnecessarily strict evidentiary standards merely in order to temporarily detain or speak with suspects.

It is essential for Congress to fully understand your office's role in Operation Fast and Furious. Therefore, please provide documents and communications of the following individuals in your office regarding Operation Fast and Furious:

1) Dennis Burke, former U.S. Attorney for the District of Arizona

2) Ann Scheel, Acting U.S. Attorney for the District of Arizona

3) Emory Hurley, Assistant United States Attorney

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- 4) Michael Morrissey, Assistant United States Attorney
- 5) Patrick Cunningham, Chief of the Criminal Division
- 6) Robert Sherwood, Spokesperson

The requested documents include e-mails, memoranda, briefing papers, and handwritten notes. They should also include communications between and among the individuals listed above and any ATF or Department of Justice employee regarding Operation Fast and Furious between October 1, 2009 and the present.

In addition, it is imperative that the Committee have an opportunity to discuss the facts above with individuals in your office who are familiar with the details of this operation. It is not our intention to second guess day-to-day decisions of your staff, but rather to make sense of them. The Attorney General has said that "letting guns walk is not something that is acceptable. . . . We cannot have a situation where guns are allowed to walk, and I've made that clear to the United States Attorneys as well as the agents in charge of various ATF offices."¹ Operation Fast and Furious is unique in that guns were allowed to walk with the apparent knowledge of, and authorization by, officials in your office.

Although our staffs spoke two weeks ago with then-U.S. Attorney Dennis Burke, he was unable to answer detailed questions about what his subordinates knew about the case. Given the national and international implications of the Fast and Furious scandal, Congress has an obligation to find out to what extent other individuals in your office were involved. To further that goal, we now request transcribed interviews with the following individuals from your office:

- 1) Emory Hurley, Assistant United States Attorney
- 2) Michael Morrissey, Assistant United States Attorney
- 3) Patrick Cunningham, Chief of the Criminal Division

The Terry Prosecution

Your office's recent court filing in opposition to the rights asserted by the family of slain Border Patrol Agent Brian Terry under the Crime Victims' Rights Act (CVRA) is disquieting.² In Mr. Burke's transcribed interview, he acknowledged that the office had never previously filed such a motion, and he wished he had handled it differently. In the motion, your office asserts: "Defendant Avila's offenses are too factually and temporally attenuated from the murder – if connected at all."³ Your office's filing asked the court to deny the Terry family basic rights as

¹ Hearing on the FY 12 Dept. of Justice Budget: Hearing Before the Subcomm. on Commerce, Justice, Science, and Related Agencies of the S. Comm. on Appropriations, 112th Cong. (2011) (testimony of Eric H. Holder, Jr., Att'y Gen. of the United States).

² See 18 U.S.C. § 3771.

³ Pl. Resp. to Mot. to Intervene on Behalf of Victims of a Crime, U.S. v. Avila, et al., No. 11-126 (D. Ariz. Aug. 8, 2011).

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crime victims due to the lack of a connection between the cases. Yet in Mr. Burke's transcribed interview, he readily admitted the connection and stated that he believed they *should* be extended rights as crime victims under CVRA, although not as intervening parties. This contradicts the basic premise of your office's opposition brief, namely that the Terry family should not be treated as victims of Avila's crimes.

We find it difficult to understand why anyone would oppose the Terry family's motion on the grounds that there is potentially no connection at all between the case against Mr. Avila and the case against Agent Terry's murderers. As you know, two firearms recovered at the Terry murder scene were traced to a purchase by Jaime Avila on January 16, 2010.⁴ Although it is the general practice of your office to obtain indictments prior to arrest, it was obviously imperative to arrest Mr. Avila immediately upon learning that the trace results linked the weapons he purchased to the murder scene. In fact, Jaime Avila was in custody less than four hours after this trace was completed.⁵ The speed of Avila's arrest contradicts the claims that there was not enough evidence to legally arrest straw purchasers earlier in Operation Fast and Furious. It also shows that your office understood the nexus between Mr. Avila and the Terry murder instantly.

Indeed, ATF immediately prepared a criminal complaint for Mr. Avila stemming from the January 16, 2010 purchase.⁶ That charge was ultimately delayed, however, until it appeared in Count 7 of the January 19, 2011 indictment, which alleges that Mr. Avila purchased these weapons illegally.⁷ Instead, Avila was initially charged with other violations. Your subordinate, AUSA Hurley, apparently engaged in communications about that decision in the hours after Agent Terry's death that both contemplated the connection between the two cases and sought to prevent the connection from being disclosed. According to an ATF e-mail documenting communications with Mr. Hurley, the motivation behind initially charging Avila with firearm offenses unrelated to the weapons found at the murder scene was to not "complicate" the FBI's investigation.⁸ Worse yet, AUSA Hurley signed your office's recent motion to the court denying the connection between the two cases despite apparently working with ATF agents to conceal the connection in the days and weeks following the murder of Agent Terry.⁹

Furthermore, AUSA Hurley has since acknowledged this nexus. In a January 28, 2011 memorandum to Mr. Burke, Mr. Hurley clearly demonstrates his understanding of the connection between Mr. Avila's purchase and its connection to the Terry murder: "The two AK-47 type rifles associated with the U.S. Border Patrol shooting, specifically two ROMARM WASR-10 7.62x39mm rifles . . . were purchased by Jaime Avila, Jr., (AVILA) on Friday, January 16, 2010."¹⁰ Moreover, at the time of Avila's straw purchases, he was known to be working with Uriel Patino. Patino previously purchased weapons that had been recovered in Mexico in connection with drug trafficking organizations as early as November 2009.¹¹ He and

⁴ E-mail from George T. Gillett, Jr. to William D. Newell (Dec. 15, 2010) [Attachment 1].

⁵ E-mail from William D. Newell to David J. Voth, et al. (Dec. 15, 2010) [Attachment 2].

⁶ E-mail from George T. Gillett, Jr. to William D. Newell (Dec. 16, 2010) [Attachment 3].

⁷ U.S. v. Jaime Avila, Jr., et al., No. 11-126 (D. Ariz. Jan 19, 2011).

⁸ E-mail from David J. Voth to William D. Newell, et al. (Dec. 16, 2010) [Attachment 4].

⁹ Id.

¹⁰ Memorandum from Emory Hurley to Dennis K. Burke re: Jaime Avila, Jr. (Jan. 28, 2011) [Attachment 5].

¹¹ ATF Firearms Trace Summary, Nov. 30, 2009; ATF Firearms Trace Summary, Nov. 30, 2009 [Attachment 6].

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Avila had visited a cooperating gun dealer together on November 24, 2009; the dealer provided contemporaneous notice to ATF, which dispatched surveillance.¹² Clearly, your office and ATF did not suddenly develop probable cause to arrest Avila in the hours after Agent Terry died. Your office could have done so much earlier, perhaps even before Avila purchased the weapons that were later found at the murder scene. In light of this information, it appears that your office has a direct interest in avoiding or minimizing these facts.

Additionally, given your office's entanglement in Operation Fast and Furious, we remain concerned that the current prosecution team on the Terry murder might be hesitant to develop additional evidence on other potential defendants who may have ties to Operation Fast and Furious. Witnesses in the congressional investigation have related that the suspects in the Terry criminal case told law enforcement officers they obtained the weapons found at the murder scene in backpacks that were stashed in a hiding place near the scene. A thorough prosecution would identify the accomplices who placed the weapons-filled backpacks near the scene and bring appropriate charges against them.

Since your office directed and approved the daily tactical decisions in Operation Fast and Furious, it is hard to avoid the perception that a conflict of interest exists. Your office's unusual intervention in the motion filed by the Terry family heightens that perception.

Please provide the requested documents and information as soon as possible, but no later than noon on September 14, 2011. If you have any questions regarding these requests, please contact Henry Kerner of Chairman Issa's Committee staff at (202) 225-5074 or Tristan Leavitt in Ranking Member Grassley's office at (202) 224-5225. We look forward to receiving your response.

Darrell Issa, Chairman Committee on Oversight and Government Reform U.S. House of Representatives

Sincerely,

Charles E. Grassley, Ranking Member Committee on the Judiciary U.S. Senate

cc: The Honorable Elijah E. Cummings, Ranking Member U.S. House of Representatives, Committee on Oversight and Government Reform

The Honorable Patrick Leahy, Chairman U.S. Senate, Committee on the Judiciary

¹² ATF Case Management Log, Case 785115-10-[redacted], 11/24/2009; *see also* Testimony of Sen. Charles Grassley before House Oversight and Government Reform Committee, Jun. 15, 2011, at 3.

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Gillett, George T. Jr. Pront Wedneedey, December 15, 2010 5:47 PM Newell, William D, Naetiles, James R, Sent tiα: វរក Fw: U.S. Border Patrol Agent killed in the line of duty - Two fireering recovered by ATF Subject 間町 ~ EY! « Qeorge T. Ollett ABAO - Phoenix Field Division Col states. NOTICE: This electronic transmission is confidential and intended only for the person(a) to whom it is addressed, if you have received this transmission in error, please notify the aunder by return e-mail and destroy this measure in its entirety (Inoluding all altachments). From 📕 To; Hundred Congert, Jr., Needles, James R., Starill, Wed Deg 15 19:45(03 2010) Starill, Wed Deg 15 19:45(03 2010) Subject: U.S. Border Patrol Agent killed in the line of duty . Two firearms recovered by ATF The two firearms recovered by ATF this Afternoon near Rio Rico, Arizona, in conjunction with the shooting death of U.S. Border Fairol agent Terry were identified as 'Suspect Guns' in the Fast and Furtone tryestigation The firearms are identified as follows: Romerrn/CUGIR, 762 rifle, Model GP WASR 10/68, serial number Romentar/CTICIR, 762 rifle, Model GP WASR 10/63, serial mumber lcontact the late this afternoon requesting Intel assistance in the trading of two recovered 68 firearms. I initiated an urgent firearme trace requests on both of the firearms and then contacted the NTC to ensure the traces were conducted today. I was advised by the NIC that the firearms were entered into ATF Support Gun detabase by 8A land associated to the Fast and Furious investigation. The NTC further advised that on 01/16/10 Jaima AVILA purchased three Romarm 7.62 rifles from two of these firearms are the recovered firearms dited above, No trace has been submitted on the third firearm purchased by AVILA (serial number am researching the trace status of the firetums recovered saffier today by the PBI.

Should you have any questions or need further assistance, please contact me.

Acting Intel Group Supervisor (602) - Direct (602) - Mobile (602) - Fax

From: Gillett, George T, Jr. Sent: Wednesday, December 15, 2010 11:24 AM To: All Phoenix Exchange Subject: U.S. Border Patrol Agent killed in the line of duty

A U.S. Border Patrol agent, Brian A. Terry, 40, was shot and killed north of the Arizona-Mexico border while trying to catch bandits who target illegal immigrants. Terry, working as part of a BORTAC unit, was waiting with three other agents in a remote area north of Nogales, Ariz., late Tuesday night when a gunfight with the bandits began. No other agents were injured, but one of the suspects was wounded in the shootout. Terry was shot in the back and was pronounced dead at approximately 4:00 AM today.

The FBI is investigating the shooting. Four suspects are in custody and Law Enforcement Personnel are searching for a fifth.

ATF Tucson personnel are assisting with the follow-up investigation and will be assisting with a search of the area. A firearm in the oustody of the FBI is currently being traced.

George T. Gillett Assistant Special Agent in Charge ATF - Phoenix Field Division Office: (602)

From: Sent:

To:

Newell, William D. Wednesday, December 16, 2010 9:43 PM Voth, David J.; Needles, James R.; Gillett, Ocorge T. Jr

Co: Subject:

Re: Avila in ouslody

Great job.

NOTICE: This electronic transmission is confidential and intended only for the person(s) to whom it is addressed. If you have received this transmission in error, please notify the sender by return e-mail and destroy this message in its entirety (including all attachments).

From: Voth, David J.

To; Newell, William D.; Needles, James R.; Gillett, George T. Jr.

Co; Sent: Wed Dec 15 23:41:30 2010

Subject: Avia in custody

We (ATF) have Jaime Avlia in our custody. We are coordinating with the USAO to charge him in the morning via Complaint. We are holding him overnight in custody.

We are charging Aviia with a standalone June 2010 firearms purchase where he used a bad (old) address on the 4473. (924(a)(1)(A) - False records required to be kept by dealer.] This way we do not divulge our current case (Fast & Furious) or the Border Patrol shooting case.

Thanks,

David Voth Group Supervisor Phoenix Group VII 602-

rom: Gillett, George T. Jr. Jent: Thursday, December 16, 2010 9:36 AM D: Gillett, George T. Jr.; Newell, William D.				, ,	
Subject;	SIR			1 J	
DEPARTMENT OF JUST INFORMATION REPORT	CCE - BUREAU OF ALCOHOL, TOBAC	XO, FIREARMS AND) EXPLOSIVES	SIGNIFICANT,	
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	785115-10- CHAMBERS, Jacob, et al Voth, David (602)	• • •	, ·		, , ,
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Arrest of Jaime AVILA.					•
NARRATIVE OF INCID	ENT/ACTIVITY:		و در بر می اند. ۱ ۱		

FIL. On December 15, 2010, after the shooting death of a U.S. Border Patrol agent in Southern Arizona law enforcement officers/agents conducted a search of the area. Two (2) of the AK-47 variant rifles purchased by AVILA on 01/16/2010 were recovered in the area during this search.

• On December 15, 2010, ATF agents located AVILA and subsequently interviewed and arrested him on charges stemming from this January 16, 2010, firearm purchase. In summary AVILA admitted to ATF agents that he straw purchased these firearms for an unidentified Hispanic male.

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AVILA was held overnight and ATF agents have prepared a criminal complaint for Jaime AVILA on firearm charges relating to the straw purchase of these three (3) AK-47 variant rifles on 01/16/2010 and are presenting it to a Federal Magistrate today (12/16/10.)

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From: Sent: To: Subject: Voth, David J. Thursday, December 16, 2010 10:11 AM Newell, William D.; Gillett, George T. Jr. change in charging

Gentlemen,

After speaking with Emory he saw the wisdom in not charging the AK-47 rifles in question so as to not complicate the FBI's investigation. As such we are back to our original plan to charge the June guns purchased by Jaime AVILA.

David Voth Group Supervisor Phoenix Group VII 602-

United States Attorney's Office District of Arizona



Weissign and Party of the second s	
Tor	Dennis K. Burks
From:	Emory Hurley
Subject:	Jaime Avila, Jr.
Date:	January 28, 2011

The two AK-47 type rifles associated with the U.S. Border Patrol shooting, specifically two ROMARM WASR-10 7.62x39 mm rifles, Serial Numbers and a single transaction were purchased by Jaime Avila, Jr., (AVILA) on Friday, January 16, 2010, along with a third ROMARM WASR-10 7.62x39 mm rifle, Serial Number and the three rifles were purchased in a single transaction from Federal Firearms Licensee (FFL) and the three rifles were purchased in a single transaction from Federal Firearms Licensee (FFL) and the three rifles were forwarded to ATF by the FFL and the of three AK-47 type rifles on January 16, 2010. These were forwarded to ATF by the FFL and the purchase is documented in ATF ROI #67.

Jaime AVILA, Jr's first known firearms purchase occurred on November 24, 2009, at FFL On that day he was in the company of another Fast and Furious suspect, Uriel PATINO. On November 24, 2009, AVILA purchased five (5) FN Herstal Five-Seven pistols, and PATINO purchased five (5) AK-47 type rifles. On the ATF Form 4473, AVILA listed his address as At the time of the purchase. AVILA and PATINO were fraveling in a

2000 Isuzu Rodeo registered to

Phoenix, Arizona, 85035. This is documented in ATF ROI # 12. As of this date, the five (5) FN pistols purchased by AVILA on November 24, 2009, have not been recovered.

On November 25, 2009, ATF entered AVILA in the ATF case management system as a suspect in the investigation. This event does not result in the creation of an ROL

On December 12, 2009, AVILA purchased five (5) ROMARM WASR-10 AK-47 type rifles from FFL ATF was notified of this purchase on December 12, 2009 when agents received the ATF Form 4473 recording the purchase. This is documented in ATF ROI #46. As of this date, these five AK-47 type rifles have not been recovered.

On December 17, 2009, this AUSA, ATF Group Supervisor David Voth, and ATF Special Agent Hope MacAllister met with had been providing information to ATF on large firearms purchases, including large purchases of (only) long gans which do not trigger any multiple purchase reporting requirements. This information was being provided voluntarily and without compensation from ATF. The supervisor had expressed concerns about the cooperation he was providing and whether he was endangering himself or implicating himself in a criminal investigation.

could not sell to and that they could not instruct that they could not tell they could not tell they could not instruct the term to make a sale in violation of the law or to refuse to make a lawful sale. If was advised by the agents that as an FFL he has to comply with all of the statutes and regulations that govern the sale and transfer of firearms and cannot sell firearms unless the required

HOGR ATF - 002537

Memo to DKB January 28, 2011 Page - 2

paperwork and background check were completed. As long as the required forms were properly filled out and the FFL did not know or have a reason to know that the firearms were part of a straw purchase or intended to be used in a crime, that he could complete the transfer. The way also told by the agents and this AUSA that the information he provided to ATF regarding large firearms transactions, particularly sales involving only long guns, was very important and useful to ongoing ATF investigations.

During this meeting, ATF agents also described additional information that the provisions of employees might receive from purchasers which would not necessarily be required by the provisions of Chapter 44 of Title 18 to be kept in his records, but which would prove useful to ATF. This information included phone numbers or other contact information as well as license plate numbers and vehicle descriptions. As of the date of this meeting, **and the provision of the providing the type of information to ATF** and continued to do so throughout the course of the investigation.

On January 9, 2010, AVILA purchased three (3) FN Herstal Five-Seven pistols from FFL. ATF was not advised of this purchase by the FFL, however, on January 14, 2010, these means were entered into the suspect gun database by ATF Phoenix. These firearms were discovered by law enforcement on January 14, 2010, in Columbus, New Mexico, but were not traced and were returned to person carrying them. ATF Phoenix was not notified of this law enforcement contact until May 17, 2010. ATF ROI #254.

On January 14, 2010, in Columbus, New Mexico, (a border town), U.S. Border Patrol agents pulled over a vehicle driven by **COLUMEN** with passenger **COLUMN** due to suspicious driving behavior. In the vehicle they found three AK-47 type rifles purchased by Uriel Patino, three FN Herstal Five-Seven pistols purchased by AVILA on January 9, 2010, from **COLUMN** and two Ruger pistols purchased by another. U.S. Border Patrol agents did not observe any other criminal conduct and so returned the firearms to the occupants of the vehicle. They did not trace any of the firearms. A'TP Phoenix was notified of the observation of the firearms on May 17, 2010, after ATF Las Cruses forwarded information in connection with a firearms trafficking hypestigation in New Mexico involving Blas Gutierrez and others. The investigation of **CO-4** is still on going, **CC-5**

On January 16, 2010, AVILA purchased the three ROMARM WASR-10 AK-47 type rifles, Serial Numbers **Series and Series and Se**

On December 15, 2010, Jaime AVILA, Jr, was arrested for using a false address on the ATF Form 4473 on June 15, 2010. A complaint was filed on December 16, 2010, and he was indicted on January 11, 2011, for making false statements in connection with the acquisition of a firearm. On January 19, 2011, he was indicted as part of the overall Fast and Furious conspiruoy.

Agents were able to determine that when AVILA purchased firearms on June 15, 2010, that he no longer lived at the determine that when AVILA purchased firearms on June 15, 2010, that he no

HOGR ATF - 002538

Memo to DKB January 28, 2011 Page - 3

drivers license was changed in August of 2010, to reflect a different address. In the course of his post arrest interview in December 2010, he admitted that he had not lived at the **state of the address** for two or three years. However, earlier in the investigation, agents had no reason to believe that this was not his address because his drivers license and the registration to the car that he was driving came back to the address. See ATF ROI #12.

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On March 1, 2010, Jaime AVILA, Jr., purchased one FN Herstal Five-Seven pistol from the in a single-firearm transaction. On or about March 3, 2010, this pistol was recovered by Phoenix Police in connection with a drug house in Phoenix. This was the first actual recovery of a firearm purchased by AVILA. ATF ROI #107 and 156.

HOGR ATF - 002639



THE DESCRIBED FIREARM WAS DETERMINED TO HAVE BEEN SOLD AS PART OF A MULTIPLE HANDGUN SALE AND REPORTED TO ATF BY A FEDERAL FIREARMS LICENSEE (FFL). THE TRANSACTION DATE NOTED IN THIS TRACE SUMMARY IS THE DATE THE MULTIPLE SALE WAS GENERATED BY THE FFL AND MAY NOT REPRESENT THE ACTUAL TRANSACTION DATE OF THE TRACED FIREARM. TO VERIFY THE ACTUAL TRANSACTION DATE OF THE TRACED FIREARM, PLEASE CONTACT THE FFL.

The information in this report must be validated prior to use in any criminal proceedings.





THE DESCRIBED FIREARM WAS DETERMINED TO HAVE BEEN SOLD AS PART OF A MULTIPLE HANDGUN SALE AND REPORTED TO ATF BY A FEDERAL FIREARMS LICENSEE (FFL). THE TRANSACTION DATE NOTED IN THIS TRACE SUMMARY IS THE DATE THE MULTIPLE SALE WAS GENERATED BY THE FFL AND MAY NOT REPRESENT THE ACTUAL TRANSACTION DATE OF THE TRACED FIREARM, TO VERIFY THE ACTUAL TRANSACTION DATE OF THE TRACED FIREARM, PLEASE CONTACT THE FFL.

The information in this report must be validated prior to use in any criminal proceedings.

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