

REDACTED – FOR PUBLIC RELEASE



Office of the Inspector General
U.S. Department of Justice



A Review of ATF's Investigation of Jean Baptiste Kingery

Oversight and Review Division 15-01

October 2014

REDACTED – FOR PUBLIC RELEASE

TABLE OF CONTENTS

I.	Introduction	1
II.	Methodology of the OIG’s Review	2
III.	Applicable Statutes and Policies	3
	A. Statutes and Regulations Relating to Grenades.....	3
	1. The National Firearms Act and the Gun Control Act	3
	2. The Arms Export Control Act	4
	B. ATF and ICE Jurisdictional Responsibilities.....	6
	C. Relevant Department of Justice Policies	7
	1. The United States Attorney’s Manual	7
	2. The ATF Directive: Informant Use and Undercover Operations.....	7
IV.	Timeline of Key Events	8
V.	The Kingery Investigation	11
	A. ATF Agents in Yuma Become Aware of Kingery From Firearms Purchases (November 2008)	11
	B. The First Intercepted Delivery of Grenade Components: October to November 2009	13
	1. The Investigative Strategy	13
	2. Discussions with ICE, the U.S. Attorney’s Office, the DOJ National Security Division, and the Government of Mexico	16
	3. Delivery of the Marked Hulls to Kingery and ATF’s Unsuccessful Surveillance Efforts	25
	4. Analysis.....	27
	C. Briefing of ATF Headquarters and the Second Intercepted Delivery: November 2009 to February 2010.....	31
	1. Executive Management Knowledge of AECA’s Application to the Kingery Investigation in Phoenix and at ATF Headquarters	31
	2. Planning and Coordination of the Second Intercepted Delivery.....	34
	3. The Operations Plans.....	46
	4. The Operation	48
	5. Analysis.....	51
	D. Border Stop of Kingery and the Decision Not to Arrest Him: June 2010.....	56
	1. Border Stop, Interview, and Release of Kingery on June 15.....	56
	2. Further Interview of Kingery on June 16	67

3.	Attempt to Use Kingery and Loss of Contact with Kingery on June 21	72
4.	Analysis.....	74
E.	Kingery’s Lack of Cooperation and the Delay by the U.S. Attorney’s Office to Prosecute Him: June 2010 to September 2011.....	77
1.	Facts.....	78
2.	Analysis.....	87
VI.	Conclusions and Recommendation	89

APPENDIX A

I. Introduction

In September 2012, the Office of the Inspector General (OIG) issued its report about Operations Fast and Furious and Wide Receiver, two firearms trafficking investigations conducted by the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF).¹ We found in that review that those investigations were seriously flawed in several respects, most significantly in their failure to adequately consider the risk to public safety in the United States and Mexico that resulted from a strategy of not taking overt enforcement action against individuals making unlawful firearms purchases.

During our review of Operations Fast and Furious and Wide Receiver, the OIG received information about other ATF investigations that allegedly used a strategy and tactics similar to those employed in those two operations. One such case involved a U.S. citizen named Jean Baptiste Kingery. This report describes our review of the Kingery investigation, focusing primarily on the period from its inception until the matter was reassigned from the United States Attorney's Office for the District of Arizona to the United States Attorney's Office for the Central District of California in September 2011.²

In October 2009, about one year after Kingery was suspected by ATF of illegally purchasing AK-47s for someone else, special agents from ATF's Phoenix Field Division learned that Kingery was ordering large amounts of grenade components from an online military surplus dealer. The agents suspected that Kingery was transporting grenade components into Mexico for conversion into live grenades and then supplying them to Mexican drug cartels. Over the next four months, ATF agents intercepted two deliveries of grenade components intended for Kingery, marked those items in a manner where they could be identified later, and delivered the marked items to Kingery's shipping address. ATF agents then attempted to conduct surveillance of Kingery to determine if he was taking the grenade components into Mexico. ATF agents also attempted to work with Mexican law enforcement officials to follow or arrest Kingery. Neither effort was successful. Months later, ATF learned that two live grenades recovered at a crime scene in Mexico contained component parts that bore markings of the type ATF used on the components delivered to Kingery.

In June 2010, U.S. Customs and Border Patrol (CBP) agents stopped Kingery as he was attempting to cross the border into Mexico from a port of entry in Arizona. During a secondary inspection of Kingery's vehicle, CBP agents recovered from the inside of a spare tire attached to the vehicle 114 grenade hulls, 114

¹ The OIG's report, *A Review of Operation Fast and Furious and Related Matters*, can be found at <http://www.justice.gov/oig/reports/2012/s1209.pdf>.

² The public version of this report contains redactions of information that the Department of Justice determined is "law enforcement sensitive" (LES).

grenade fuses, and more than 2000 rounds of ammunition.³ That evening, special agents from ATF and Immigration and Customs Enforcement (ICE) interviewed Kingery and, after conferring with an Assistant United States Attorney (AUSA) from the U.S. Attorney's Office for the District of Arizona (U.S. Attorney's Office), allowed him to leave without any charges being filed, but with the understanding that he would voluntarily return the next day for further interviews.⁴ The following day Kingery returned and was interviewed by ATF and ICE agents. After the interview, he was again allowed to leave without being charged with a crime.

According to the AUSA, Kingery was not charged because ATF wanted to use him as an informant; however, ATF agents involved in the investigation told us that Kingery was never an informant and that he was allowed to leave because the AUSA refused to file a criminal complaint against him.

Approximately one week later, after ATF agents lost contact with Kingery and he was stopped trying to re-enter the United States, ATF agents requested of the same AUSA that he agree to Kingery's immediate arrest. The AUSA declined, but agreed to indict Kingery at a later date. Kingery returned to Mexico.

Mexican authorities, with assistance from ATF, arrested Kingery in Mexico in August 2011. Officials there are currently prosecuting him for violating Mexican organized crime laws. Following the allegations in 2011 regarding the U.S. Attorney's Office for the District of Arizona's handling of Operation Fast and Furious, the Department reassigned the United States investigation of Kingery to the U.S. Attorney's Office for the Central District of California and it remains ongoing.

II. Methodology of the OIG's Review

To conduct this review, we obtained and reviewed reports of investigation and other documents from ATF's investigative file, as well as case notes and memoranda maintained by the U.S. Attorney's Office for the District of Arizona. We also reviewed thousands of e-mail communications of individuals directly involved in the conduct, management, and prosecution of the Kingery investigation.⁵

³ ATF agents used the terms grenade "hulls" and grenade "bodies" interchangeably in documents created during the Kingery investigation and in interviews during the course of our review. Both terms are used in this report.

⁴ Unless specifically stated otherwise, all references to the "U.S. Attorney's Office" in this report are to the U.S. Attorney's Office for the District of Arizona.

⁵ We were provided access to grand jury information related to the Kingery investigation, but only after the Attorney General concluded that doing so was permissible under Rule 6(e)(3)(A)(ii) of the Federal Rules of Criminal Procedure because our review of the Kingery case would assist him in discharging his criminal law enforcement supervisory responsibilities. However, in numerous prior OIG oversight reviews, the Department had provided the OIG with grand jury information without raising a legal objection and without requiring a finding by the Attorney General that the OIG's oversight work was of assistance to the Attorney General. The Attorney General and Deputy Attorney General have informed us that they will continue to grant permission to the OIG to enable us to obtain these records in future reviews. We believe that requiring the Inspector General to obtain permission

(Cont'd.)

We interviewed more than 20 witnesses from the Departments of Justice, Homeland Security, and State. The witnesses included ATF and ICE agents from Phoenix who had involvement in the Kingery investigation, such as then-ATF Special Agent-in-Charge (SAC) William Newell, then-ATF Group Supervisor Peter Forcelli, and the Phoenix ICE SAC. We interviewed officials at ATF Headquarters in Washington, D.C., including then-ATF Deputy Assistant Director William McMahon, and ATF agents assigned to the Mexico City Office, including the then-ATF Attaché to Mexico. We also interviewed prosecutors who played roles in the investigation, including AUSA Emory Hurley and other attorneys from the U.S. Attorney's Office; attorneys from the Department of Justice's (the Department or DOJ) National Security Division (NSD) who provided legal advice to ATF agents; and the Department's Attaché to Mexico. Finally, we interviewed the State Department's former Deputy Chief of Mission to Mexico.

This report is organized into five sections. Sections I and II above contain the introduction and methodology to this review. Section III describes the federal statutes and Department policies relevant to the Kingery investigation, and Section IV provides a timeline of key events in the case. In Section V, we set forth the OIG's factual findings regarding the Kingery investigation. We also provide in this section our analysis of ATF's two attempts to conduct surveillance of Kingery in November 2009 and January 2010 following his receipt of grenade components, ATF's handling of the stop of Kingery in June 2010, and the lack of prosecution of Kingery by the U.S. Attorney's Office for the District of Arizona. Section VI contains the OIG's conclusions and recommendation. Appendix A to the report contains comments on the report by the Deputy Attorney General.

III. Applicable Statutes and Policies

A. Statutes and Regulations Relating to Grenades

As detailed below, the Kingery investigation primarily focused on the possession and export of grenade components. Three federal statutes specifically prohibit or regulate possessing, dealing or exporting in grenades or grenade parts: the National Firearms Act of 1934 (26 U.S.C. § 5801, et seq.), the Gun Control Act of 1968, (18 U.S.C. § 921, et seq.), and the Arms Export Control Act (22 U.S.C. § 2778, et seq.)

1. The National Firearms Act and the Gun Control Act

The National Firearms Act prohibits unlicensed individuals from making, dealing, importing, receiving, or possessing certain firearms, including "destructive devices." 26 U.S.C. §§ 5845, 5861. The Gun Control Act prohibits the importation, manufacture, shipping, transportation or receipt of certain firearms, including

from Department leadership in order to be allowed to review relevant documents in the Department's possession impairs the Inspector General's independence and conflicts with the core principles of the Inspector General Act.

"destructive devices," in interstate or foreign commerce, without a license. 18 U.S.C. § 922(a)(1)(A). Under both statutes, "destructive devices" include grenades or "any combination of parts either designed or intended for use in converting any device into a destructive device . . . and from which a destructive device may be readily assembled." 18 U.S.C. § 921(a)(4); 26 U.S.C. § 5845(a)(8), (f)(1)(B), (f)(3). Violations of these statutes are felony offenses. 18 U.S.C. § 924(a)(1)(D); 26 U.S.C. § 5871.

The National Firearms Act and Gun Control Act thus make it illegal for an unlicensed individual to possess, import, manufacture, deal, or ship live grenades or grenade components that can be readily assembled into a live grenade. The term "destructive devices" only includes devices that are designed or redesigned for use as a weapon. Consequently, novelty items in which grenade components are used, such as desk displays, are not "destructive devices" for purposes of the statutes. Courts have also held that an individual cannot be convicted of possessing an unlicensed destructive device if he or she does not possess all of the components necessary to complete the device. 26 U.S.C. § 5845(f)(3); *United States v. Malone*, 546 F.2d 1182 (5th Cir. 1977).

The National Firearms Act authorizes the government to seize and forfeit any destructive device (such as a grenade) that is "involved in any violation of the provisions" of the Act. 26 U.S.C. § 5872. Likewise, a destructive device that is transported in interstate or foreign commerce in violation of the Gun Control Act is also subject to seizure and forfeiture. 18 U.S.C. §§ 922(a)(4), 924(d)(1); *see also* ATF Order 3400.1B at 61-62.⁶ However, as noted above, it is not a violation of the National Firearms Act or the Gun Control Act to possess or transport components of grenades so long as a component that is essential to rendering the grenade operable is absent. Consequently, there is generally no federal law that would authorize the seizure and forfeiture of grenade components inside the United States unless the components can be readily assembled to make an operable grenade.

2. The Arms Export Control Act

The Arms Export Control Act (AECA) prohibits the unlicensed export of certain defense articles, including grenade components. The AECA provides that "[e]xcept as otherwise provided in regulations . . . , no defense articles or defense services [identified on the United States Munitions List] may be exported or imported without a license [issued by the State Department] for such export or import" 22 U.S.C. § 2778(b)(2)(A). Any person who willfully violates the AECA shall, upon conviction, be fined for each violation not more than \$1,000,000 or imprisoned more than 20 years. 22 U.S.C. § 2778(c).

⁶ The process for administrative and civil forfeiture proceedings is governed by the Civil Asset Forfeiture Reform Act, 18 U.S.C. § 981, et seq. ATF may also seize property, such as destructive devices, solely for use as evidence in a prosecution. However, if there is a statutory basis to forfeit the device, ATF's regulations require it to initiate forfeiture proceedings and simultaneously use the device for evidence. ATF may also take custody of property that has been voluntarily abandoned to the agency by the owner.

In order for an individual to be convicted of violating the AECA, the prosecution must prove a willful violation. Up until May 2010, the Court of Appeals for the Ninth Circuit (which includes Arizona) required the government to prove that a defendant voluntarily and intentionally violated a known legal duty, which was a heightened legal standard that required proof that a defendant was specifically aware of the AECA licensing regime.⁷ However, in May 2010, the Ninth Circuit held that a conviction of willfully violating the AECA merely requires proof the defendant knew he was acting unlawfully, rather than a specific understanding of the AECA's licensing requirements.⁸

The International Traffic in Arms Regulations (ITAR), set forth at 22 C.F.R. Part 120, control the export and import of defense-related articles and services on the United States Munitions List (USML). These regulations implement the provisions of the AECA. ITAR regulations dictate that information and material pertaining to defense and military related technologies (for items listed on the USML) may be shared only with U.S. persons unless a special license from the Department of State is received or a special exemption is used. The Department of State Directorate of Defense Trade Controls interprets and enforces the ITAR. 22 U.S.C. § 2778; 22 C.F.R. § 120.1.

The USML is contained in 22 C.F.R. § 121.1, and it lists 21 categories of ITAR-controlled defense articles, services and technology that, among other things, cannot be exported from the United States without a license issued by the U.S. Department of State. Of particular relevance to ATF's investigation of Kingery is Category IV(a), which includes grenades, and Category IV(h), which includes "all specifically designed or modified components, parts, accessories, attachments, and associated equipment for the articles in Category IV(a)." 22 C.F.R. § 121.1.

The ITAR states that any person who intends to export a defense article must obtain the approval of the Directorate of Defense Trade Controls prior to the export, unless the export qualifies for an exemption. 22 C.F.R. § 123.1. The State Department has the authority to issue such exemptions. 22 C.F.R. § 126.3. Another ITAR regulation states that "no person, [including government agencies], may knowingly or willfully cause, or aid, abet, counsel, demand, induce, procure, or permit the commission of, any act prohibited by, or the omission of any act required by [the AECA], or any regulation, license or order issued thereunder." 22 C.F.R. §§ 123.1, 127.1(e).

Items that are listed on the USML remain there even if sold by the U.S. Military to civilians for "scrap" and can only be exported without a license issued by the Department of State if the item has "been rendered useless beyond the possibility of restoration to [its] original identity only by means of mangling, crushing, or cutting." 15 C.F.R. § 770.2(g)(3).

⁷ *United States v. Lizarraga-Lizaragga*, 541 F.2d 826, 828 (9th Cir. 1976), *United States v. Jerez*, 935 F.2d 276, *5 (9th Cir. 1991).

⁸ *United States v. Mousavi*, 604 F.3d 1084, 1094 (9th Cir. 2010).

In short, under the AECA it is illegal to export live grenades and all inert grenade components, including hulls, pins, spoons (levers), and fuse assemblies, individually or constructed, without a license unless the items are first rendered permanently incapable of being restored to use or an exemption applies to the export. Thus, unlike the Gun Control Act or the National Firearms Act, the AECA's prohibition applies to grenade components even if an essential component to making the grenade operational is absent.

Two federal statutes, 22 U.S.C. § 401(a) and 18 U.S.C. § 981(a)(1), authorize the government to seize any arms or munitions that are being exported out of the United States without a State Department license and seek their forfeiture. As explained below, any seizures at the border of outgoing contraband involve ICE or CBP, whose agents are responsible for export violations. Although the government must prove specific intent (knowledge that the export was illegal) to prove a criminal violation of AECA, items on the USML, such as grenade components, may be seized at the border even if the person attempting to export them is not knowingly violating the law and not prosecutable. 22 U.S.C. § 401(a).

B. ATF and ICE Jurisdictional Responsibilities

Under 28 U.S.C. § 599A(b)(1), ATF is responsible for investigating criminal and regulatory violations of the Federal firearms, explosives, arson, alcohol, and tobacco smuggling laws. ATF's specific statutory responsibilities are delineated in 28 C.F.R. § 0.130. These include the Gun Control Act (18 U.S.C. chapter 40) and the National Firearms Act (26 U.S.C. chapter 53). ATF does not have investigative authority for the parts of the AECA relating to the exportation of items on the USML. 28 C.F.R. § 0.130(a)(6)(vi). That authority falls to ICE, as numerous provisions throughout the U.S. Code either expressly or implicitly authorize ICE to enforce export laws. In particular, 22 C.F.R. § 127.4 grants ICE the investigative power to enforce violations of the ITAR export provisions, which includes the AECA.

An ATF directive provides that ATF agents who discover evidence of a violation outside of ATF's investigative authority must report such violation to the law enforcement agency having investigative jurisdiction, and must provide all information relating to the violation to the responsible law enforcement agency unless such action could or would jeopardize an ongoing investigation. ATF agents are required to offer assistance and cooperation if the responsible law enforcement agency chooses to assume control of the investigation. See ATF Directive: Investigative Priorities, Procedures and Techniques, ATF Order 3210.7C(A)(3)(a), (02/25/99). If the responsible law enforcement agency declines to control or enter the investigation, ATF may assume control of the investigation if the other agency enters into an agreement allowing ATF to pursue the matter and the ATF Deputy Director approves the investigation. ATF Directive: Investigative Priorities, Procedures and Techniques, ATF Order 3210.7C(A)(3)(b), (02/25/99).

On June 30, 2009, Acting ATF Director Kenneth Melson and Assistant Secretary of ICE John Morton signed a memorandum of understanding (MOU) regarding information sharing between the two agencies. Section II of the MOU states that: "ATF shall report to the appropriate ICE field office in a timely manner

any intelligence received relating to the illegal exportation, attempted exportation, or planned exportation of any item on the United States Munitions List (USML)” Section III of the MOU states that “upon establishing that customs or immigration violations have been identified during an ATF investigation, ATF field offices will notify and invite participation by the appropriate ICE field office(s) prior to further investigative action.” Finally, in Section IV, the MOU states: “Recognizing that all investigative activities at the Ports of Entry, borders and their functional equivalent must be coordinated through ICE, ATF will notify and coordinate with the local ICE field office when it is anticipated that an investigation will have an ICE-related violation.”

C. Relevant Department of Justice Policies

1. The United States Attorney’s Manual

The United States Attorney’s Manual contains general policies and procedures relevant to the work of the U.S. Attorneys’ offices and their relationships with legal divisions, investigative agencies, and other components within the Department. The U.S. Attorney’s Manual provides only internal Department of Justice guidance. U.S.A.M. § 1-100.

U.S.A.M. § 9-90.620 provides direction relating to the AECA. It states:

Unless the unlicensed shipment has no relevance to the foreign relations of the United States (*e.g., smuggling small quantities of weapons*), prosecution of violations of the Arms Export Control Act should not be undertaken without prior approval of the [Department’s] National Security Division. However, the United States Attorney is authorized to take whatever action is necessary to prevent the commission of an offense where time does not permit seeking prior authorization. Often an illegal exportation can be circumvented by seizure of the munitions pursuant to the provisions of 22 U.S.C. § 401.

2. The ATF Directive: Informant Use and Undercover Operations

The ATF directive on the use of informants that was in effect during the October 2009 to November 2011 time period defined Confidential Informants as:

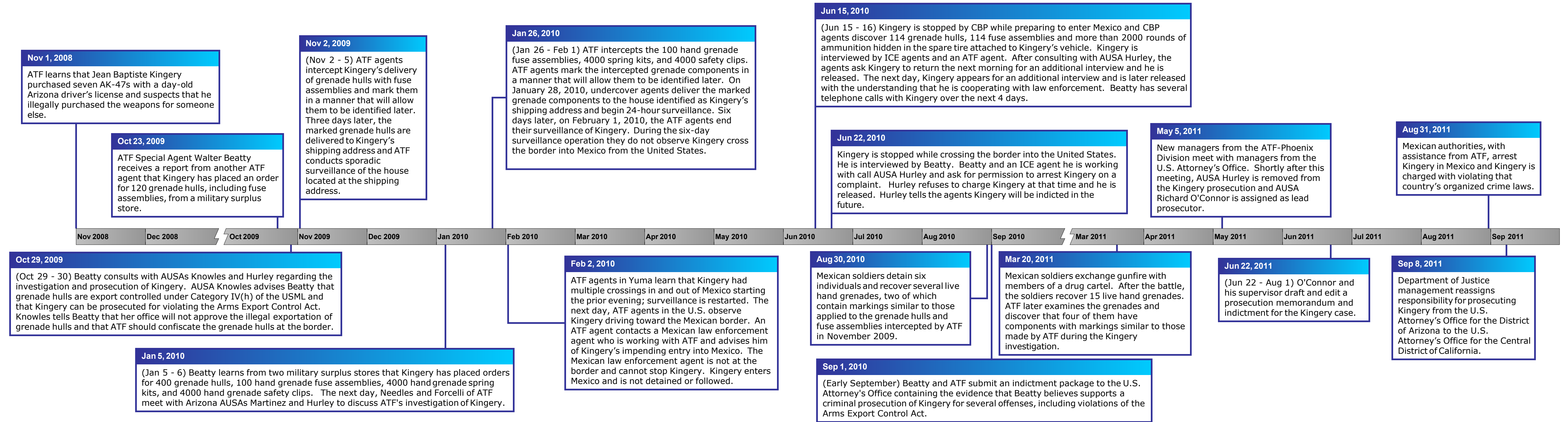
persons who assist enforcement efforts, providing information and/or lawful services related to criminal or other unlawful activity to ATF that otherwise might not be available, in return for money or some other specific consideration. Informants shall work under the direction and control of ATF special agents. The information or services provided must have specific investigative or general intelligence value in enforcing laws and regulations within ATF responsibility.

ATF Directive: Informant Use and Undercover Operations, ATF O 3250.1A (4/2/2003).

An ATF agent must obtain approval from his or her SAC before using a confidential informant. Prior to doing so, the ATF agent must complete an informant package with information about the proposed informant, including the individual's true name and all known aliases, addresses and telephone numbers, past activities (criminal or criminally associated), and whether the informant is a substance abuser or has a history of substance abuse.

IV. Timeline of Key Events

Kingery Overview



V. The Kingery Investigation

In this section, we describe how ATF agents became aware of Kingery and his efforts to purchase large quantities of grenade components in 2009. We describe ATF's strategy to mark the grenade components purchased by Kingery in order to be able to identify the components at a later date, even after being detonated as parts of explosive devices. We also describe the legal advice the U.S. Attorney's Office for the District of Arizona provided to ATF concerning a proposed operation that may have allowed Kingery to cross the U.S.-Mexico border without the grenade components being confiscated, and how ATF acted contrary to that advice.

A. ATF Agents in Yuma Become Aware of Kingery From Firearms Purchases (November 2008)

In November 2008, Special Agents Walter Beatty and Kurt Smith, of ATF's Yuma Satellite Office (which is part of the Phoenix Field Division), reviewed a completed Form 4473 dated November 25, 2008, that they received from another ATF agent and learned that Kingery had purchased seven AK-47 assault rifles using a one-day old Arizona driver's license.⁹ Suspecting that Kingery had illegally purchased the weapons for someone else, the agents interviewed him on December 5, 2008, at his mother's house in Arizona, which was the address identified on Kingery's one-day old driver's license and listed on the Form 4473.¹⁰ During the interview Kingery provided evasive answers to the agents as to the whereabouts of the AK-47s, but agreed to show them the firearms if they returned at a later date. On December 8, the agents returned to Kingery's mother's house to examine the AK-47s, but Kingery was not there and his mother told them that Kingery could be in Mexico. The agents tried to call Kingery on his cell phone, but the call went directly to voicemail, which indicated to the agents that the cell phone was turned off. Because Kingery had not returned the voicemail messages the agents had left on his cell phone and was possibly in Mexico, Beatty examined records related to Kingery's border crossings. In doing so, Beatty discovered that Kingery had numerous border crossings between the United States and Mexico from January 2008 to December 5, 2008.

The two ATF agents made several more unsuccessful attempts in December 2008 and January 2009 to contact Kingery. Beatty then contacted AUSA Susan Knowles of the U.S. Attorney's Office on January 12, 2009, and requested that she

⁹ A Form 4473 is the mechanism by which Federal Firearms Licensees (FFLs) comply with the requirement under the Gun Control Act to conduct background checks on firearms purchasers. See 18 U.S.C. § 922(t)(1); 28 C.F.R. § 178.124. The form requires the buyer to disclose his or her name, address, and date of birth, and to provide government-issued photo identification. The Form 4473 also contains an affidavit requiring the purchaser to swear that he is eligible to purchase firearms under federal law and is not purchasing the firearm for another individual. A person convicted for making a false statement on a Form 4473 can be punished by up to five years in prison. See 18 U.S.C. § 922(a)(6).

¹⁰ Walter Beatty and Kurt Smith are pseudonyms.

prosecute Kingery in connection with his purchase of the seven AK-47 assault rifles for violating 18 U.S.C. § 922(a)(6), which prohibits making false statements on the Form 4473, under the theory that Kingery's use of a one-day old Arizona driver's license listing his mother's residence as his residence, combined with statements by his mother which indicated to the agents that Kingery lived in Mexico and not with her, showed that he had lied about his address.¹¹ Knowles declined to do so because she concluded that there was insufficient proof that Kingery had made a false statement regarding his address.

Following the investigation in 2009 described below into Kingery's conduct involving the smuggling of grenade parts, ATF formally requested in January 2010 that the U.S. Attorney's Office indict Kingery for making false statements on the Form 4473 in connection with his 2008 purchase of 7 AK-47s. The U.S. Attorney's Office again declined to prosecute Kingery based on its judgment that there was insufficient evidence to prove that Kingery purchased the AK-47s for someone else and the fact that the guns were never recovered and that Kingery never admitted he purchased the firearms for someone else. In regard to ATF's belief that Kingery lied about his address, Knowles stated that she believed this would be difficult to prove because ATF found Kingery at the address listed on his Arizona driver's license and Kingery's mother had confirmed for ATF, at that time, that Kingery was staying with her there.

Agents Beatty and Smith continued to investigate Kingery and on January 21, 2009, working with officers from the Yuma police department, attempted to interview Kingery's sister at her house in Yuma about Kingery's whereabouts. When they arrived at the house, but prior to knocking on the door, the agents saw Kingery in the living room with his sister and sister's boyfriend. When the agents knocked on the door, they saw Kingery crawl on the floor toward a back room in the house. After Kingery's sister opened the door to the house, Beatty, Smith, and the local police officers smelled marijuana and observed an empty gun holster. In addition, Beatty observed a black AR-15 style rifle lying on the kitchen table.

The Yuma police obtained a search warrant for the house that day. While searching the house with the police, the ATF agents found Kingery hidden under a pile of clothes. Beatty and Smith then attempted to question Kingery, but stopped when he requested an attorney. During the search, the police and ATF agents recovered marijuana, drug paraphernalia, and four assault rifles. According to the ATF report of the search, Kingery told the agents, without being asked, that one of the AK-47s and an AK-47 parts kit and assembly were his. After the search was completed, the occupants of the house, including Kingery, were released. Kingery's sister and boyfriend were later charged with state law violations, including misconduct with weapons, possession of drug paraphernalia, and lying to police. Kingery was not charged with any criminal offenses relating to the search warrant.

¹¹ Susan Knowles is a pseudonym.

B. The First Intercepted Delivery of Grenade Components: October to November 2009

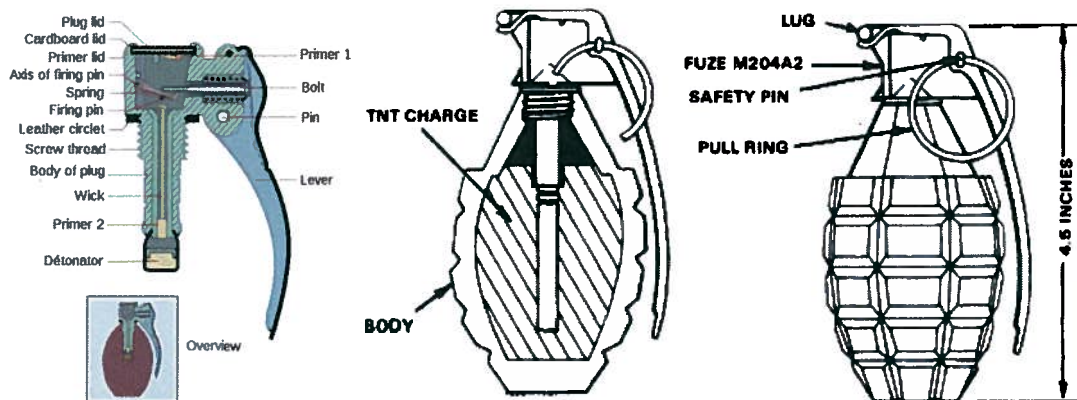
After executing the search warrant in January 2009, Beatty and Smith continued their investigation of Kingery by attempting to set up an interview of Kingery through his attorney, which never occurred, and tracking Kingery's border crossings. Then, in October and November 2009, after learning that Kingery had ordered grenade hulls from a military surplus store, ATF agents developed and implemented a plan to intercept and mark the grenade hulls and components in order to trace them back to Kingery.

1. The Investigative Strategy

On October 23, 2009, Beatty received a report from an ATF agent in McAllen, Texas that Kingery had placed an order for 120 grenade hulls that included fuse assemblies, but not explosives, from a military surplus store located in the Northeastern United States (Surplus Dealer 1).¹² Beatty spoke with the owner of Surplus Dealer 1 regarding Kingery's order, and during that conversation the owner advised Beatty that one month earlier Kingery had purchased 1000 hand grenade safety clips, 900 hand grenade spring kits, 1 M18 smoke grenade, and 20 USGI M16/AR15 Shoot Thru Muzzle Covers.

Diagram 5.1: Hand Grenade Fuse Assembly and Hand Grenade

These diagrams are included for informational purposes only and do not depict the actual component parts purchased by Kingery or the explosive device he was suspected of manufacturing.



Agents involved in the investigation told us that they suspected that Kingery was planning to transport the grenade hulls into Mexico for manufacture into explosive devices. Beatty checked border crossing records and determined that Kingery frequently crossed the Mexican and U.S. border in Arizona and California. Beatty and his Group Supervisor, Peter Forcelli, told us that Kingery's proximity to

¹² Fuse assemblies are sometimes referred to as "spring assemblies" and are the mechanism through which hand grenades are armed and detonated. A detail of a fuse assembly is depicted on the left side of Diagram 5.1.

the border, frequent border crossings, and purchase of grenade components was suspicious.

As discussed above, while it is lawful to possess and sell grenade components within the United States so long as an essential component to assemble them into a "destructive device" is missing, it is illegal to export those same components individually or fully constructed to another country without an export license issued by the State Department. According to ATF Explosives Enforcement Officer (EEO) Arthur Spencer, who was working in ATF's Mexico City Office during this time, Beatty requested his assistance in determining whether the grenade hulls Kingery had ordered were "destructive devices."¹³

Spencer told us that he advised ATF agents in Yuma that the grenade hulls Kingery had ordered from Surplus Dealer 1 were "novelty grenades," which meant they could be lawfully possessed in the United States.¹⁴ In addition, Spencer said he told the Yuma ATF agents that he "did not believe" the grenade hulls Kingery had ordered were covered under the AECA because, in his opinion, they were not manufactured to military classifications, which meant that they could be legally exported into Mexico.¹⁵ However, Spencer also told us he did not actually know whether the grenade hulls and components were export-controlled and that only the State Department can make that determination. Spencer said that he "probably misled" the ATF agents with the advice he provided to them.¹⁶

Then-SAC of ATF's Phoenix Field Division William Newell told us that he spoke with Spencer regarding the applicability of AECA to the grenade components Kingery had ordered. Newell said that based upon Spencer's advice he did not believe Kingery could be charged with violating the AECA if he attempted to transport into Mexico the grenade hulls that he had purchased from Surplus Dealer

¹³ The authority to make "destructive device" determinations is delegated to the Director of the ATF. 27 C.F.R. 479.24. The Director has further delegated this authority to EEOs. As of March 2012, ATF has 26 EEOs, including 3 supervisory EEOs and 2 program managers.

¹⁴ Arthur Spencer is a pseudonym.

¹⁵ Spencer told us that Surplus Dealer 1 did not get "army surplus material" and that is why he determined the grenade hulls ordered by Kingery were novelties. However, the website for Surplus Dealer 1 specifically states that it is in the military surplus business and a review of its website shows a multitude of military surplus goods for sale, including inert grenades and grenade components. Moreover, Surplus Dealer 1's website currently contains a disclaimer in its descriptions of grenade parts that specifically states the parts cannot be shipped outside the United States.

¹⁶ After reviewing a draft of this report, Spencer submitted comments to the OIG in which he stated that "[t]he fuse assemblies presented to [him] were M228 fuse assemblies designed for the M67 training grenade version and had apparently been purchased from the Defense Reutilization Materials Office (DRMO); which they sell as scrap metal, not intended to be used for its original purpose." We do not believe Spencer is correct if his latter observation is meant to suggest that military surplus materials that are sold as "scrap" are not intended to be used for munition purposes and may therefore be legally exported without an export license issued by the Department of State. Items that are listed on the USML remain there even if they are sold by the U.S. Military to civilians for "scrap," and can only be exported without a license issued by the Department of State if the item has "been rendered useless beyond the possibility of restoration to [its] original identity only by means of mangling, crushing, or cutting." 15 C.F.R. § 770.2(g)(3).

1, nor could CBP agents seize the grenade hulls because they were novelties. Beatty, Smith, and Special Agent John Hacker – all of whom were assigned to ATF's Yuma office – as well as other ATF witnesses involved in the Kingery investigation, told us that they understood that Kingery could only be arrested in the United States under the National Firearms Act and Gun Control Act if he possessed all of the grenade components together.¹⁷

According to Hacker, because the Yuma ATF agents understood that ATF could not arrest or stop Kingery for possessing grenade components in the United States, they developed an alternative investigative strategy. The strategy included intercepting the shipment of grenade hulls and fuse assemblies that Kingery had ordered from the military surplus store, marking the intercepted items, arranging the delivery of the grenade hulls to Kingery's mother's house, and then surveilling Kingery to see where he took the grenade components.

In furtherance of this plan, the agents from Yuma coordinated with Mexico-based ATF agents and ATF's National Laboratory Center (ATF Laboratory). In addition, according to an ATF report, Surplus Dealer 1 agreed to cooperate with ATF and ship Kingery's order of grenade hulls to Beatty so that ATF could then deliver the items to Kingery in a "controlled" manner.

Spencer worked with the ATF Laboratory, which, according to witnesses, had previously developed a technique to mark items in a manner that would allow the mark to [REDACTED] and be identified afterwards. On October 29, 2009, Spencer e-mailed Hacker informing him of the technology's existence and told him that the process had never been used before, but that he thought the Kingery investigation was a "great opportunity to test the procedure."

Forcelli told us that this was the first time the ATF Laboratory would be attempting to use this technology. Forcelli also said that he fully supported its use because of his understanding that it is legal to purchase grenade hulls in the United States and if Kingery was making live grenades that "start[ed] turning up" in the United States or Mexico, ATF would be able to use the technique to trace the grenades back to Kingery.

Hacker drafted a memorandum to Newell on October 29 requesting permission to use the marking technology. Hacker stated in the memorandum that "marking" each grenade body would allow U.S. and Mexican investigators to establish a chain of custody if live grenades [REDACTED] were later recovered [REDACTED] and link them back to Kingery.

The memorandum also asserted that AUSA Knowles approved the strategy to mark the grenade hulls, which Knowles told us she did not recall doing. While Hacker and Beatty said they could not recall how they learned of Knowles's approval, Beatty showed us an entry he made in the ATF case management log dated October 29, 2009, stating that Knowles concurred with the plan to mark the

¹⁷ John Hacker is a pseudonym.

grenade hulls, but that Knowles would check to see if grenade hulls were covered under the AECA. Beatty told us that he could not remember the specific details of the conversation he had with Knowles regarding her concurrence with this plan. As described below, Beatty and Knowles had communications in late October, including on October 29, about the Kingery investigation and the possible transportation of the grenade hulls into Mexico. Whatever those discussions on October 29 may have entailed, we found that Knowles clearly told Beatty the next day that the U.S. Attorney's Office objected to any plan to allow marked grenade hulls to enter Mexico. Hacker's memorandum, however, included the assertion that Knowles had approved ATF's strategy, and it was provided to Mexico-based ATF agents, ATF Laboratory personnel, Forcelli, and Spencer. According to ATF documents, Hacker and Beatty faxed Hacker's memorandum to Forcelli. Forcelli told us that he received it and that he hand-delivered the memorandum to Newell. Newell stated to us that he had no recollection of receiving or reviewing Hacker's memorandum.

2. Discussions with ICE, the U.S. Attorney's Office, the DOJ National Security Division, and the Government of Mexico

According to the SAC for ICE's Phoenix office, his office received the same tip as ATF from Surplus Dealer 1 and initiated an investigation based on the information in October 2009. On October 30, 2009, an ICE agent contacted ATF Agent Hacker to inquire about ATF's investigation of Kingery and to inform ATF that ICE was aware of Kingery's order for 120 grenade hulls.¹⁸ In an e-mail describing this conversation, Hacker told Beatty and Smith that he made it clear to the ICE agent that Kingery was an old ATF target and that he and the Yuma agents would be conducting a "controlled deliver[y]" of the grenade components to Kingery the following week and did not need ICE's assistance, but would contact them if they did.¹⁹ Forcelli told us that ICE wanted to be the lead agency in the Kingery investigation even though ATF had been investigating him for several months.

¹⁸ On January 12, 2009, ATF Agent Beatty inserted information into a law enforcement database known as TECS identifying Kingery as an ATF investigative subject. TECS is owned and managed by the U.S. Department of Homeland Security and is available to law enforcement officials from different agencies. Privacy Impact Assessment Update for the TECS System: CBP Primary and Secondary Processing (TECS) National SAR Initiative, DHS/CBP/PIA-009(a), August 5, 2011 (Available at <http://www.dhs.gov/xlibrary/assets/privacy/privacy-pia-cbp-tecs-sar-update.pdf>) (accessed January 9, 2014). Beatty told us that the database identifies participating agencies' investigative targets in order to help avoid conflicts arising from multiple agencies investigating the same individuals.

¹⁹ ATF personnel throughout this investigation inaccurately used the term "controlled delivery" to describe the Kingery operations. A "controlled delivery" typically occurs when a law enforcement agency effectuates the delivery of contraband to a criminal subject and maintains continuous surveillance on the subject with the objective of making an arrest for possessing an illegal item, such as drugs or illegal firearms. The Kingery operations involved ATF intercepting, marking and delivering to Kingery grenade components (items lawfully possessed in the United States) and then observing Kingery to see where he was taking those items and whether he was using grenade components to manufacture illegal "live" hand grenades. ATF did not maintain continuous surveillance of the delivered components and we do not believe it is accurate to characterize the operations as "controlled deliveries."

According to witnesses from both agencies, ICE and ATF had a strained relationship in Phoenix and Yuma. Witnesses told us that agents from both agencies undercut and withheld information from each other. An ICE agent told us that the relationship between ICE and ATF was “absolutely horrible” and that “as an agency” ATF had a “chip on [its] shoulder, especially toward [ICE].” He stated further that investigations ICE conducted involved some instances where ATF agents tried to undermine ICE’s activities. Similarly, some ATF agents expressed the belief that ICE could not be trusted because its agents would take investigation-related actions without informing ATF, would designate known ATF investigative targets as ICE targets, and sometimes “steal” cases. Furthermore, according to some ATF agents, ATF did not want to share the “glory” or the “limelight” with ICE on cases in which ATF was the lead agency. As described throughout this report, the friction between ATF and ICE affected ATF’s investigation of Kingery.²⁰ We saw a similar lack of coordination between ATF and ICE in our review of Operations Wide Receiver and Fast and Furious.²¹

Also in late October 2009, while the Yuma ATF agents were working with the ATF Laboratory, Beatty conferred by telephone with AUSA Knowles and her supervisor, AUSA Emory Hurley, about the Kingery matter. During these calls, Knowles and Hurley explained the legal requirements of the AECA to Beatty. On October 29, 2009, Knowles e-mailed Beatty a copy of the portions of the U.S. Attorney’s Manual that detailed the evidence necessary to prove a violation of the AECA. Knowles told us that Beatty explained to her during these calls that he and the other agents planned to mark the grenade hulls in a manner that would allow ATF to track them back to Kingery [REDACTED]

On the evening of October 29, Beatty e-mailed the following question to Knowles: “If, in the KINGERY case, all we have is KINGERY driving across the border with the grenade bodies and spring assemblies, do we have enough to charge him under the AECA?” On October 30, 2009, Hurley wrote an e-mail to Knowles that became the basis for specific instructions Knowles relayed to Beatty. Because a dispute later arose between ATF and the U.S. Attorney’s Office regarding the advice given by the AUSAs, we quote Hurley’s e-mail to Knowles at length:

[Y]ou and I both spoke by phone with the ATF agents in Yuma about a shipment of grenade bodies that may be headed south to Mexico. It appears that the grenade bodies without explosives are covered by the United States Munitions List under Category IV (h) as a “specifically designed or modified component” of a grenade. As such, they cannot be exported without a license. A violation of [the AECA] however, is a specific intent crime requiring a willful state of mind.

²⁰ We did not assess the validity of agents’ statements to us, but have included them in this report to show how ATF agents’ perceptions and beliefs regarding their ICE counterparts influenced ATF actions during its investigation of Kingery.

²¹ See *A Review of Operation Fast and Furious and Related Matters* (September 2012), <http://www.justice.gov/oig/reports/2012/s1209.pdf> (accessed January 9, 2014).

ATF has a target in Yuma named Jean Baptiste Kingery, suspected of smuggling guns to Mexico. . . .

ATF has learned that this target has recently ordered 100+ grenade bodies from a surplus company. . . .

ATF has also questioned whether or not they could “[mark]” the grenade[s] [in a manner] that will allow [REDACTED] to be traced back to this transaction . . . [REDACTED]. ATF’s plan was to allow the target to take the grenade bodies to Mexico, should we not be able to charge him with attempted export of munitions. This office cannot approve of the exportation of grenade bodies under these circumstances.

If it becomes clear that the target is taking grenade bodies out of the United States into Mexico, we cannot approve of allowing the illegal export to be accomplished. The munitions should be confiscated at the outbound port. Although it is very likely that no charges will arise from this confiscation unless the target makes a detailed and unexpected confession, the munitions should still be interdicted and administrative forfeiture of the grenade bodies initiated by ATF.²² Although ATF is concerned about tipping its hand and letting the target know he is under investigation, we cannot be a party to the unlawful export of 100+ grenade bodies, [marked] or not.

Should ATF want to interdict the grenade bodies without making its involvement obvious, the confiscation could be accomplished with a secondary outbound inspection by CBP/USBP. The Target could be warned that guns, gun parts, ammunition, ammunition components, grenades, and any grenade components or parts are illegal for export without a license, thus putting the target on notice for the next time he attempts to smuggle munitions. (Emphasis in original.)

Knowles and Beatty told us that they spoke by telephone that same day and that Knowles relayed verbatim the contents of Hurley’s October 30 e-mail to Beatty. Beatty told us that Knowles told him the grenade bodies should be confiscated at the border because exporting them was illegal, even if Kingery could not be prosecuted criminally because of a lack of specific intent evidence.

According to Beatty’s contemporaneous entry in the case management log, the U.S. Attorney’s Office advised him that prosecuting Kingery for an AECA violation would require proving that Kingery knew that exporting the hulls was illegal. Beatty’s October 30, 2009, case management log entry of that conversation stated:

²² ATF does not possess administrative authority to forfeit property involved in an AECA export violation. Administrative authority to forfeit such property is vested in the Department of Homeland Security (DHS). In the event ATF agents discover AECA material, they can refer the interdiction to DHS agents (such as ICE or CBP agents) for administrative forfeiture.

AUSA's [sic] Knowles and Hurley advise that grenade bodies fall under category 4H of Arms Export Control Act Munitions list. Advise that case may not be prosecuted without knowing violation of act. Hurley and Knowles advise that US attorney's Office relay's [sic] "repercussions" to SA Beatty should SA's not follow AUSA directions in case. SA Beatty advised Knowles that ATF could not indefinitely surveil KINGERY if he does not transport grenade bodies; grenade bodies lawfully possessed unless manufacture of [Destructive Devices] attempted, etc. SA Beatty referred Hurley and Knowles to his and their chain of command with questions concerns regarding transport of grenade bodies. . . . Beatty spoke to GS Forcelli regarding AUSA concern.

Although the management log entry does not reference an instruction that the grenade parts be confiscated at the border, Beatty told us that he orally advised Group Supervisor Forcelli that the U.S. Attorney's Office objected to allowing the grenade hulls to cross into Mexico and that they should be seized at the border. Forcelli told us that Beatty provided him with this information. Beatty also stated to us that he could not recall Forcelli's response, but said that the message he took from his conversation with Forcelli was that Forcelli did not care about Knowles's and Hurley's admonition and that ATF would proceed as it saw fit, which Beatty said involved "mostly" permitting the grenade components to "cross[] the border" into Mexico. After reviewing a draft of this report, including this statement by Beatty, Forcelli submitted comments in which he stated that he never instructed Beatty to allow the grenade hulls to cross the border into Mexico.

In a handwritten note to the file written contemporaneously during a conversation with Beatty and dated October 30, Knowles wrote: "Received response that ATF will proceed with their investigation as they see fit. According to Special Agent Beatty decisions were being made at levels above him." Knowles told us that she viewed Beatty's response as indicating that ATF and the U.S. Attorney's Office were at an impasse. We found no evidence that Beatty's response to Knowles stating that ATF would proceed as it saw fit was elevated to senior officials in the U.S. Attorney's Office at that time.

Regarding the U.S. Attorney's Office's admonition relayed to him by Beatty, Forcelli told us that ATF intended to follow the instructions from the U.S. Attorney's Office and have agents follow Kingery and the grenade hulls to the Mexican border and then interdict them at the border. Forcelli said that he understood that the grenade hulls could only be interdicted if Kingery tried to take them across the border into Mexico, because they were legal to possess in the United States. Forcelli also stated that in accordance with the legal advice from the U.S. Attorney's Office, he directed Beatty to notify CBP agents and have them look for Kingery. Forcelli told us that it would have been "fine" if the CBP agents had stopped Kingery and searched his vehicle because the border was CBP's jurisdiction. However, as described below, Beatty told us that he did not recall receiving an instruction from Forcelli to notify CBP about Kingery and that he did not do so.

ATF Phoenix Assistant Special Agent in Charge (ASAC) Jim Needles supervised Forcelli and the Yuma agents. He told us that in October 2009, Forcelli orally told him that the U.S. Attorney's Office had approved of ATF's investigative strategy, which involved marking the grenade hulls and then surveilling Kingery to see where he took them, including to Mexico. Needles told us that he did not learn of Hurley's and Knowles's admonition against letting the grenade hulls cross into Mexico until 2011, when he discovered Hurley's October 30, 2009, e-mail to Knowles.²³

Newell stated that he approved the plan to mark the grenades and surveil Kingery to see where the grenade hulls were going after speaking with Spencer and Needles, who gave him the impression that possessing the grenade hulls in the United States was not a crime. Newell also told us that he was not aware of any admonition from the U.S. Attorney's Office to seize the grenade hulls before they crossed the border. We found no evidence that Newell sought guidance or approval from his superiors at ATF Headquarters before approving the plan to mark the grenades and conduct surveillance of Kingery.

Forcelli, however, told us that he briefed Newell and Needles about the plan to mark the grenade hulls and informed them of the U.S. Attorney's Office's admonition to intercept the grenade hulls before they went into Mexico. According to Forcelli, Newell was already aware of the marking plan and knew more than Forcelli did about the proposed marking technique. Furthermore, Forcelli stated that Newell "seemed to know" that if Kingery attempted to bring the grenade hulls across the border it would be a violation of U.S. law.

On November 2, 2009, the ATF agents received Kingery's order of grenade hulls from Surplus Dealer 1. See Photo 5.1. The ATF agents in Yuma, with their superior's approval in Phoenix, proceeded with the marking and delivery operation, but did not draft an operations plan. Needles, who was out of the office in early November, told us that he would have required an operations plan detailing what the agents would be doing regarding the intercepted grenade hulls and would have expected Forcelli to have required the Yuma agents to submit one. Beatty told us that the ATF agents did not draft an operations plan for the operation because they were only going to conduct surveillance of Kingery. The next day, the ATF agents marked the grenade hulls in a manner that would allow them to be identified later, [REDACTED].

²³ Needles told us that ATF assigned him to review documents relating to Operation Fast and Furious during the pendency of the OIG's investigation of that matter. He stated that he discovered a copy of Hurley's October 30, 2009, e-mail to Knowles during this review.

Photo 5.1: Grenade Hull, Fuse Assembly, Spoon, and Grenade Pin Ordered by Kingery and Received by ATF on November 2, 2009



Source: ATF

In accordance with the U.S. Attorney's Manual, Knowles contacted an attorney in the Department's National Security Division (NSD) for guidance regarding AECA prosecutions. She relayed the attorney's response to Beatty in an e-mail on November 2, 2009, stating:

I just got off the phone with a DOJ attorney in the National Security Division at Main Justice. He was very helpful. Although he agreed with our assessment that the grenade bodies are covered by the U.S. Munitions List, he advised that it is absolutely essential that ATF reach out to ICE, to get a determination from the State Department that (1) the grenade bodies are controlled under the AECA/Munitions list, and (2) Kingery is not licensed.²⁴ DOJ will not approve ANY prosecution under the [AECA] without those two necessary determinations, which should be done ASAP.

As a way of imputing the requisite mental state, he suggested perhaps having [an undercover agent] call Kingery posing as a company representative and ask where the final destination for the grenade bodies is and letting him know that it is illegal to export them outside the U.S.

Beatty told us that Hacker and Smith told him that they thought the NSD recommendation for developing evidence to establish specific intent was "asinine" and "ridiculous" and that they never tried it.

²⁴ ICE had direct contact with the Directorate of Defense Trade Controls at the State Department and was in the best position to obtain certifications regarding licensing requirements that would be necessary to prosecute Kingery if he were arrested for attempting to illegally export grenade components in violation of the AECA. Department of State and Department of Homeland Security protocols require that all requests for AECA certifications for criminal prosecutions must be submitted to the State Department's Directorate of Defense Trade Controls by ICE.

On November 3, 2009, Beatty spoke directly with the NSD attorney with whom Knowles had consulted the previous day. The NSD attorney reiterated Knowles's instruction to Beatty that ATF contact ICE in order to facilitate receiving the State Department certifications that would be needed in order to prosecute Kingery if he tried to export the hulls. Beatty e-mailed Forcelli that same day to relay what the NSD attorney told him and stated:

ICE is able to get a prompt determination from the State Department regarding the munitions list and licensing. . . . [and that] [a]lthough there are currently no violations being committed regarding the dummy grenades, the determination is needed to preempt a possible situation where the grenades make it to a [Port of Entry]. . . . At this point we do know that there are valid Mexican charges for the dummy grenade bodies alone; however, we have no positive determination from the State Dept or DOJ that they are prohibited from being exported.

Forcelli forwarded this e-mail on November 3 to SAC Newell and ASAC Needles. Newell responded to Forcelli stating that he was in San Diego with the ICE SAC and that the ICE SAC was "aware [of the Kingery case] and said [to Newell that ICE agents] on the ground [were] coordinating." Newell also asked Forcelli to keep him informed about events relating to Kingery.

Beatty told us that on November 3, he spoke to an ICE agent about the need for State Department determinations of whether grenade hulls are a controlled export and whether Kingery was a licensed exporter of munitions. Beatty made the following entry in the case management log:

SA Beatty spoke with [an] ICE SA ref AUSA concerns regarding AECA. SA Beatty advised [the ICE SA] that AUSA would need State Dept Determination [sic] of whether or not Kingery is a licensed exporter of munitions. SA Beatty advised ICE assistance not needed at present with non-prohibited grenade bodies however would contact ICE if future assistance needed and if ATF observed violations falling under ICE purview. [The ICE SA] advised that AECA charges take a long time to charge because of determinations from Dept. of State, etc. SA Beatty advised that, if ICE wanted to begin process for determination should future ICE-related AECA violations arise, ATF would support ICE if violations were observed regarding AECA. SA Beatty referred [the ICE SA] to supervisor Forcelli if there is any issue from chain of command.

On November 4, 2009, Beatty again e-mailed Forcelli to tell him that Knowles and the NSD attorney had instructed him to call an ICE Section Chief to request the necessary AECA determinations. In the e-mail, Beatty told Forcelli that he did not want to "overstep" his rank by directly contacting an ICE Section Chief in Washington, and stated that he was "happy to do whatever [he] need[ed] to in order to make a good case for the AUSAs and assist ICE." He also said that if ATF found an ICE-related violation "then ICE would need to charge it appropriately" as it

saw fit. Forcelli responded later that same day in an e-mail: "The SAC [referring to Newell] has ordered that we cooperate. Not my idea. Please do what Ms. Knowles has instructed and coordinate with ICE down there."

Forcelli told us that he preferred to not include ICE in the Kingery investigation, but that he spoke to Newell about it because DOJ attorneys at the Main Justice building were directing ATF to work with ICE to get the State Department certifications. He said that Newell instructed him to have the Yuma agents notify ICE regarding the Kingery investigation and "have them involved and up to speed on the case." Forcelli stated that this did not include relinquishing control of the investigation to ICE, but only included sharing information with ICE because he was "aware the border was theirs." He also said that ATF was "trying to walk that delicate balance of letting ICE know what . . . we're doing, but not [letting them come in and try] to bulldoze us."

Also in early November, Spencer began coordinating with Mexican law enforcement authorities regarding Kingery and informed them that ATF suspected that he was smuggling grenade components into Mexico. According to Spencer, because the grenade hulls were contraband in Mexico, he worked with the Mexican military to mobilize units for the purpose of arresting Kingery if he attempted to bring the hulls across the border. On November 4, Spencer sent Beatty and SAC Newell, but not Forcelli or Needles, information about the squads that the Mexican government had "on stand by" to cover the border. Then-ATF Assistant Attaché to Mexico Alex Reid told us that he advised the Mexican government about the possibility of Kingery smuggling grenade hulls into Mexico, ATF's use of the marking technology, and how to identify the marked grenades if the Mexican government recovered them.²⁵

The next day, November 5, 2009, Beatty forwarded detailed information to Spencer about the locations where Kingery had previously crossed the border and the vehicles he had used. Spencer then shared this information with Mexican authorities. We found no evidence that this information was conveyed to the CBP.

Also on November 5, Beatty received a call from the ICE Section Chief in Washington, D.C., whom Beatty had attempted to contact the previous day. The ICE Section Chief advised him that he would have an ICE agent "get the ball rolling" on obtaining the AECA certifications. The Section Chief further advised that the AECA requests should be handled on an agent-to-agent level. That same day, Beatty corresponded by e-mail with an ICE agent regarding the AECA determinations. The ICE agent asked Beatty whether the determinations would be needed "ASAP" and whether ATF was planning to arrest Kingery the following Monday. Beatty replied to the ICE agent, with a copy to Forcelli, stating:

I do not need the determination ASAP, however if you need to in order to satisfy your chain of command, etc. then it's cool by me. I don't want to step on your toes with the determination and, as far as I'm

²⁵ Alex Reid is a pseudonym.

concerned, the AECA violations are ICE's baby and should be enforced by you guys. I know that our US Attorney wants it done soon; however, I know that her concern was that (during our past controlled-delivery) our suspect would immediately head south and get through the port before the appropriate licensing/munitions determinations were made. Anyway, if we get intel and/or observe the suspect headed south and/or crossing the border, I will be in touch with you if that's ok. We have recent information that is indicative of manufacturing and, at this point, have no criminal violation or evidence that these grenade bodies are headed south. We are NOT planning an arrest or warrant regarding this suspect or any of his associates either next week or in the near future. This investigation has been an ongoing year-long investigation and we anticipate that it will continue to be just that. (Emphasis in original.)

The ICE agent responded, "Amen to that. Keep me posted, and let me know whatever you need." In his description of this exchange in the case management log, Beatty wrote that he and the ICE agent "re-agreed to the original agreement that, if a known AECA violation exists, then SA Beatty would contact ICE." He also wrote that the ICE agent would work on obtaining the licensing and munitions determinations to "satisfy the AUSA's [sic] in Phoenix and Washington" and that "[e]verything is good between ICE/ATF and no further AUSA intervention needed regarding AECA determination."

We asked Beatty why he wrote the e-mail to the ICE agent in the manner he did. Beatty told us he was aware of the history of rivalry and tension between ATF and ICE and that he specifically "remember[ed] discussing or at least going over" his e-mail response to the ICE agent with Forcelli. He stated that Forcelli told him to "tell ICE if something comes within their purview that you'll notify them and let them know, and they can . . . , come along and play. But other than that . . . we don't need their help or don't want anything to do with them." Beatty said, "I know that absolutely that ATF didn't necessarily want to share any credit with ICE" for the Kingery matter. He said:

I can't remember a conversation where [Forcelli] said hey, you know, we don't want this to be an AECA determination because, because that would mean ICE has got to be involved so just, just delay it. I mean I don't remember him saying specifically avoid AECA determinations because of ICE. But I think it's certainly implied about don't deal with ICE, you know, keep them on the, tell them this was the role basically and keep them on the backburner because this [is] an ATF case.

Beatty told us that he "felt like he was a middleman" and that he was telling the ICE agent what his "boss," Forcelli, wanted him to say.

Beatty told us that he now understands that by not obtaining the AECA and licensing determinations, as he had been instructed to do by Forcelli, the U.S. Attorney's Office, and the NSD attorney, ATF had complicated the ability to prosecute Kingery for an AECA violation if he had been stopped at the border in November 2009.

Forcelli told us that when he saw the November 5 e-mail from Beatty to the ICE agent he had a sense of "relief" because it showed that Beatty followed his directive and briefed the ICE agent about the Kingery case. He stated that Beatty "was putting [Kingery] on ICE's radar," which is what Newell told him to do. Forcelli stated, however, that he was unaware at the time that Spencer had asked the Mexican military to be on standby to intercept Kingery if he entered Mexico and that therefore Beatty's e-mail to the ICE agent was inaccurate in that it implied ATF did not suspect Kingery was going to Mexico at a time when at least Newell, Beatty, and Spencer clearly suspected he would.²⁶

3. Delivery of the Marked Hulls to Kingery and ATF's Unsuccessful Surveillance Efforts

After marking the grenade components on November 3, 2009, ATF prepared to deliver the marked items to Kingery. The three agents from ATF's Yuma office – Beatty, Smith, and Hacker – were assigned to the marking and delivery operation. Beatty told us that he asked Forcelli to assign additional ATF agents to the operation so that they could maintain 24-hour surveillance, but that Forcelli did not agree to the request. According to Forcelli, he chose not to commit the additional ATF agents because of the limited size of the Yuma office (only three agents), his understanding that it was not illegal for Kingery to possess the grenade components in the United States and therefore they could not be seized as contraband, his belief at the time that there was insufficient evidence Kingery was taking the grenade hulls to Mexico or that he had other grenade components and his belief that there was no indication at that time that there was a threat to public safety.

On November 4, 2009, ATF agents working with an agent from the U.S. Postal Inspection Service delivered the marked grenade hulls and fuse assemblies to the delivery address for the order – Kingery's mother's house. We found no evidence that the ATF agents alerted ICE or CBP that the marked hulls were delivered to the house on November 4 so agents could be on the watch for Kingery in the event he attempted to take the hulls across the border. Though Forcelli told us that he instructed Beatty to ask CBP to be on lookout for Kingery, Beatty told us he did not think to inform CBP about Kingery and did not recall anyone directing him to do so. As previously noted, ATF EEO Spencer and Special Agent Beatty clearly anticipated that Kingery would attempt to cross the border because the same day as the delivery they had alerted Mexican authorities and provided detailed information to facilitate Kingery's arrest in Mexico.

The Yuma-based ATF agents conducted sporadic surveillance of Kingery's mother's house on November 4, but did not see any sign of Kingery. ATF discontinued surveillance on the house that same day after they observed and then pursued a truck for a private delivery company that dropped off a package at

²⁶ As noted above, Forcelli was not included on the November 4 e-mail Spencer sent to Beatty and SAC Newell informing them of Mexico's involvement.

Kingery's mother's house.²⁷ As described below, the Yuma agents waited more than two weeks to reinitiate surveillance of the house.

Two days later, on November 6, 2009, Beatty sent an e-mail to Forcelli requesting to set up a remotely monitored pole camera outside the house. Beatty's request was approved by SAC Newell on November 13, 2009. However, because the utility company was unavailable to provide ATF with access to the utility pole, the pole camera was not installed by ATF until approximately December 14, 2009 – about 40 days after the ATF agents delivered the marked grenade hulls to the house. Beatty told us that the pole camera was “very unproductive.”

On November 9, 2009, Beatty spoke with the ICE agent to whom he had sent an e-mail about the AECA determination on November 5, and the ICE agent advised Beatty that grenade hulls were a controlled export under the AECA and could only be properly demilitarized for exportation if “completely melted.”

On November 12, 2009, Beatty and Smith interviewed a witness who knew Kingery and learned that Kingery was living in a neighborhood in Mazatlán, Mexico, that ATF agents later described to the U.S. Attorney's Office as being “populated by individuals engaged in narcotics activity.” They also learned from this witness that Kingery had a history of manufacturing machine guns and silencers and frequently returned to the United States to pick up supplies and visit his mother. ASAC Needles told us that this witness's statements regarding Kingery's weapons manufacturing in conjunction with Kingery's frequent border crossings heightened ATF's interest in Kingery.

Border Patrol records show that on November 20, 2009, Kingery crossed into the United States from Mexico. The next day, the Yuma agents conducted physical surveillance at the mother's house and observed a new vehicle that they determined was registered to Kingery. Agents placed two GPS trackers on the vehicle that same day. Beatty alerted Spencer, who was in Mexico, of this event and Spencer in turn provided Kingery's license and vehicle information to Mexican law enforcement officials. Again, we found no evidence that ATF took any steps to provide CBP or ICE with this information.

ATF records indicate, and Spencer told us that, despite the coordination between ATF and its Mexican counterparts, Kingery was able to cross unnoticed back into Mexico the next morning, Sunday, November 22, 2009, at a time when no ATF agent was monitoring the GPS tracker. ATF records further indicate that Kingery returned to the United States that afternoon. In an e-mail sent that evening, Beatty told Spencer it was possible that Kingery brought the grenade hulls across the border into Mexico, but that he could not be sure. We found no evidence

²⁷ According to ATF documents, Hacker and Beatty stopped the delivery truck several blocks from the residence and determined the package was sent from an industrial supply company. Hacker and Beatty subsequently contacted the industrial supply company and learned that Kingery had purchased drill bits and taps. Beatty and Hacker concluded that these items were consistent with items used to manufacture AR-15 receivers, which are firearms and not related to the manufacturing of destructive devices.

that this information was shared with Knowles, Hurley, or anyone else from the U.S. Attorney's Office.²⁸

On December 4, 2009, 12 days after Kingery crossed the border into Mexico, Spencer sent an e-mail to all ATF agents working in Mexico describing the Kingery investigation and attached a one-page document called a "BOLO," that contained a picture of Kingery, identified his aliases, and described vehicles Kingery was known to drive.²⁹ On December 8, 2009, Spencer forwarded the BOLO in an e-mail to a contact at the State Department. The State Department contact asked Spencer if he could share the information with DEA, FBI, and ICE in Mexico. Spencer asked Beatty's permission in an e-mail before responding to the State Department contact. Beatty replied:

In general I have no issue with passing on the BOLO information, but I do have another slight concern which surrounds a previous "issue" with ICE. . . . *ICE and attorneys at main justice have already indicated a desire to prosecute the Arms Export charge which we essentially cannot prove.* I've advised ICE here of the possibility that he's trafficking grenades, guns, etc. and told them I would notify them if we came across any violations within their purview. I just don't want the BOLO to revisit the past issues we had where I, GS Forcelli, and SAC Newell had to field questions from ICE. I suspect that if this information was given to DEA, FBI, and ICE again that I and the bosses would be fielding more questions which, in turn, could create more potential leaks and hinder the investigation before it has gotten off the ground. Again, I am all about playing well with our counterparts, I just want to make sure that this information is protected and disseminated on a true need to know basis. Please let me know your thoughts. (Emphasis added.)

Spencer responded to Beatty that he would not pass the information along to DEA, FBI, or ICE. Beatty responded that he thought this was "the best decision" and that he'd "like to keep things close to the vest." We found no evidence that Beatty conferred with his superiors in ATF Phoenix before or after he sent this e-mail to Spencer.

4. Analysis

We found that ATF's efforts at this stage of the investigation of Kingery were seriously flawed with respect to operational planning and communications and cooperation with other relevant federal agencies. As a result of these flaws, ATF

²⁸ In an e-mail written to his supervisor, Samuel Rodgers, on January 7, 2010, Hurley gave a synopsis of the above described events, and wrote that "ATF received the grenades, [marked] them, and had them sent to the target [Kingery]. He [Kingery] did not try to cross [the border into Mexico] with them."

²⁹ A "BOLO" is a method by which law enforcement agencies advise other agencies to "be on the lookout" for individuals suspected of engaging in criminal activity.

attempted to conduct a cross-border operation that was inconsistent with clear guidance from the U.S. Attorney's Office, suffered from inadequate surveillance resources, and lacked coordination with ICE, the agency primarily responsible for enforcing the criminal statute Kingery was most likely to violate, and CBP, the agency responsible for monitoring the border that Kingery was expected to cross.

According to agents involved in the investigation, they suspected that Kingery was planning to transport grenade hulls into Mexico where they would be manufactured into explosive devices. The agents also believed that under the applicable criminal statutes, Kingery could not be arrested or charged in the United States merely for possessing a grenade component. In addition, an ATF explosives expert incorrectly advised the agents that the hulls were "novelty items" that he believed were not covered under the AECA. Based on this understanding of the facts and the law, ATF agents decided to intercept the hulls (and fuse assemblies) Kingery had ordered, mark the items so they could be identified if recovered later [REDACTED], arrange for delivery to Kingery, and then conduct surveillance to determine where Kingery went.

The ATF case agent for the investigation, Beatty, conferred about this plan with two prosecutors from the U.S. Attorney's Office, AUSAs Knowles and Hurley. According to Knowles, Beatty told her that marking the hulls would allow ATF to track the items to Kingery after they were located in Mexico, [REDACTED]. Beatty asked Knowles whether Kingery could be charged under the AECA for crossing the border with the hulls and spring assemblies. The prosecutors' legal guidance and response to ATF's plan was unequivocal: the grenade hulls appeared to be export-controlled and therefore could not be exported without a license, and the U.S. Attorney's Office would not approve allowing the "illegal export" to occur. The prosecutors also advised that the applicable charge under AECA is a specific intent crime and for that reason it was unlikely any criminal charges against Kingery would arise from a confiscation unless Kingery made a "detailed and unexpected confession." However, the prosecutors clearly stated that if Kingery tried to cross the border, the hulls should be confiscated and administratively forfeited. The prosecutors even suggested that if ATF was concerned about Kingery learning he was under investigation, the confiscation could be conducted by CBP agents. The confiscation would have had the additional benefit of putting Kingery on notice of the illegality of exporting the munitions, knowledge that could help establish specific intent should he attempt similar exports in the future.

Knowles provided Beatty additional guidance just three days later after she consulted with an attorney in NSD. Knowles told Beatty the attorney agreed with the assessment that the hulls were export-controlled under AECA. She also told Beatty that the NSD attorney said it was "essential" that ATF obtain from ICE an official determination from the U.S. State Department that the hulls were export-controlled and that Kingery did not possess a license to export the munitions. The Department requires these two determinations before approving a prosecution under AECA. Knowles also related to Beatty a suggestion from the NSD attorney for establishing specific intent: having someone make an undercover call to Kingery posing as a company representative, asking about the final destination for

the grenade bodies, and informing him that it is illegal to export them outside the United States.

As we described in this section, ATF agents' response to the instruction provided by the U.S. Attorney's Office that they seize the grenade parts at the border was to ignore it. The agents went forward with a marking and surveillance operation that anticipated Kingery crossing the border with munitions. They did not coordinate with ICE or CBP to confiscate the munitions should Kingery attempt to cross the border, did not obtain the determinations identified by the NSD attorney required for any AECA prosecution, and did not make any direct efforts targeted at developing the evidence of specific intent that the U.S. Attorney's Office and NSD Attorney told them would be required to convict Kingery of a charge under AECA.³⁰

We received differing recollections about the decision to go forward with the operation despite the guidance from the U.S. Attorney's Office. Case agent Beatty informed supervisor Forcelli of the U.S. Attorney's Office's objection to allowing the grenade components to be brought into Mexico. Although Beatty said he could not recall Forcelli's response, he said the message he took from Forcelli's response was that ATF would proceed as it saw fit.³¹ However, Forcelli told us that he followed the U.S. Attorney's Office's advice by instructing Beatty to notify CBP of the operation and place them on the lookout for Kingery because the border was CBP's jurisdiction. Beatty said he did not recall any such instruction from Forcelli and in fact did not notify CBP. We did not identify any e-mails or other documents relevant to this issue of CBP notification.

We also received differing recollections about whether ATF senior managers in ATF Phoenix were informed of the objections raised by the U.S. Attorney's Office. Forcelli's supervisor, ASAC Needles, told us that Forcelli orally informed him that the U.S. Attorney's Office had approved ATF's marking and surveillance operation, and that Needles did not learn until 2011 that the U.S. Attorney's Office had objected to allowing the grenade parts to enter Mexico. SAC Newell told us that he was not aware of the objections from the U.S. Attorney's Office and that he approved the operation based on his understanding from Needles and Spencer that possessing the hulls in the United States was lawful. Forcelli told us that he informed Newell of the U.S. Attorney's Office's admonition that the hulls be confiscated before entering Mexico. We did not identify any written communications prior to the operation informing Newell of this admonition, and the memorandum drafted by Hacker that Forcelli told us he hand-delivered to Newell – which was drafted on the day prior to the October 30, 2009, conversation between

³⁰ After reviewing a draft of this report, the Department submitted comments in which it stated that before and after November 2011, ATF agents used several investigative tools to determine what Kingery was doing with the grenade components he had purchased, including conducting witness interviews, and obtaining financial and phone records, pen registers, and tracking devices.

³¹ As described earlier, a handwritten note by Knowles dated the same day she communicated her office's objections to the plan to Beatty, stated, "Received response that ATF will proceed with their investigation as they see fit. According to agent Beatty decisions were being made at levels above him."

Beatty and Knowles and which Newell said he does not recall receiving – stated that the U.S. Attorney’s Office approved of the marking operation. Under these circumstances, we were unable to resolve whether Newell was aware of the U.S. Attorney’s Office’s objections.

The operation itself was poorly planned and executed. ATF agents proceeded with the marking and surveillance operation without first developing a written operations plan that described how the activities would be conducted. The agents were sufficiently suspicious that Kingery might transport the hulls across the border that Spencer shared detailed information about the case with Mexican authorities, apparently in the hope they might arrest Kingery if he entered Mexico. However, the agents did not similarly share information with ICE, the agency with jurisdiction over export offenses, or CBP, the agency responsible for conducting inspections at the ports of entry. Compounding these problems was the fact that the agents knew ATF did not have sufficient resources to conduct post-delivery surveillance of Kingery to learn when he left his mother’s residence and where he was going. According to the agents, ATF maintained only sporadic surveillance of the residence for a single day. Thus, even if the Mexican authorities had personnel available, it was highly unlikely ATF would have been able to notify them about when and where Kingery might cross the border. Under these circumstances, it was hardly surprising that Kingery was able to enter and return from Mexico on two occasions within three weeks of taking delivery of the marked munitions.

We found the failure to meaningfully coordinate any aspect of the operation with ICE or CBP particularly irresponsible. ATF agents and supervisors admitted to us that from the beginning of the investigation of Kingery, they sought to exclude or at least minimize ICE’s role in the case. Forcelli told us that he preferred not to include ICE in the investigation, but that SAC Newell ordered him to cooperate and keep ICE “up to speed on the case.” According to Forcelli, ATF was “trying to walk that delicate balance of letting ICE know what . . . we’re doing, but not [letting them come in and try] to bulldoze us.” For example, although Beatty contacted ICE after Forcelli told him to follow the prosecutor’s instruction and obtain a determination regarding the AECA issue, Beatty told the ICE agent that the request was not urgent. As we described in this section, ATF agents did not inform ICE of precisely when the marking and surveillance operation would occur, did not request that ICE assist with surveillance or help coordinate a seizure of the components, and did not have ICE obtain the determinations from the State Department required for an AECA prosecution in a timely fashion. According to Beatty, the approach taken with ICE was motivated by ATF not “want[ing] to share any credit with ICE” for the case. We believe that ATF’s conduct as it related to ICE and the ATF agents’ failure to coordinate efforts with CBP at the border reflected wholly inadequate consideration of the risk to the public safety created by Kingery’s activities.

Even after ATF learned its surveillance had failed and Kingery had entered and returned from Mexico undetected on two occasions within three weeks of taking delivery of the marked munitions, Beatty remained reluctant to share information with other federal agencies. Spencer distributed a BOLO to ATF agents working in Mexico and to a contact at the U.S. State Department containing Kingery’s picture,

aliases, and vehicle description. The contact at the State Department asked Spencer whether he could share the BOLO with other federal agencies in Mexico – the DEA, FBI, and ICE. Spencer asked Beatty for permission, and Beatty expressed reservations based on concerns about creating issues with ICE. Spencer told Beatty that he would not pass the information, to which Beatty replied that he thought this was “the best decision” and that he’d “like to keep things close to the vest.”

In sum, we found that ATF’s handling of the Kingery investigation at this stage was seriously flawed. The operation was poorly planned and executed, and ATF agents’ coordination with relevant federal agencies was wholly inadequate. Moreover, ATF attempted to conduct the cross-border operation in a manner that was contrary to clear guidance from the U.S. Attorney’s Office. As we describe in the next section, ATF’s investigation continued to suffer from poor planning and execution in connection with a second intercepted delivery of grenade parts to Kingery.

C. Briefing of ATF Headquarters and the Second Intercepted Delivery: November 2009 to February 2010

In November 2009, officials at ATF Headquarters received their first briefing paper about the Kingery case and the use of the marking technology. In addition, in December 2009, ATF agents learned that Kingery had ordered additional grenade hulls from two different online military surplus dealers. In this section we describe the information that was conveyed to officials at ATF Headquarters. We also describe ATF’s plan to turn the Kingery case over to the Mexican government and the agents’ attempt to conduct a second marking and surveillance operation involving grenade components ordered by Kingery.

1. Executive Management Knowledge of AECA’s Application to the Kingery Investigation in Phoenix and at ATF Headquarters

On November 13, 2009, Deputy Assistant Director William McMahon at ATF Headquarters sent an e-mail to SAC Newell requesting a briefing paper about the Kingery investigation that specifically addressed the use of the marking technology. McMahon stated in the e-mail that Assistant Director Mark Chait, who was McMahon’s supervisor at ATF Headquarters, recently learned about the case and had some questions.³² McMahon wrote that while he also knew about the investigation, he did not know about the marking, and that Chait was “very excited about this innovative investigative technique.”

On November 15, 2009, Newell sent an e-mail to Forcelli informing him that Chait had requested a briefing paper about the investigation. Forcelli responded by

³² Spencer told us that at some time he and his supervisor provided an oral briefing about ATF’s work in Mexico to ATF senior executive management, including then-Acting Director Kenneth Melson and Assistant Director Chait. The briefing included a description of the Kingery investigation and ATF’s use of the marking technology. Newell told us that he was aware of this briefing and we believe it is likely that this briefing prompted Chait’s request to Newell for more information.

describing some of the recent investigative steps that had been taken, including speaking with ATF personnel about installing a pole camera, obtaining a pen register on Kingery's U.S. phone numbers, and seeking assistance from ATF personnel in Mexico with the investigation. Forcelli also forwarded to Newell an e-mail from Beatty that included a synopsis of a witness interview.

Newell responded to Forcelli's e-mail, stating that he had spoken to McMahon and Chait and "explained to them that [they still did not have] evidence of any crime" Kingery may have been committing. Forcelli replied, "[g]reat. Glad to hear it boss." McMahon also told us that Newell told him that the U.S. Attorney's Office had advised ATF that there were no federal criminal charges available to prosecute Kingery. Newell told us that he recalled having several conversations with McMahon about the Kingery investigation, but did not specifically recall telling McMahon about the U.S. Attorney's Office's advice.

Newell, with Forcelli's assistance, drafted the briefing paper the next day. In preparing the document, Newell reviewed the case file and learned that ICE had confirmed that the grenade hulls were covered by the AECA. Newell conveyed this information to McMahon and ASAC Needles in a November 16, 2009, e-mail in which Newell stated, "I was just advised that grenade bodies are covered under the AECA under section '4H' and that only completely melted down would they be able to be legally exported to Mexico." In a similar e-mail to Phoenix ASACs George Gillett and Needles he wrote, "Beatty received confirmation from ICE that grenade bodies are covered under AECA. I am going to confirm via my own sources. . . . [F]or the purposes of the [briefing paper] I'm going to go with they are covered." Newell told us that his "own source" was Spencer and that after conferring with Spencer he continued to believe that the grenade hulls Kingery purchased were not subject to the AECA because Spencer told him the items were novelties.

We showed Needles the e-mail in which Newell stated that he was going to check with his "own sources" regarding the AECA, and asked him if he recalled having any conversations with Newell about whether the grenade hulls Kingery had ordered were covered by AECA and export-controlled. Needles told us he did not recall having any such discussions with Newell. In fact, both Newell and Needles told us that up until December 2009 they believed that an individual could legally export grenade hulls out of the United States without an export license because grenade hulls were "novelty items" not included on the USML.

In the final briefing paper sent to McMahon and Chait on November 16, 2009, Newell summarized his office's efforts since late 2006 to work with Mexican authorities to help address the Mexican drug cartel's increasing use of grenades. The briefing paper described how the Kingery investigation was initiated and how agents used the marking technique to identify the grenade hulls and components if they were later used to manufacture functional explosive devices. According to the briefing paper, Newell approved using the marking technique because "it is still not known what [Kingery] is planning to do with these items" The briefing paper also stated that Kingery was found to have purchased other notable items, such as drill bits and taps, and that agents learned from an interview with a witness that Kingery had a history of manufacturing machine guns and silencers, had trafficked

firearms, and had a residence in Sinaloa, Mexico. The briefing paper stated the U.S. Attorney's Office "is aware of this investigation and fully cooperating with ATF's investigative efforts," but it did not reference the earlier instruction from the U.S. Attorney's Office that ATF could not permit Kingery to export the grenade parts to Mexico and that the parts should be seized at the border. The briefing paper also did not identify any efforts by ATF to coordinate the investigation with other federal agencies, nor did it reference the fact that ICE had determined grenade hulls were covered by AECA and therefore it would be a violation of federal criminal law to attempt to transport them into Mexico.

There were additional communications between ATF agents and DOJ attorneys in December about the application of AECA to grenade hulls and components. At a meeting with the DOJ Attaché attorney assigned to the U.S. Embassy in Mexico, Spencer provided information about individuals smuggling grenade components from the United States into Mexico and described the use of the components as improvised explosive devices. According to the DOJ Attaché, Spencer did not tell him Kingery's name during this meeting, but shared a fact pattern that described the grenade components as "dummy grenades" and "novelty item[s]."

The DOJ Attaché sent an e-mail to NSD attorneys on December 11, 2009, requesting assistance on dealing with the export of empty "dummy" grenades for conversion into live grenades for use against law enforcement and the military. The NSD attorneys forwarded this e-mail to staff in the State Department's Directorate of Defense Trade Controls, which is responsible for making determinations about whether items are covered by the USML. The Directorate's staff responded to the NSD attorneys that grenade hulls that are "not rendered permanently incapable of being restored [to use]" are export-controlled and thus illegal to export to Mexico.

On December 30, 2009, a deputy chief in NSD forwarded the State Department's determination to ATF Acting Director Melson, whom the NSD Deputy Chief knew when Melson was an AUSA in the U.S. Attorney's Office for the Eastern District of Virginia.³³ The e-mail was then forwarded from Melson to McMahon, from McMahon to Newell, from Newell to Needles, and from Needles to Forcelli. We found no evidence of anyone at ATF Headquarters taking any affirmative actions regarding the Kingery investigation in response to the information that they received.

Newell wrote his e-mail to Needles forwarding the message on December 31, 2009, and stated "the Yuma case may or may not fall under this due to Kingery sending and/or having sent the parts over individually. And, we have yet to detect him or anyone else in this case doing anything of the sort, correct? We suspect it obviously." Newell told us he did not know why he wrote the e-mail this way, but said he continued to wrongly believe, based on Spencer's advice, that CBP could not seize the grenade components if Kingery attempted to transport them across

³³ Melson is no longer employed by the Department and declined our request for a voluntary interview.

the border. That same day, minutes after he forwarded the e-mail to Needles, Newell wrote an e-mail to McMahon in which he stated:

Our issue with the Yuma case is we believe our suspect is using several different people and methods to send the parts over individually. We have yet to catch him or anyone "red handed" which is the problem. He is ordering all the different components individually from several different sources

We found no e-mails from Needles responding to Newell, but found an e-mail from Needles to Forcelli dated January 1, 2010, in which he wrote "Pete take a look at [the forwarded e-mail and Newell's statement], we'll talk Tuesday [January 5, 2010]." Needles told us that he recalled the e-mail forwarded by Newell, but could not recall any discussions that he had with Newell or Forcelli about the AECA.

2. Planning and Coordination of the Second Intercepted Delivery

At the same time communications were taking place about whether the AECA applied to Kingery's conduct, ATF managers in Phoenix began developing a proposal to turn the Kingery investigation over to the Mexican government for prosecution in Mexico. On December 10, 2009, Beatty informed Forcelli, Spencer, ATF Special Agent Randolph Clark, and the other Yuma agents that Kingery had ordered 300 grenade hulls from two different online military surplus dealers and that at least 200 of the grenade hulls were shipped to Kingery on November 22.³⁴ According to Beatty's e-mail, this order brought the total number of grenade hulls ordered by Kingery to "approximately 420." Forcelli forwarded Beatty's e-mail to Newell and Needles that same day.

Several days later, on December 15, 2009, Newell e-mailed McMahon about the Kingery investigation, stating: "All indications are he's shipping grenade parts down in pieces via unknown cooperators so we are contemplating sharing our investigative data with the Mexicans . . . and letting them run with it." Newell also stated that "the Mexicans would be very appreciative of [ATF's] willingness to partner" with them on the investigation. On December 27, 2009, Forcelli sent an e-mail to ATF's Assistant Attaché to Mexico, Scott Blankenship, and others suggesting that the case be investigated by ATF and turned over to the Mexican government for prosecution.³⁵

Gregory Shaw, then ATF's Attaché to Mexico, opposed the proposal to turn the investigation over to Mexico.³⁶ Shaw stated in an e-mail dated December 28, 2009, to ATF Assistant Attachés Reid and Blankenship that the proposal to do so reflected a "prime example" of not understanding how the Mexican criminal justice

³⁴ Randolph Clark is a pseudonym.

³⁵ Scott Blankenship is a pseudonym.

³⁶ Gregory Shaw is a pseudonym.

system works. Shaw recommended that Kingery be prosecuted in the United States. When we asked him about the position in his e-mail, Shaw told us that he believed Mexican authorities were not capable of interdicting and prosecuting Kingery.

On December 30, 2009, the DOJ Attaché sent an e-mail to Shaw, Blankenship, and Reid advising them of the NSD and State Department guidance that a person bringing "hollowed out grenades" across the border into Mexico without an export license may be prosecuted under AECA "as long as [the grenade hulls] are not rendered permanently incapable of being restored once a part/component has been deleted" by, for example, filling the hull with cement. The State Department guidance went on to state that even if there were challenges in establishing evidence of "willful conduct" for purposes of a criminal prosecution, the grenade hulls could still be lawfully seized at the border. Blankenship forwarded the e-mail to Forcelli and Beatty.

In response to this e-mail, Forcelli told Blankenship, Reid, and the DOJ Attaché that he had consulted with ASAC Needles and that they would meet with the U.S. Attorney's Office soon "to advise them of our intent to hand this case off to [the Mexican government] while perfecting the investigative needs on the US side of the border." We found no evidence that either Forcelli or Needles were made aware of Shaw's objection to this plan.

On January 4, 2010, Beatty spoke with Surplus Dealer 1 who had cooperated with ATF in October 2009. This dealer told Beatty that on December 29, 2009, Kingery had placed an order for 100 hand grenade spoons, 100 hand grenade fuse assemblies, 4,000 hand grenade spring clips and 4,000 hand grenade safety clips. The next day, January 5, 2010, Beatty spoke with another military surplus dealer – Surplus Dealer 2 – who informed Beatty that Kingery wanted to place an order for 250 pineapple dummy hand grenade bodies, 150 lemon dummy grenade bodies, and 25 Kevlar helmets. Surplus Dealer 2 also told Beatty that Kingery told him that he would come to the store, which was located in the Midwestern United States, and pick up the items.³⁷

This information prompted a meeting between ATF and the U.S. Attorney's Office to discuss the investigation. The meeting took place on January 6, 2010, and was attended by Needles, Forcelli, U.S. Attorney's Office's Criminal Division Section Chief for Southwest Border Crimes Vernon Martinez, and AUSA Hurley.³⁸ Martinez had become Knowles's supervisor one month earlier and attended this meeting at Hurley's request because Knowles was unavailable.

³⁷ Kingery's orders from the two military surplus dealers did not include fuses or an explosive agent, such as gun powder, which would have allowed him to assemble the grenade components into an explosive device, as defined under 18 U.S.C. § 921(a)(4); 26 U.S.C. § 5845(a)(8), (f)(1)(B), and (f)(3), discussed in Section III.

³⁸ Vernon Martinez is a pseudonym.

Needles and Forcelli told us that the purpose of this meeting was to explain ATF's plan to allow Kingery to smuggle the grenade components across the border into Mexico so that authorities there could arrest and prosecute Kingery on Mexican terrorism charges. They also told us that they wanted the U.S. Attorney's Office's concurrence with the proposed plan. After reviewing a draft of this report, Hurley and Martinez submitted comments to the OIG in which they asserted that neither Needles nor Forcelli communicated a plan during the meeting that involved allowing Kingery to smuggle grenade components across the border into Mexico.

After the meeting Martinez sent an e-mail summarizing the meeting to all of the attendees, U.S. Attorney Dennis Burke, Section Chief for National Security Duane Rodgers, and other senior officials in the U.S. Attorney's Office.³⁹ Martinez told the OIG that he had little familiarity with AECA and that he drafted the e-mail to memorialize what was said at the meeting and to have it reviewed by individuals in his office knowledgeable of AECA and joint operations, as well as by Needles and Forcelli. Because a dispute later arose between ATF and the U.S. Attorney's Office regarding what was discussed at this meeting, we quote from Martinez's e-mail at length:

Emory and I have just met with ASAC Needles and GS Forcelli. The meeting was called abruptly based on new developments in an investigation that Katherine [Knowles] has been working. Both ASAC Needles and GS Forcelli are extremely pleased with Katherine's work on this investigation as am I.

Kingery has been purchasing large amounts of "parts" which, when assembled, would form the body of a grenade with triggering device Kingery is shipping these "parts" to his mother's home in Yuma. Kingery's primary residence is in Mazatlán, Mexico The residence is in an upscale neighborhood and is believed to be populated by individuals engaged in narcotics activity.

It is believed by law enforcement that Kingery is assembling and activating the grenades in Mexico for sale to Cartels. It apparently is not a crime in the US to purchase (no special license required) or assemble the inert shells but is a crime to transport them into another Country. If activated, it is a crime in the U.S. to possess these items.

ATF in Mexico is aware of the investigation. It is unclear if Mexican authorities are aware but ASAC Needles has assured us that they will be made aware shortly. ASAC Needles is also going to contact the appropriate authorities at ICE.

ATF has been made aware of a recent and substantially large purchase of grenade bodies by Kingery from [Surplus Dealer 2]. The \$8,000 purchase includes 400 grenade bodies, some assemblies and 19 Kevlar helmets. Kingery is believed to be currently in Mexico and it is

³⁹ Duane Rodgers is a pseudonym.

anticipated that he will drive to [Surplus Dealer 2] to pick up the shipment.

ATF will pick up surveillance of Kingery in the United States. If they believe at any time that he has possession of grenades capable of being activated, they will make an immediate arrest. If not, they wish to follow him to the border and have him picked up again on the other side (ATF in conjunction with ICE and Mexican Authorities). The purpose is to determine where his "manufacturing facility" may be in Mexico as well as his customers. ATF understands that if an arrest is made in Mexico, than [sic] a prosecution will happen there that will have greater charges than what we can generate here. However, we have not precluded the possibility of a prosecution here as well if evidence warrants and all parties agree that it is an effective use of resources. Also, ATF has been advised and understands that absent us seeking the appropriate orders, no grand jury material can be shared with Mexican authorities or any other agency. Nor can the existence of a grand jury investigation be acknowledged.

Emory and I were comfortable with ATF's plan. The one caveat we gave them was our comfort level was subject to any concerns of the [U.S. Attorney].

I have tried to encapsulate all of the pertinent information. I invite ASAC Needles or GS Forcelli to jump in and fill in any gaps. However, I suggest limited e-mail traffic. After 4 pm, I will not have e-mail access but can be reached by cell.

Forcelli responded to Martinez's summary by describing it as "absolutely perfect," and Needles forwarded the e-mail to Newell the following day. Burke later replied to Martinez's e-mail that he "agree[d] with the [proposed] course of action."⁴⁰

Despite the detail in this e-mail, and the fact that none of the recipients disputed its accuracy at the time, the meeting participants gave the OIG conflicting accounts of what took place at this meeting. Forcelli told us that going into the meeting he and Needles knew that the U.S. Attorney's Office objected to the grenade components being allowed to cross the border into Mexico. They also believed that the U.S. Attorney's Office would not charge Kingery with a crime if he brought grenade components into Mexico. Forcelli stated that ATF's goal for the meeting was to obtain the U.S. Attorney's Office's "blessing" to allow the grenade components to cross the border into Mexico so that Mexican authorities could charge Kingery with a crime or follow him to his manufacturing facility. Needles similarly told us that he and Forcelli proposed a plan at the meeting that involved allowing Kingery to cross the border with the grenade components so the Mexican authorities could take him into custody. He said that he and Forcelli made "clear that if at any point during the operation ATF thought [Kingery] . . . had the powder

⁴⁰ Burke resigned as U.S. Attorney on August 29, 2011, and declined our subsequent requests for an interview.

or the explosive . . . [or] the ability to make an IED," that ATF would immediately stop Kingery. Needles also told us that if circumstances dictated it, ATF was going to have ICE contact CBP and have that agency stop Kingery prior to entering Mexico and that Hurley and Martinez were told of this potentiality at the January 6 meeting.

Needles and Forcelli both told us that at the end of this meeting the U.S. Attorney's Office concurred with ATF's plan to allow grenade components to cross into Mexico. Martinez, on the other hand, told us there was never any discussion of allowing this to occur and that it was his understanding from the meeting that attempting to export grenade components was a crime. He also told us that he understood ATF's plan to be that agents would only allow Kingery to enter Mexico if they did not believe he was crossing the border with anything illegal and would then follow Kingery to his "manufacturing facility." Martinez told us that he "[would not] have been comfortable" with ATF knowingly allowing grenade components to cross the border and that he would have put that information into his e-mail if that had been ATF's plan. Martinez also told us that his reaction to the meeting with ATF was that Kingery would be arrested if agents knew he was bringing illegal items into Mexico and that if Kingery was not doing this, agents would just conduct surveillance.

Hurley told the OIG that his understanding from the meeting was that no matter what occurred, Kingery would be stopped as he attempted to enter Mexico and his vehicle searched because this was the only way that ATF could determine if Kingery had "grenades capable of being activated," as Martinez wrote in his January 6 e-mail. According to Hurley, CBP agents would then seize any grenade parts that were found and ATF agents would then decide whether to allow Kingery to cross into Mexico where he would be arrested by Mexican law enforcement or followed to his manufacturing facility.

On January 7, 2010, the day after the meeting between ATF and the U.S. Attorney's Office, Hurley forwarded to his direct supervisor – Rodgers – his October 30, 2009, e-mail to Knowles, stating the U.S. Attorney's Office position that grenade bodies were export-controlled. Hurley also sent a second e-mail to Rodgers that provided an overview of the Kingery case. The second e-mail recounted the U.S. Attorney's Office's objection to ATF's original plan to mark the grenade hulls and allow Kingery to take them to Mexico, and the U.S. Attorney's Office's suggestion that the hulls should be interdicted if Kingery attempted to export them. Hurley's e-mail made no mention of the January 6 meeting; nor did it contain any indication that the U.S. Attorney's Office had again objected to a plan that allowed Kingery to take the hulls to Mexico. Rodgers, like Hurley, had received Martinez's e-mail summarizing the meeting.

With respect to the first interception and delivery operation, Hurley wrote:

ATF agent Beatty came to [Knowles] with the investigation of [Kingery's] purchase of grenade bodies ATF learned through a tip from [Surplus Dealer 1] that [Kingery] had ordered 100 grenade bodies. ATF believed that [Kingery] would try to export these grenade

bodies to Mexico. When ATF first brought us this information, they were not submitting the case for possible prosecution, but to seek our approval for letting the grenades go to Mexico, marked . . . so that this particular shipment of grenades could be identified later. ATF was at this point laboring under the belief that grenade bodies were not covered by the U.S. Munitions List. This office disagreed with this belief.

ATF's plan was to have the grenades sent to ATF first so that they could be [marked]. [ATF] also considered inserting a flyer into the shipment of grenades advertising the sale of other munitions or services that would lead [Kingery] to call [an undercover agent] and possibly set up illegal arms deals.

We took the following position:

The [U.S. Attorney's Office] believes the grenade bodies are covered by the United States Munitions List and cannot be exported without an export license from the State Department. If the Defendant attempts to export the grenade bodies, the shipment should be interdicted. Unless agents develop evidence to prove that Kingery knew it was illegal to export the grenade bodies from the United States without a license, we would not have a provable case under [the AECA]. The confiscation at the port would, however, provide an opportunity to advise [Kingery] that any such exportation was illegal, setting up proof of specific intent for the next time he tried to export any type of munitions.

ATF received the grenades, [marked] them, and had them sent to the target [Kingery]. [Kingery] did not try to cross with [the grenade components].

Hurley concluded the e-mail to Rodgers by stating that even if Kingery possessed all of the mechanical parts to build an inert grenade the U.S. Attorney's Office might not have a provable case under AECA because the violation was a specific intent crime and required proof that Kingery knew his conduct was against the law. Hurley also said that because it was legal for anyone to purchase the mechanical grenade parts, Kingery could claim as a defense that he was exporting the grenade components as a novelty and did not know doing this was illegal. He added that if Kingery was "building destructive devices out of the grenade parts, we have a chargeable offense, whether he [was] exporting them or not." Rodgers told us that he had no recollection of this e-mail from Hurley or of the January 6 e-mail from Martinez, nor did he recall discussing the Kingery matter with Hurley during January 2010.

Hurley told us that prior to drafting his e-mail to Rodgers, he spoke with Knowles and she provided him with an overview of what had occurred in the Kingery investigation in October and November 2009. He stated that he believed that Knowles told him at this time that Kingery did not bring the grenade hulls into Mexico in November 2009. Knowles told us that she recalled being told that Kingery had not brought the grenade hulls across the border into Mexico during the

first interception and delivery operation and believed that Beatty was the agent who provided her with this information. She also told us that she could not recall speaking with Hurley in January 2010, but that it "made sense" that she would have provided him with this information.

According to an ATF report, on January 8, 2010, Surplus Dealer 2, who was cooperating with ATF, contacted Kingery to inform him that a portion of his order could not be filled. Kingery at that time ordered an additional 700 grenade hulls from this dealer. The dealer contacted agent Beatty four days later and informed him that it would take four to six weeks to fill Kingery's order and that Kingery had not yet made any payments toward the order. This order was never delivered because the dealer was unable to reach Kingery to finalize payment. However, Surplus Dealer 1, from whom Kingery had ordered on December 29, 2009, the 100 hand grenade spoons, 100 hand grenade fuse assemblies, 4,000 hand grenade spring kits, and 4,000 hand grenade safety clips, was able to fulfill Kingery's order. Surplus Dealer 1 shipped the items to ATF and Beatty received them on January 13, 2010.

SAC Newell, ASAC Needles, and GS Forcelli contacted ATF personnel in Mexico in early January in preparation for the upcoming operation. Special Agent Clark, who was assigned to ATF's Mexico City Office, told us that Newell called him directly in early January and asked him to assist the Phoenix Field Division by coordinating efforts with Mexican law enforcement. Clark, who was supervised by Shaw, said he agreed to do so even though Newell was not in his chain of command. Newell told us he had no recollection of making this call, but did not deny that it took place. Shaw, who as noted above was opposed to the plan, told us that Newell bypassed his authority in Mexico in different ways and as one example stated that Newell directly contacted personnel who worked for Shaw in Mexico without notifying him first.

ATF records show that Needles spoke with Shaw on January 6, 2010, regarding the proposed operation. According to Shaw, Needles told him that he wanted Mexico-based ATF agents to follow Kingery when he was in Mexico to see where he was bringing the grenade components. Shaw told us that he told Needles that agreements between the United States and Mexico prohibited U.S. agents from engaging in operational activity in Mexico and that the Mexico-based ATF agents could not do what Needles was requesting. Shaw stated further that he told his supervisor, ATF's Chief of International Affairs, Barry West, that he thought any plan to allow the grenade components to cross the border into Mexico was a bad idea because ATF had no operational capabilities in Mexico and the Mexican law enforcement agencies were not capable of interdicting Kingery when he crossed into Mexico.⁴¹ West told us that Shaw said to him that he would not allow Kingery to bring the grenade hulls into Mexico.

Shaw told us that he also received a call from Phoenix ASAC George Gillett requesting ATF-Mexico's assistance in the proposed operation. According to Shaw,

⁴¹ Barry West is a pseudonym.

he told Gillett that he disagreed with the plan because Mexican law enforcement was not up to the task of surveilling and investigating Kingery and Gillett responded that he would speak with ATF Headquarters. Gillett told us he did not recall this conversation and that he exercised no decision-making authority over the Kingery case and only participated in briefings. We found no evidence that Gillett contacted anyone at ATF Headquarters regarding Shaw's concerns.

Shaw told us he later received a phone call from West, who told him that he (Shaw) would be replaced if he did not assist Phoenix's operation. West told us he did not recall having this conversation with Shaw.⁴²

On the same day as the meeting between ATF and the U.S. Attorney's Office – January 6 – Forcelli discussed ATF's proposed plan to mark the grenade components and surveil Kingery with Reid in Mexico, and forwarded to him Martinez's e-mail summarizing the earlier meeting. Reid responded:

Like we talked about yesterday, all we can do down here is coordinate with the [Government of Mexico] and provide them actionable intel. The [January 6 e-mail from Martinez] says that we will conduct surveillance on this guy once he gets into Mexico and attempt to find his lab. That's not possible. Even if we could, we have less than 10 agents in Mexico. We are forbidden from doing that type of activity. If ICE is telling you they can do that they are full of shit and I wouldn't bet on the Mexicans doing this type of surveillance, the best case scenario is that he gets arrested on the Mex side of the border with the hulls. [Mexican authorities] are periodically checking his house. Also, is this our case or theirs? If it's ours and they are assisting please sit down with them and set some ground rules otherwise they will run their own investigation. I guarantee that they will do shit behind our back. This is what I've seen so far working down here.

Forcelli responded:

Duly noted. We made the [U.S. Attorney's Office] aware that Mexican Officials may elect to stop the vehicle as soon as it crosses the border, and that we have no control over their actions.

As for ICE, they will NOT be running our case here and that has already been established.

Best case scenario is that we have assets in place to ensure we don't let the suspect slip thru the cracks

In another e-mail to Reid sent the next day, Forcelli stated:

⁴² After reviewing a draft of this report, West submitted comments to the OIG in which he stated that he did not tell Shaw that he would be replaced as ATF's Attaché to Mexico if he did not assist the Phoenix Field Division in the marking and delivery operation. West also stated that it is not accurate that Shaw told him that he would not allow Kingery to bring grenade hulls into Mexico. According to West, Shaw said he would not allow a cross border operation to occur unless he – Shaw – approved the operational plan first.

Once he crosses the border, what Mexico does is their business. I'd hope that they'd follow him to where he delivers the hulls and assemblies because they may find a few hundred IEDs and other evidence before someone gets their hands on them . . . But if they stop him on the highway, that's their business. (Ellipsis in original.)

On January 6, 2010, Agent Clark, who as described above had been asked by SAC Newell to help provide coordination with Mexican authorities, contacted the head of one such authority with jurisdiction in the border region adjacent to Yuma and requested its assistance. Clark told us that it was his decision to contact this Mexican agency, rather than the Mexican State Police because he knew its chief and to Clark's knowledge no agency personnel had ever been accused of corruption. According to Clark, the Mexican agency's chief agreed to station some of his agents at the San Luis Port of Entry (POE) during the pendency of the operation. Shaw and Reid told us that the Mexican agency did not have arrest authority. As a result, the plan that ATF developed called for Clark to identify Kingery's vehicle to the agency's personnel stationed at the San Luis POE and for the agency personnel to then contact Mexican State Police or Mexican military to stop Kingery's vehicle, search it, and arrest Kingery if warranted.

In an e-mail on January 9, 2010, that Forcelli sent to the agents he supervised in Phoenix, Forcelli requested that they prepare for a deployment to Yuma to assist Beatty, Smith, and Hacker with the Kingery investigation. In response to the e-mail, Beatty expressed his view that the Kingery case could be a larger case, but that Phoenix Field Division management wanted a "quick hit" in Mexico. Forcelli responded to Beatty that he understood his feelings, but added:

If we don't take him and anyone we catch dealing with him during these controlled deliveries down and someone gets hurt whether it be here or in Mexico, then we are fucked. We know of over 300 grenades that [Kingery] allegedly sent south and the line must be drawn.

On January 13, 2010, ATF received the shipment of grenade components ordered by Kingery from Surplus Dealer 1. The shipment was slightly different from the order Kingery had placed on December 29, 2009. It included 100 hand grenade head/fuse assemblies, 203 grenade spoons, 100 hand grenade pins, approximately 4,000 safety "jungle" clips, and approximately 4,000 spring kits.

On January 15, 2010, Beatty spoke with Knowles and she advised him, as she had done over two months earlier, to contact ICE to determine whether Kingery was licensed to export grenade components. ATF records indicate that Beatty contacted ICE that day and that about two weeks later an ICE agent advised him that Kingery was not a licensed exporter of munitions.

Forcelli told the OIG that a representative of the Mexican government told him that possession of inert grenades in Mexico was unlawful and that he hoped the Mexican government would prosecute Kingery because it was clear that the U.S. Attorney's Office would not. According to Beatty, Forcelli told him that if the Mexican government prosecuted Kingery, it would be an embarrassment to the U.S.

Attorney's Office because a foreign government that had the same information as the U.S. Attorney's Office was able to prosecute Kingery when the U.S. Attorney's Office would not do so.

On January 22, 2010, Beatty e-mailed Forcelli regarding a conversation he had had with an ICE agent the day before, in which he notified ICE about the planned operation and requested ICE's assistance. He said: "I explained that we were going to do the delivery and see where it goes, etc. and that we didn't anticipate any enforcement action right away . . . he specifically mentioned working with the port to knock off the load should it go south." Forcelli responded:

We need to stress that we are NOT doing any interdiction in the USA because it would jeopardize a much bigger operation. We also need to stress that we have concurrence from the US Attorney and Main Justice that they won't prosecute unless we have functional parts, or ALL the components required to make a functional IED.

Stress that this is a small part of a much bigger picture and if they want in, they can't 'jump the gun'. If his boss wants to call me, then that'd be good.

Tell him that per the US Attorney himself (Burke) there is no prosecutable crime here just based on an interdiction of these parts at the border. I have an e-mail to show this. I'd also hint that US Attorney Burke was Janet Napolitano's Chief of Staff when she was Governor here.

Later that day, Hacker wrote an e-mail to Forcelli warning that the local ICE office had a "'jump out' mentality" and had repeatedly "burnt" other law enforcement agencies working with them, and recommended that Forcelli arrange for a phone call from ICE supervisors in Phoenix to ensure that the ICE agents did not take actions that would undermine ATF's investigation of Kingery. Forcelli responded: "I feel your pain. The calls have been made. What (may) help in this case is that the US Attorney is blessing this, and he was Janet Napolitano's Chief of Staff when she was the Governor here."

That same day, Beatty received a voicemail from a CBP agent inquiring about the Kingery investigation. Beatty responded with an e-mail to that agent that outlined ATF's interception and delivery plan, including the fact that there would be a briefing about the operation on January 27, 2010. Beatty wrote that "if Kingery isn't in town, then we may not conduct the surveillance, so I guess we'll have to play it by ear." He also stated:

if Kingery is observed and/or 3rd party observed moving components, then surveillance will be conducted until the components either cross the border or move to another location; if they move across [the] border, then ATF Mexico and [their] Mexican counterparts will pick up surveillance and conduct further operations in Mexico as warranted.

Beatty's e-mail did not discuss interdicting Kingery at the border and ATF records show that ATF never submitted a BOLO to CBP or otherwise requested that

CBP agents stop Kingery at the border. The CBP agent responded to Beatty's e-mail three days later stating that CBP agents would be available to attend the briefing. Beatty replied, "if [Kingery] isn't in town and we don't anticipate doing surveillance, I will let you know."

Beatty and Hacker told us that ATF considered asking CBP to stop Kingery as he traveled southbound into Mexico, but their superiors decided it would be better to have Kingery bring the grenade components into Mexico and have the Mexican government prosecute him. Beatty told us, "[m]y bosses, their, the vision for this was essentially to let [the grenade components] go, let [Kingery] get caught red-handed, and . . . [Kingery will] be charged [in Mexico] and it will essentially be an embarrassment to the U.S. Attorney's Office." Beatty said it would be an embarrassment because the U.S. Attorney's Office kept telling the agents there was no crime with which to prosecute Kingery. Needles told us that ATF's plan was for Kingery to cross the border into Mexico.

Also on January 22, SAC Newell contacted the ICE SAC and told him that Kingery was purchasing grenade hulls and other grenade components. According to the ICE SAC, Newell advised him at this time about ATF's planned delivery of marked components to Kingery. The ICE SAC said that Newell told him that ATF was going to execute a "controlled delivery" to Mexico, that ATF planned to follow Kingery to his manufacturing facility in Mexico, and that the U.S. Attorney's Office approved the plan. In addition, Newell requested ICE's assistance in conducting surveillance of Kingery during the operation. The ICE SAC told the OIG that in situations where known export-controlled commodities, like grenade components, are going to be allowed to leave the United States illegally, the agency permitting the export must get a "statement of no objection" from the State Department before it can allow the export to occur.⁴³ According to The ICE SAC, Newell was aware of this requirement because he and Newell had a meeting in the fall of 2008 during which they discussed this State Department requirement. The ICE SAC told us that the meeting was held because he would not concur with an earlier ATF plan to allow weapons that the ICE SAC knew were export-controlled to cross the border into Mexico.

Newell told us that he called the ICE SAC in January 2010 to provide him with an update on the Kingery investigation and to request ICE's assistance in conducting surveillance of Kingery during the proposed operation. He told us that he has never heard of a statement of no objection. Newell also told us that he

⁴³ As discussed in Section III, the ITAR states that any person who intends to export a defense article must obtain the approval of the Directorate of Defense Trade Controls prior to the export, unless the export qualifies for an exemption. 22 C.F.R. § 123.1. The State Department has the authority to issue such exemptions. 22 C.F.R. § 126.3. Another ITAR regulation states that "no person, [including government agencies], may knowingly or willfully cause, or aid, abet, counsel, demand, induce, procure, or permit the commission of, any act prohibited by, or the omission of any act required by [the AECA], or any regulation, license or order issued thereunder. (Emphasis added.) 22 C.F.R. §§ 123.1 and 127.1(e). Consequently, law enforcement officials must have State Department approval before they can knowingly allow an individual to illegally export defense articles, such as grenade components.

recalled the meeting with the ICE SAC in 2008 concerning case coordination with ICE. According to Newell, he "shut down" a case in 2008 involving weapons crossing the border into Mexico because the operation "was not properly coordinated" with ICE.⁴⁴ Newell said he could not recall the ICE SAC discussing State Department rules regarding "statements of no objection" in that meeting and that he could not recall anyone ever telling him that State Department approval was necessary before export-controlled items could leave the United States. However, Newell also said he believed permission was needed from CBP – what Newell referred to as "pass-through authority" – in order to allow contraband to cross the border into Mexico.

On the same day Newell spoke to the ICE SAC about the Kingery operation – January 22, 2010 – he also e-mailed McMahon, describing the planned delivery of components to Kingery: "We will be making a controlled delivery of grenade fuse components, not casings, to Suspect KINGERY on Wednesday. . . . If he goes to the border then we have SA Richard Clark ([Tijuana] office), [Mexican agency personnel] and ICE Hermosillo ready to take him off once he enters Mexico." He also stated that ATF had no charge relating to the components, "but the Mexicans do, a 'terrorism' charge," and advised McMahon that the U.S. Attorney's Office approved the plan. Newell made no statement in the e-mail indicating the option of CBP stopping Kingery in the United States and confiscating the components. McMahon responded "10-4 very good."

McMahon told us that Newell told him about the planned operation and that it was his understanding from talking to Newell that there were no charges in the United States with which the U.S. Attorney's Office could charge Kingery, but that the Mexican government could charge Kingery with a crime. According to McMahon, Newell also told him the operation was a way to pass the Kingery case to the Mexican government and that if the coordination was successful, ATF might be able to "do controlled deliveries of firearms" with Mexican law enforcement in the future.

Also on January 22, Hurley spoke with the NSD Deputy Chief at Main Justice in Washington, D.C., and then advised Burke, the Chief of the U.S. Attorney's Office's Criminal Division, and Rodgers by e-mail that this NSD Deputy Chief was the person from whom the U.S. Attorney's Office needed to seek approval to proceed with cases involving export items on the USML. The Hurley e-mail stated:

I spoke this afternoon with [an NSD Deputy Chief], the Export Enforcement Coordinator in the Counter Espionage Section. (He is the person from whom we would seek approval to proceed with cases involving the export of items on the U.S. Munitions list.) He concurs with the proposed ATF operation.

⁴⁴ Agents assigned to this case sent an e-mail to Newell in August 2008 that provided information about the lack of coordination between ATF and ICE. The e-mail indicated that ICE had a concern about weapons passing through the port of entry into Mexico without "Port approval."

The NSD Deputy Chief told us that he recalled speaking with Hurley and telling him that grenade hulls were export-controlled items. He also said he recalled discussing an operation in which he was told there would be a “controlled deliver[y]” followed by an arrest of an individual, and that the grenade hulls would not be allowed to walk.⁴⁵ He said he could not recall whether the arrest would take place in the United States or Mexico, but added that it was not uncommon for U.S. and foreign law enforcement agents to work together and that his understanding was that U.S. agents would be “right there” with Mexican law enforcement. He also said that he would not have agreed to a plan in which the grenades would have been allowed to cross unimpeded into Mexico and told us that he would have recalled if Hurley had made such a statement to him.

3. The Operations Plans

Beatty drafted an operations plan for the delivery of the marked grenade components to Kingery. Beatty’s operations plan described the objectives of the operation as follows:

Grenade components will be delivered to target location. Once components are delivered, agents will conduct surveillance of the location to determine the final destination of the components.

No enforcement action is expected in the USA.

Should the components approach the [POE] into Mexico, information will be relayed to ATF assets assigned to the [Mexico City Office], who will communicate suspect’s movements to Mexican Law Enforcement Authorities. If Mexican [law enforcement] conducts an interdiction, ATF Yuma will be notified.

The synopsis of Beatty’s operations plan similarly stated:

If the components cross into Mexico, ATF assets in Mexico will be notified to coordinate enforcement activities by [Government of Mexico] assets. . . . No enforcement activity will occur unless information indicates that Kingery or others have components required to enable/create an [improvised explosive device], or other device that may cause risk to public safety.

Beatty’s operations plan did not include any plan to confiscate grenade components at the border pursuant to ICE’s and CBP’s authority to do so pursuant to 22 U.S.C. §§ 401(a) and 981(a)(1).

When Shaw reviewed Beatty’s operations plan he saw that it did not contain any input from his agents in the Mexico City Office. On January 25, 2010, Shaw sent an e-mail to his six assistant attachés informing them that there would be no ATF operations in Mexico without an approved operations plan and that Mexico-

⁴⁵ As noted earlier, we believe that ATF personnel inaccurately used the term “controlled delivery” to describe the operations in the Kingery investigation.

based ATF agents would not participate in knowingly bringing grenade hulls, explosive materials, firearms, or any other explosives materials into Mexico without his written approval. He also stated in the e-mail that if he approved such activity, the grenade hulls, explosive materials, or firearms would not be allowed to go any further than the Mexican side of the border.

Shaw directed Clark that same day to draft an operations plan detailing Clark's roles and responsibilities in the operation. Clark told us that he wrote the operations plan on January 26, 2010. It stated that if Kingery crossed into Mexico, Clark would identify Kingery to the Mexican authorities and provide other intelligence to the Mexican authorities to assist them in their investigation of Kingery. The plan also stated that Mexican agency personnel would stop Kingery a safe distance from the border and that while Clark would not participate in the surveillance or stop of Kingery, he would be able to photograph and view any evidence seized from Kingery.

The next day, January 27, 2010, Clark's immediate supervisor, Steven Hewitt, forwarded an updated version of Clark's operations plan to Shaw, Clark, and Forcelli.⁴⁶ This operations plan also provided that if, after the first 24 hours of surveillance, Kingery did not attempt to approach the Mexican border with the grenade components, the agents would monitor his vehicle by GPS and conduct intermittent physical surveillance of his mother's residence. It further stated that agents from ATF Yuma would provide Clark with a description of the vehicle in which Kingery was transporting the grenade components. Clark would then pass that information to his contacts in the Mexican agency, who in turn would pass the information to Mexican customs officers. According to this operations plan, Mexican agency personnel would establish a perimeter adjacent to the POE so they could observe Kingery enter Mexico. Once Kingery was identified, the Mexican agency personnel would request that local police officers stop the vehicle and interview Kingery. Clark would be permitted to photograph any evidence that the police seized. Additionally, this plan provided that Clark would cease his participation in the surveillance after the first 24 hours, although Clark would continue to be responsible for contacting Mexican agency personnel after Kingery was observed driving toward the Mexican border. Shaw told us that he made the decision to end Clark's participation after 24 hours because he had concerns about manpower and did not want to leave Clark at the San Luis POE – where Kingery was expected to cross into Mexico – for an indeterminate period of time.

Forcelli told us that he received Clark's operations plan and remembered reviewing it, but did not remember seeing a paragraph indicating that ATF's surveillance of Kingery would end on January 28, 2010. By contrast, the operations plan drafted by Beatty did not limit physical surveillance to a 24-hour period and, as explained below, ATF agents in fact maintained surveillance on Kingery for several days.

⁴⁶ Steven Hewitt is a pseudonym.

Shaw briefed the U.S. Embassy Deputy Chief of Mission (DCM), a State Department employee, about the cross-border operation and the Embassy approved ATF's plan. According to the DCM, Shaw told him that ATF planned to mark grenade components in the United States, deliver them to Kingery, and then, while working with Mexican law enforcement officials, allow Kingery to cross the border into Mexico where he would be arrested or followed.⁴⁷ Both Shaw and Reid told us that Mexico's Deputy Attorney General was briefed about the proposed cross-border operation and that the Mexican official approved and agreed with ATF's plan. Additionally, Shaw specifically ordered his agents to notify the Mexican State Police about the operation and they did as directed.

4. The Operation

On January 13, 2010, ATF received the shipment of Kingery's December 29, 2010, order of grenade components from Surplus Dealer 1. The order included 100 hand grenade head/fuse assemblies, 103 green grenade spoons (also referred to as "levers"), 100 blue grenade spoons, 100 hand grenade pins, approximately 4,000 grenade safety clips, and approximately 4,000 spring kits. As we described earlier, Surplus Dealer 2, from whom Kingery had sought to purchase 400 grenade hulls and Kevlar vests, was unable to fill Kingery's order and none of these items were delivered.

On January 26, 2010, ATF marked the grenade components and prepared them for delivery the next day to the residence of Kingery's mother. See Photo 5.2. That evening, Clark arrived in Yuma and met with Forcelli and one of the Mexican agency personnel assigned to the border by the chief of the Mexican agency.

⁴⁷ The DCM told us that he did not recall being told Kingery's name at this meeting.

Photo 5.2: Grenade Fuse Assemblies Received by ATF in January 2010



Source: ATF

In the morning of January 27, 2010, ATF convened a briefing for all of the agents participating in the operation, including some ICE agents who the ICE SAC had assigned to assist in the surveillance. Included among the group were numerous Phoenix-based ATF agents and ICE agents, as well as two Mexico-based ICE agents from Hermosillo who had worked with the Mexican agency chief in the past, CBP agents, and a Yuma police officer. The marked grenade components were delivered to Kingery's mother's house after this briefing. The ATF agents then began their continuous (24-hour) surveillance of the mother's house and waited for Kingery to arrive. According to U.S. government records, Kingery crossed the Mexican border into the United States at approximately 8:00 that evening near San Diego, California. Agents, using GPS tracking surveillance, were able to confirm that Kingery drove from San Diego to Yuma, Arizona, and observed him arrive at his mother's house.

On January 28, 2010, Kingery remained at his mother's home in Yuma and did not depart for Mexico. Clark, Forcelli, and others told us that Clark received a telephone call that afternoon from Assistant Attaché Hewitt directing him to return to Tijuana, Mexico. As described above, this decision was made by Shaw. Clark, Forcelli, Hacker, Beatty, and Smith all told us the decision to pull Clark from the operation was unexpected.

Forcelli told us that he selected Hacker to act as the liaison with the Mexican agency personnel after Clark departed because he was fluent in Spanish. Clark told us that Hacker was chosen over the Hermosillo-based ICE agents because if that responsibility was given to them, ATF would have given ICE the most important aspect of the operation. Clark also said the ATF agents had given the ICE agents the "cold shoulder from the get-go" and "nobody wanted ICE involved." ATF documents corroborate Clark's claims. In two separate e-mails sent on January 22, 2010, by Beatty and Hacker, both ATF agents expressed their concern that ICE agents would act in a manner inconsistent with ATF's plan and jeopardize ATF's investigation.⁴⁸

ATF maintained continuous (24-hour) surveillance of Kingery's mother's house for the next 5 days. There were indications that Kingery discovered ATF was conducting surveillance and therefore did not attempt to travel to Mexico. According to Forcelli and Needles, early in the surveillance Kingery approached an ATF agent's vehicle and knocked on its window. Forcelli also told us that ATF later learned that Kingery smashed all of the GPS sensors that agents had placed on his vehicle.

ATF's surveillance of Kingery was terminated on February 1, 2010, at 10:00 p.m. Needles and Forcelli told us that they decided to end it because the ATF agents conducting the surveillance were tired, they could not get replacement agents to Yuma, and Kingery was aware of the surveillance. Needles told us that he did not know whether CBP was advised to be on the lookout for Kingery when the surveillance ended. He stated further that it "would have been a good idea" to have notified CBP and that if it was not done, it should have been done. We found no evidence that ATF advised CBP to be on the lookout for Kingery when ATF terminated the surveillance.

At an unknown time on February 1, 2010, Kingery was able to cross the border back into Mexico.⁴⁹ CBP border crossing records indicate that he then returned to the United States at 11:26 p.m. on February 1, 2010. The records also indicate that the next day, Kingery traveled between the United States and Mexico two more times. After discovering Kingery's crossings from a review of CBP border records on February 2, 2010, ATF special agent Beatty and the other Yuma agents reinitiated surveillance of the border that same day. On February 3, 2010, at 12:10 a.m., Hacker observed Kingery reenter the United States and the agents followed him around the San Luis area "going no-where in particular."

⁴⁸ According to ATF agents, ICE ultimately had a very limited role in the surveillance of Kingery. ICE agents were not part of the early surveillance because they were attending the funeral of a colleague who had died unexpectedly just before the operation. Some ATF agents said that when ICE agents did assist with surveillance, they did so for only a couple of hours. Other ATF agents claimed the ICE agents were actually conducting surveillance of ATF.

⁴⁹ We were unable to determine the precise time when Kingery entered Mexico from the United States, and are therefore uncertain if it occurred while ATF was surveilling his mother's residence or after ATF terminated the operation.

Later that same day the Yuma agents observed Kingery driving toward Mexico in a manner they perceived to be designed to identify anyone who might be following him. As a result, Hacker immediately called the Mexican agency personnel to inform them that Kingery was preparing to cross the border. Hacker stated that he had been in phone contact with the Mexican agency personnel and was under the impression that they were at the POE. Hacker said that in order to help facilitate the Mexican agency personnel's apprehension of Kingery, he removed all of his ATF identification and equipment and crossed the border into Mexico. According to Hacker, after he crossed, the Mexican agency personnel were nowhere to be found. He told us that he tried to direct them to Kingery over the telephone, but was unable to do so. Kingery was not stopped and drove off into Mexico. Clark told us that the Mexican agency personnel were stationed about 30 minutes away from the border and that one of the Mexican agency personnel told him that when they received the information from Hacker, the Mexican agency personnel on duty was sleeping and was unable to make it to the border in time to stop Kingery.

ATF records indicate that Kingery crossed back into the United States the next day, February 4, 2010. We found no evidence that any ATF agents initiated surveillance of Kingery at this time. The same records show that Kingery returned to Mexico and did not reenter the United States again until April 1, 2010. It is unknown what happened to the 100 hand grenade head/fuse assemblies, 103 green grenade spoons (levers), 100 blue grenade spoons (levers), 100 hand grenade pins, approximately 4,000 grenade safety clips, and approximately 4,000 spring kits that were marked by ATF and then delivered to Kingery.

5. Analysis

We found that ATF's January 2010 marking and surveillance operation suffered from many of the same flaws that we identified in the November 2009 operation. At the time they planned the second operation, the ATF agents knew from the failed first operation that Kingery had entered and returned from Mexico undetected on 2 occasions within 2 weeks of taking delivery of 120 grenade hulls and fuse assemblies. They believed that he had exported the hulls to Mexico. They knew that his residence in Mexico was in a neighborhood "populated by individuals engaged in narcotics activity." They knew that he had ordered thousands more grenade hulls and other grenade components, which they believed he would export, and they had received advice through the DOJ National Security Division and the U.S. Attorney's Office that grenade hulls were export-controlled under AECA and thus subject to seizure at the border. They also knew that Kingery had a history of manufacturing machine guns and silencers and believed that he was assembling and activating grenades in Mexico for sale to drug trafficking cartels. They further knew that, as discussed below, the plan for monitoring Kingery once he crossed the border likely had little chance of succeeding. Under these circumstances, we believe the risk to public safety created by Kingery's unlawful activities made it imperative that ATF devise an operation that at minimum included seizing at the Port of Entry with Mexico the thousands of grenade components Kingery had purchased, before they were outside the potential reach of federal law enforcement

authorities. Instead, ATF agents planned again to allow Kingery to cross the border with the components.

However, we also concluded, based upon Martinez's e-mail memorializing the U.S. Attorney's Office's understanding of the proposed operation that it was reasonable for ATF to have believed that the U.S. Attorney's office concurred with ATF's plan. ATF and the U.S. Attorney's Office resumed their discussions in early January 2010, after ATF learned that Kingery had placed orders for additional grenade components. At that time, Needles and Forcelli met with Martinez and Hurley of the U.S. Attorney's Office to discuss and seek concurrence with ATF's proposed operation. The recollections of how that operation was described at the meeting differ sharply between the two offices. In sum, according to Needles and Forcelli, the discussion included allowing Kingery to smuggle grenade components into Mexico so that authorities there could arrest and prosecute Kingery on Mexican terrorism charges; according to Hurley and Martinez, there was no discussion about allowing components to cross the border and it was understood that exporting such items was unlawful.

We found that Martinez's contemporaneous e-mail summarizing the meeting, while not definitively resolving the differing recollections, supports ATF's belief that the U.S. Attorney's Office had concurred with ATF's plan to allow Kingery to pass into Mexico with grenade components. In the operation described in that e-mail, ATF agents would conduct surveillance of Kingery after he picked up the shipment of components and, if agents believed at any point Kingery possessed grenades that could be activated, they would immediately arrest Kingery (for violation of U.S. law). However, according to the e-mail, the plan would otherwise be to follow Kingery to the border "and have him picked up again on the other side (ATF in conjunction with ICE and Mexican Authorities)," in order to determine the location of Kingery's "manufacturing facility" and identify his customers. The e-mail also discussed the possibility of an arrest and prosecution in Mexico, though Martinez wrote that it was unclear whether Mexican authorities were aware of the investigation.

With respect to grenade components, the e-mail stated that Kingery was purchasing large amounts of components and shipping them to Mexico, where he was believed to be assembling the items into active grenades for use by drug cartels. The e-mail stated that it is not a crime to purchase or assemble inert shells in the United States, but is a crime to transport them to another country. However, as noted above, the only enforcement action described in the e-mail was that which should occur if agents believed Kingery possessed grenades that could be activated – the e-mail does not expressly address what action, if any, should be taken if agents believed Kingery was in possession of unassembled grenade components.

We concluded that Hurley should have addressed this situation at the meeting and in response to Martinez's e-mail by stating unambiguously – as he did just two months earlier in connection with ATF's proposed November 2009 operation – that ATF agents should not allow grenade components to cross the border and that the items should be confiscated. Indeed, Hurley told us that he understood Kingery would be stopped at the border, his vehicle searched, and any

grenade components confiscated with the assistance of CBP agents. Moreover, the day after the meeting with ATF, Hurley forwarded to Rodgers the October 2009 e-mail in which Hurley and Knowles informed Beatty that ATF should not permit Kingery to smuggle grenade hulls across the border and that the items should be confiscated if he attempted to do so, as well as a second e-mail that provided an overview of the case and recounted the office's objection to ATF's November 2009 plan and the suggestion that ATF interdict the components if Kingery attempted to export them.

We found it perplexing that Hurley did not reiterate this position at the January 6, 2010, meeting with ATF or in response to Martinez's e-mail given Hurley's knowledge of what agents had proposed to do in November 2009 and the clear expectation that Kingery would again be attempting to smuggle grenade components into Mexico. We believe a principal objective of that meeting should have been to develop and clearly articulate a plan that dealt with the thousands of grenade components that Kingery was likely exporting and that posed a significant risk to the public safety. Had this occurred, and had Hurley's prior guidance been reiterated, it is less likely that ATF's flawed operation would have been carried out. In fact, the clarity with which the U.S. Attorney's Office's admonition was stated in November reasonably would have led ATF to believe that the prior position no longer controlled when it was not reiterated just two months later.

ATF's understanding of the January 6 meeting and Martinez's e-mail was reflected in representations Newell made about the operation to his ICE counterpart and to his superior at ATF Headquarters. On January 22, 2010, Newell contacted the ICE SAC to update him on the Kingery investigation and to request ICE assistance with surveillance. According to the ICE SAC, Newell told him ATF was going to conduct a "controlled delivery" of components to Kingery and then follow him to his manufacturing facility in Mexico, and that the U.S. Attorney's Office approved the plan. That same day, Newell reported to Deputy Assistant Director McMahan that the U.S. Attorney's Office had approved the plan to make a controlled delivery of grenade fuses to Kingery and to "take him off" if and when he entered Mexico.

Newell told us that he believed permission – what he referred to as "pass-through authority" – was needed from CBP in order to allow contraband to cross the border into Mexico. We found that Newell's reliance on ATF Explosives Enforcement Officer Arthur Spencer for the belief that grenade hulls are not export-controlled – and therefore not contraband if brought across the border – was misplaced in light of the contrary guidance ATF received from ICE and the Department's National Security Division.⁵⁰ However, even under this incorrect belief, at the time Newell

⁵⁰ As described in this section of the report, Newell had prepared a briefing paper about the Kingery investigation in November 2009 for ATF Headquarters. In preparing the paper, Newell learned from the case management log that ICE determined grenade hulls were covered by AECA. Newell informed Deputy Assistant Director McMahan of this fact and also told ASAC Gillett that he was going to check with his "own sources" but that "for the purposes of the [briefing paper] I'm going to go with they are covered." However, the final briefing paper that went to ATF Headquarters in fact did not mention ICE's determination. We believe Newell should have included in the briefing paper the

(Cont'd.)

explained the operation to the ICE SAC and McMahon he understood that the delivery would involve a different grenade component – grenade fuses. We believe that given Newell’s past experience with “pass-through authority” and his awareness of the conflicting information he received about the export status of grenade hulls, it was irresponsible for him to have not more carefully considered whether items he described as “grenade fuse assemblies” were export-controlled. Instead, Newell, like Needles and Forcelli, relied on what they understood to be the U.S. Attorney’s Office’s approval of ATF’s plan to allow the grenade components to cross into Mexico.

The subsequent operation itself was poorly conceived and executed. As discussed, we found ATF’s strategy of permitting Kingery to cross the border with the grenade components alarming, because ATF knew Kingery’s conduct was illegal and compromised public safety, and also because the plan for monitoring Kingery once he crossed the border had little chance of succeeding, as was emphasized by ATF personnel stationed in Mexico. As described in this section, the plan relied on effective and timely communications between ATF and the Mexican agency, and then between the Mexican agency and multiple other Mexican authorities. Shaw told ASAC Gillett that he did not believe that Mexican authorities were capable of conducting the kind of surveillance and investigation ATF Phoenix was seeking. According to Shaw, he subsequently was contacted by Derek West, ATF’s Chief of International Affairs at ATF Headquarters, and was told he would be replaced if his office did not assist the operation. As we described earlier, West told us that he did not recall having this conversation with Shaw.⁵¹

ATF e-mails show that Reid also expressed reservations about the operation. He told Forcelli that the most ATF agents in Mexico could do was help coordinate with the Mexican authorities. Referencing Martinez’s e-mail that stated ATF agents would conduct surveillance of Kingery in Mexico, Reid stated, “That’s not possible,” and “we are forbidden from doing that type of activity.” Forcelli replied that he understood and stated, “[b]est case scenario is that we have assets in place to ensure we don’t let the suspect slip through the cracks”

Moreover, ATF agents from Phoenix and Yuma knew they could not conduct 24-hour surveillance on Kingery’s mother’s residence indefinitely. Yet despite the readily apparent resource limitations and significant doubts about the feasibility of coordinating with the Mexican authorities, ATF did not take the simple step of enlisting CBP’s assistance through a BOLO to detect and, as necessary, temporarily detain Kingery at the border. As a result, “slip through the cracks” is precisely what Kingery did.

conflicting determinations about the export status of grenade hulls made by his source – Spencer – and ICE.

⁵¹ As noted earlier, in comments that West submitted to the OIG after reviewing a draft of this report, West stated that he did not tell Shaw that he would be replaced as ATF’s Attaché to Mexico if he did not assist the Phoenix Kingery operation.

We are mindful that Shaw said he briefed the U.S. Embassy Deputy Chief of Mission about the cross-border operation, and that the Embassy approved ATF's plan. Both Shaw and Reid told us that Mexico's Deputy Attorney General was also briefed about the operation and that she approved the plan. In addition, Hurley spoke to an NSD attorney who, according to an e-mail from Hurley to his superiors, concurred with the proposed operation. However, we do not believe these notifications or responses mitigate ATF's poor judgment and deficient planning. First, the plan described to the Deputy Chief of Mission (a non-law enforcement official) involved the delivery of marked grenade components to Kingery followed by coordinated surveillance by ATF agents and Mexican authorities that would result in Kingery's arrest or continued surveillance. This description conveyed an unrealistic degree of control over the munitions and an unrealistic expectation that Kingery would be followed and monitored. Second, the NSD attorney said he understood the operation he discussed with Hurley to be a "controlled delivery" where law enforcement maintains effective control over the contraband during the operation and the grenades would not be allowed to "walk." As we have described, however, ATF's plan was to do just the opposite – that is, relinquish control after marking the components.

We also found that ATF's continued resistance to meaningfully coordinate with ICE, the agency with jurisdiction over export offenses, or CBP, the agency responsible for conducting inspections at the POEs, was irresponsible. For example, when Forcelli learned from Beatty that an ICE agent had mentioned working with ATF agents at the POE "to knock off the load should it go south," his response was for Beatty to convey in forceful and arguably threatening terms that ICE not "jump" the gun if it wanted to participate in the operation. Hacker expressed similar sentiments when he warned Forcelli that the local ICE office had a "'jump out' mentality" and had repeatedly "burnt" other law enforcement agencies working with them. With respect to CBP, it was apparently informed of the operation only after making inquiries with ATF, and though CBP was represented at the pre-operation meeting, ATF did not submit a BOLO to the agency, which would have allowed its agents to play a role in the operation by stopping Kingery at the border. We believe that these attitudes reflected a desire by ATF to avoid charges being brought by another U.S. law enforcement agency – a desire that clearly undermined any productive, effective coordination.

We recognize that ICE agents were included on the surveillance of Kingery, though their participation was sporadic at best and appeared perfunctory. But when ICE appeared well-positioned to make a valuable contribution to the operation by having its Mexico-based agents serve as the liaison between ATF and Mexican authorities after Clark was called off surveillance, ATF instead selected its own U.S.-based agent, Hacker, to assume Clark's role. According to Clark, this decision was made because ATF did not want to give ICE the most important aspect of the operation. Clark also said ATF agents had given the ICE agents the "cold shoulder from the get-go" and that "nobody wanted ICE involved."

The attitudes reflected in these comments and those described in the prior section of this report are troubling. MOUs between agencies, such as the one between ATF and ICE that was directly applicable to the facts and circumstances

surrounding Kingery's activities, can only be as effective as the attitudes and relationships of the supervisors and line agents at the respective agencies responsible for the investigations. Despite directives from Newell that ATF personnel fully cooperate with ICE in the Kingery investigation, at crucial times during the investigation certain individual ATF agents and supervisors allowed prior negative experiences with ICE to serve as a barrier to meaningful cooperation with the agency. That approach predictably produced poorly conceived and executed operations that reflected inadequate consideration of the risk to the public safety that Kingery's illegal activities were creating.

**D. Border Stop of Kingery and the Decision Not to Arrest Him:
June 2010**

After the second operation ended in early February 2010, Beatty continued to pursue investigative leads relating to Kingery by interviewing witnesses, reviewing financial documents, and continuing to monitor Kingery's border crossings. In this section we describe the stop of Kingery by law enforcement at the San Luis POE on June 15, 2010, and the interviews conducted of Kingery that evening and the next day. We also describe the decision not to arrest and charge Kingery with any crime despite his possession of a large quantity of grenade components and ammunition at the time he was stopped, and ATF's subsequent efforts, with AUSA Hurley's concurrence, to use Kingery as a source of information to develop evidence about his and others' criminal activity.

**1. Border Stop, Interview, and Release of Kingery on June
15, 2010**

On June 8, 2010, Beatty was advised by another military surplus dealer – Surplus Dealer 3 – that Kingery had purchased 29 more grenade hulls. Beatty told us that because he was frustrated with the handling of the Kingery investigation and the interaction of ATF, ICE, and the U.S. Attorney's Office, he sent a BOLO that same day, on his own initiative, asking CBP to be on the lookout for Kingery. This was the first time anyone at ATF had contacted CBP with a request to stop Kingery if he attempted to cross the border.

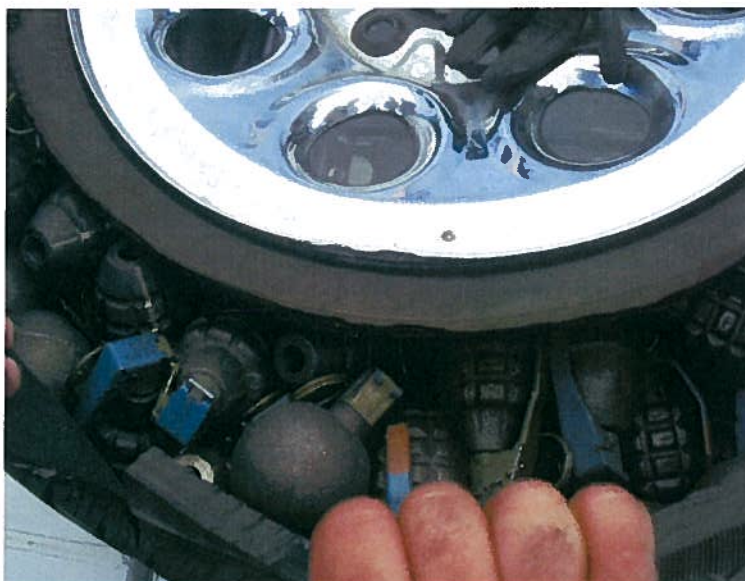
According to ATF's case management log, Beatty sent a third request to AUSA Hurley regarding a mutual legal assistance treaty (MLAT) and seeking a draft order to obtain tax information on June 8.⁵² The case management log reflected that Hurley had not replied to two prior e-mail requests for this assistance, even though, as noted in the log the following day, "it was requested several months ago." The case management log for June 9, 2010, further reflects that AUSA Knowles contacted Beatty to apologize for the lack of response, and indicated that

⁵² According to the case management log, a financial investigation of Kingery was also underway at the time.

Hurley had been busy and had not done anything with regard to the requests. Knowles told Beatty that she would "work on it."⁵³

On June 15, 2010, at approximately 2:00 p.m., a CBP agent at the San Luis POE stopped Kingery, based upon the BOLO that Beatty had distributed, as Kingery attempted to leave the United States and enter Mexico by vehicle. Kingery admitted he owned the vehicle and its contents and twice falsely told CBP agents that he had no weapons or ammunition with him. However, during a secondary inspection of Kingery's vehicle, CBP agents recovered from the inside of a spare tire 114 grenade hulls, 114 grenade fuses, and more than 2,500 rounds of ammunition. See Photos 5.3 and 5.4. CBP agents also seized several pieces of electronic media. Upon discovery of these items, the San Luis POE was shut down until the Yuma County Sheriff's Office Bomb Squad addressed the situation and determined it was safe to reopen.

Photo 5.3: Truck Spare Tire with Visible Grenade Hulls and Components



Source: ATF

⁵³ As these events in the Kingery case were unfolding in June 2010, the Operation Fast and Furious investigation was particularly active. For example, as outlined in our report *A Review of Operation Fast and Furious and Related Matters*, between March and July 2010, the U.S. Attorney's Office and Hurley had decided to seek nine wiretaps in connection with that investigation, the development and application for which take a very substantial amount of a prosecutor's time.

Photo 5.4: Grenade Hulls and Components and Ammunition Seized from Spare Tire of Kingery's Vehicle on June 15, 2010



Source: ATF

Newell, Needles, and case agent Beatty were in New Mexico on an unrelated investigation when a CBP supervisor notified Newell that day that CBP had stopped Kingery.⁵⁴ Word of the event spread quickly within ATF and agent Smith, who was in ATF's Yuma office, notified Hurley. Hurley told us that he advised Smith that no one should question Kingery about his November 2008 purchase of AK-47s because, as we described earlier, Kingery had previously invoked his right to counsel on that matter when ATF attempted to question Kingery during the execution of a search warrant at his sister's residence in January 2009.

According to ATF and ICE records, Smith arrived at the San Luis POE at approximately 3:45 p.m. that day and, together with agents from ICE, whom CBP had contacted, conducted an initial interview of Kingery, which began at approximately 4:00 p.m. and lasted approximately 1 hour. During this interview, Kingery initially denied knowing that the grenade components were in his spare tire. However, after Smith told Kingery that "ATF was aware of his purchases of large quantities of grenade bodies," Kingery admitted to loading the ammunition into the spare tire, although he did not specifically state that he knew that transporting ammunition or grenade components across the border was illegal. According to an ATF report of investigation (ROI) drafted by Smith, Kingery expressed a willingness to cooperate and provide information relating to Mexican

⁵⁴ The time in New Mexico was one hour ahead of the time in Arizona during this period. The times reflected in this report reflect the time in Yuma, AZ.

drug cartels and other criminal activity during this interview. Kingery also told the agents at this time that he was concerned about being at the POE with so many people around and in such close proximity to the border.⁵⁵ According to the ROI, this first interview of Kingery was stopped after it was interrupted several times. Immediately thereafter the ATF and ICE agents interviewed Kingery's sister, who was with Kingery when CBP stopped him from entering Mexico.

ATF records indicate that Newell was notified of the San Luis POE stop at 4:48 p.m. in an e-mail from CBP's Chief Patrol Agent in Yuma. The Chief Patrol Agent advised Newell that based upon an ATF BOLO someone headed southbound had been stopped with hand grenades hidden in the car. The Chief Patrol Agent did not identify Kingery by name, but indicated that the location of the discovery meant that "they'll be turning this all over to ICE."

Three minutes later, Newell forwarded the Chief Patrol Agent's e-mail to Needles and Forcelli, and Forcelli responded "It's Kingery. Smith is with him now." Newell responded to the Chief Patrol Agent: "If it's Jean Baptiste Kingery we have a year long active case on him. He's good for several hundred grenades and lower receivers illegally shipped to Mexico."

Newell, Needles, and Forcelli communicated with each other multiple times by telephone throughout the remainder of the day. Smith told us he advised Forcelli by telephone about Kingery's statements regarding the grenade components and his willingness to cooperate.⁵⁶ Forcelli and Needles also spoke and, according to Needles, Forcelli told him that Kingery was willing to cooperate. Needles also said he recalled being informed that Kingery was in possession of empty grenade hulls and that he was talking to the agents. Needles told us that "at that point" he knew there was a viable charge under AECA because Kingery was found in possession of ammunition, which Needles knew was export-controlled.

At 5:26 p.m., Hurley sent an e-mail to Smith and Beatty with the subject heading "complaint language." The e-mail provided boiler-plate language for criminal complaints that could be used in the event that Kingery was arrested and charged with violating the AECA.

At 5:36 p.m., Newell sent an e-mail to Burke in which he stated that Kingery was stopped at the San Luis POE based on an ATF BOLO "due to his purchase on June 8th of 29 grenade hulls." The e-mail made no mention of the items found in

⁵⁵ According to an e-mail Newell sent to Burke on June 16, 2010, the shutting down of the border following CBP's stop of Kingery's vehicle received publicity in a local Mexican newspaper, but the articles did not identify Kingery by name. Forcelli told us that, approximately one month after the incident, Kingery was "begging to be charged" because cartel members in Mexico were becoming suspicious and looking through Court records to see if he had been charged with an offense relating to his stop on June 15. A failure to publicly charge Kingery, to those who were aware he had been stopped by law enforcement while in possession of grenade components, could have raised suspicions that Kingery might be cooperating.

⁵⁶ We obtained and reviewed the June 15-16, 2010, calling records for the government cell phones issued to Newell, Needles, Forcelli, Beatty, and Smith.

Kingery's car. Two minutes later, Newell e-mailed ATF Deputy Assistant Director McMahon, informing him of CBP's stop of Kingery. Newell wrote:

Jean Baptiste Kingery was stopped about an hour ago southbound at the San Luis POE based on a BOLO our case agent provided CBP personnel last week due to his purchase on June 8th of 29 grenade hulls. He had crossed back into the US on the 5th. He was with his sister and in the car along with the grenade hulls were several firearms. Dealing with ICE 'issues' right now.⁵⁷

Over the next 15 minutes, Newell called Forcelli and then Newell contacted the ICE SAC about CBP's stop of Kingery. According to the ICE SAC, he was already aware that CBP had stopped Kingery when Newell called him. The ICE SAC said that Newell was seeking concurrence on how ATF and ICE would proceed with Kingery and that he and Newell agreed that Kingery should be arrested for violating the AECA by attempting to export prohibited items. Newell told us that he recalled contacting the ICE SAC to advise him that CBP had stopped Kingery, but said he could not remember the specifics of the conversation.

At 6:20 p.m., Needles called AUSA Hurley to provide the information he had learned from Smith through Forcelli, including the fact that Kingery had loaded the ammunition and grenade hulls into a spare tire. The call lasted 7 minutes.⁵⁸

Needles told us that he "made it clear" to Hurley that he wanted Kingery arrested on a criminal complaint based upon Kingery's attempt to export the ammunition in violation of the AECA. Needles said that he told Hurley that he wanted to get Kingery "off the street" and that with charges "to hang over his head," Kingery would be more willing to talk with the agents and describe his illegal conduct. Needles told us that, on two or three prior occasions, when no charges were available, ATF had tried to get Kingery to speak with them, but to no avail. According to Needles, Hurley responded that a charge based solely on the ammunition would result in a 5-month sentence, that ATF should see what additional information Kingery would provide during the interview, and that the U.S. Attorney's Office could "always charge him with [a crime]" and did not "have to do it immediately."

Hurley, on the other hand, told the OIG that no one from ATF ever told him on June 15 that they wanted Kingery arrested that day. Hurley said he recalled a conversation with an ATF agent on the night of June 15, but could not recall with whom he spoke. Hurley said his general recollection was that the discussions with ATF at that time revolved around what to do with Kingery and that the ATF agents were eager to "work" Kingery and obtain more information from him.

⁵⁷ Newell did not reference any "issues" with ICE in the e-mail he wrote to Burke immediately prior to his e-mail to McMahon.

⁵⁸ When we asked Needles what time the call occurred, he said it was the first time he spoke with Hurley, and that "it was probably closer" to 7 pm. As noted below, Needles' cell phone records indicate that he had a second call with Hurley later that day, at 9:21 pm.

After his call with Hurley, Needles spoke with Forcelli. Needles and Forcelli then spoke with Smith in a conference call.⁵⁹ Smith described to them the circumstances of Kingery's detention and interview and Kingery's willingness to cooperate. According to Smith, during this conversation he was told that either Needles or Forcelli was in contact with Hurley, but he had no indication from either of them whether the U.S. Attorney's Office was willing to charge Kingery at that time.

Needles told us that during this same time, he was keeping Newell informed of the events that were occurring at the San Luis POE and he also told us that the two of them may have discussed using Kingery as an informant. Newell told us that Needles told him that he was speaking with Hurley, but said he could not remember any details of the information Needles had shared with him. According to Newell, Needles told him that the ATF agents were working with Hurley to "get charges on [Kingery] for the ammunition."

At approximately 6:30 p.m., ICE agents transported Kingery to an ICE facility in Yuma for a second interview. During this interview, Smith and the ICE agents were joined by another ICE agent, Bryan Territo.⁶⁰ Territo told us he had extensive experience investigating cases involving arms smuggling. According to Territo and the ICE ROI prepared in late June, Kingery made additional admissions during the second interview, including that he knew it was illegal to transport grenades and ammunition out of the United States and into Mexico. According to ATF and ICE documents, this interview ended at approximately 8:45 p.m. and Kingery reiterated his willingness to cooperate with authorities.

Telephone records reviewed by the OIG show that, after the interview of Kingery was concluded, a series of telephone calls took place between approximately 9:00 p.m. and 10:00 p.m. involving Smith, Forcelli, Needles, Newell, and Hurley. According to these witnesses, the discussions during these calls concerned the nature of the information Kingery had provided to agents and what next steps should be taken with Kingery. As described below, while there is disagreement among the witnesses about the positions taken by the ATF agents and Hurley during the calls, the result of these discussions was the decision to release Kingery from custody on June 15 and request him to return the following day for further interviews.

ATF telephone records reflect a call from Smith to Forcelli at 9:04 p.m. and a call from Forcelli to Needles at 9:10 p.m. Smith told us that after he finished interviewing Kingery with the ICE agents, he called Forcelli and provided him with a summary of Kingery's statements from the second interview. Forcelli then called Needles. According to Forcelli, Needles told him during this call that Kingery was going to be released that evening because, while Kingery had made "some"

⁵⁹ ATF cell phone records show that these calls began at 6:29 p.m. and ended at 6:32 p.m.

⁶⁰ Bryan Territo is a pseudonym.

incriminating statements, the U.S. Attorney's Office wanted more information and to have the agents conduct a "thorough" interview of Kingery.⁶¹

Needles told us that it was his understanding, based upon what was reported to him, that Kingery had provided general information about his illegal activities, but had not been sufficiently specific so that the information could be assessed and a determination made at that time as to whether it was actionable. For example, according to Needles's understanding, Kingery told the ICE and ATF agents that he sold empty grenade hulls to people in Mexico, but was unaware of what those individuals were doing with them. Needles told us that the "impression [he] was getting" was that the statements Kingery provided were "nothing that was solid." We asked Needles if it was ever brought to his attention that Kingery told the ICE and ATF agents that "he knew it was illegal for him" to bring the ammunition and grenade components across the border into Mexico. Needles responded that it could have been conveyed to him, but that he did not currently recall whether it had been.

Following his call with Needles, Forcelli spoke with Smith a second time. ATF cell phone records indicate that this call occurred at 9:17 p.m. According to both agents and Smith's Report of Investigation about the border stop, Forcelli, consistent with what he had been advised by Needles, told Smith that "ATF's position" was that Kingery should be released and asked to appear the next day for another interview. Forcelli also told Smith, consistent with what Needles says he had been told by Hurley, that Kingery would be indicted at a later date. According to Smith, Forcelli also told him that Kingery was being released to give him an opportunity to cooperate and provide additional information to ATF. Smith said that his impression was that the decision to release Kingery had been made before his second telephone call with Forcelli. Smith said he advised the ICE agents of ATF's position after speaking with Forcelli.

Shortly after Needles informed Forcelli that Kingery was to be released, Needles called Newell.⁶² Newell told us that Needles kept him apprised of what was occurring with Kingery at the POE, but said he did not recall any conversation with Needles in which they discussed releasing Kingery on the night of June 15 or using him as an informant.

After Needles informed Forcelli that Kingery was to be released and asked to return the next day, Needles called Hurley. ATF telephone records indicate that this call occurred at 9:21 p.m. and lasted 5 minutes. Neither Needles nor Hurley had specific recollections of this telephone call. As noted previously in connection with the 6:20 p.m. call between Hurley and Needles, Hurley said he recalled a single conversation with one ATF agent on the night of June 15, though he could not recall with whom he spoke.

⁶¹ Forcelli told us he also heard from Newell that Kingery was going to be released that evening, although ATF cell phone records do not show a call between Forcelli and Newell that night.

⁶² ATF cell phone records show a call from Needles to Newell at 9:18 p.m.

We asked Needles for his understanding of why Kingery was not arrested on the evening of June 15. He told us that based upon his conversation with Hurley, "the U.S. Attorney wasn't going to charge him." He stated further that he wanted Kingery arrested on a complaint based on the possession of the ammunition, but that the U.S. Attorney's Office was not going to take the case and that ATF did not have a "heck of a lot of options." He stated that

[ATF's] best scenario was [to] get [Kingery] to come back in [and] give a full day of debriefing . . . [to get] . . . the type of information that [ATF] would need . . . regarding [the] grenades [and] see if we could . . . get him to [make admissions] that would sway the U.S. Attorney for charges pertaining to the grenades [and] the exportation.

Asked whether Hurley said to Needles during the conversation that evening that he would not charge Kingery, Needles said "[i]t wasn't those exact words" and that he recalled Hurley saying they did not have to charge Kingery now and that they could wait and "see what we got." Needles said that in response he told Hurley there was enough information to charge Kingery at that time. He also said he told Hurley, in response to Hurley's concern about the possible short jail sentence, that he did not care if Kingery did not receive significant time in prison for the charge or if he received probation. Needles said he tried to make a "twofold" point to Hurley:

number one, we want to get [Kingery] off the street. Number two . . . by having a charge on him . . . we've got a position where we can bring him in and . . . talk to him . . . and see if he'll cooperate and see if he can work for us. . . . I didn't care what his sentence was going to be . . . I just wanted to get him off the street, number one, and number two, . . . try and talk to him.

When we asked Needles if this meant that it was a goal to obtain Kingery's cooperation, Needles responded that it was not

a goal, per se, to flip this guy and work him. . . . I don't think that . . . was it at all. But the goal was to get him off the street, number one. If he's making hand grenades, we want him off the street. That, that was the goal. The number two was, now that we had a legitimate charge on him, . . . [we could] really find out if this guy had anything to say or not.

Needles further told us that, had there been a state charge available, ATF would have sought to have him charged there "in a minute," as they had done in other cases when the U.S. Attorney's Office declined to bring charges on someone ATF was holding. However, Needles noted there was no available state charge in this instance and, after Hurley indicated he was not going to charge Kingery that day, there was no choice but to release him and bring him back for a full debriefing the next day, as "that's all we had to do."

We asked Needles if he ever considered calling Hurley's supervisor to complain about Hurley's resistance to charging Kingery on June 15. Needles told us

that he did not do so. We also asked Needles if he threatened to "go over Hurley's head" because he did not agree with Hurley's position on charging Kingery. Needles stated to us that he did not have "quite that kind of conversation" with Hurley, but that he told Hurley that "we" did not "agree with his decision." Needles stated it was a "fluid situation" and that he "didn't know exactly what [evidence] [he] had" because Needles had not "talked to the ICE agent." According to Needles, Hurley told him that he had spoken to the ICE agent and that ICE was telling Hurley that the exportation charge was ICE's jurisdiction and not ATF's jurisdiction, and that ICE wanted Kingery charged. Needles further stated that Hurley told him that he responded by advising the ICE agent that ATF was going to be part of the case when and if it was charged.

Needles told us he spoke with Newell about Kingery that evening and told Newell that he did not agree with Hurley's decision not to charge Kingery in a criminal complaint. He further told us that he did not recall Newell expressing a need to call Hurley's supervisors at the U.S. Attorney's Office about Hurley's decision, but believed that Newell was "frustrated . . . like we all were." He stated further that he "did not think" that he and Newell discussed contacting Hurley's supervisor that evening.

We found no evidence that Newell or Needles contacted Hurley's supervisors at the U.S. Attorney's Office that evening to complain about Hurley's resistance to charging Kingery with an offense. To the contrary, as detailed below, Newell's contacts with Burke that evening and the next day were supportive of Hurley and the idea of trying to work with Kingery.

After Needles spoke with Hurley at 9:21 p.m., a conference call involving Hurley, Smith, and the ICE agents took place at 9:45 p.m.⁶³ Territo, one of the ICE agents who participated in the call, told us that the ICE agents wanted Kingery to be arrested immediately on a criminal complaint. Territo said he told Hurley during this call that Kingery had admitted all of the elements of an AECA violation with respect to the grenade components and the ammunition, including an admission that he knew it was illegal for him to bring munitions into Mexico without an export license. He said that Hurley resisted this idea, and that Hurley told the agents it was unknown whether the grenade hulls and the fuses were export-controlled and that the items might be novelty items. Territo said he responded that even if there were doubts about the grenade components, there were no doubts about the ammunition. According to Territo, Hurley said he wanted to consult with NSD and said "it's just cleaner to do it by grand jury." Territo also said he told Hurley that Kingery posed a flight risk because of his ties to Mexico, but that Hurley responded

⁶³ Forcelli told us that he was present for a conference call involving ICE Agent Territo, other ICE agents, and ATF agents Beatty, Smith, and Clark on June 16, 2010, during which the group argued with Hurley to prosecute Kingery. After reviewing a draft of this report, Forcelli submitted comments to the OIG in which he reiterated this recollection. We interviewed the witnesses named by Forcelli and none but Beatty testified to being present for a conference call with Forcelli on either June 15 or June 16. Beatty told us that on June 16 he spoke with Hurley on speakerphone while Forcelli was present, but could not remember any details of what transpired during that conversation.

that Kingery would come back to see his family in the United States. Territo said that the ICE agents "were floored that we couldn't arrest him."

According to Hurley, during the conference call with Smith and the ICE agents on the night of June 15, he agreed that Kingery could be charged under the AECA for exporting the ammunition, but that in his view there was still some question whether the other items that Kingery was carrying were real grenade hulls or merely novelty items made to look like them. Hurley said that he wanted to know whether there were other grenade components recovered, such as spoons (levers) and fuses, which would unquestionably be covered by AECA. Hurley told the OIG that when he asked this question, Territo just said it was irrelevant and would not answer him. Hurley told us: "I thought working [Kingery] was a better idea because the charges against him that we could prove up the next day [for the ammunition] were kind of thin sentence-wise."

We asked Hurley why he was concerned the hulls may be novelties when, at the beginning of the Kingery investigation, he had explicitly stated in the October 30, 2009, e-mail that the grenade hulls Kingery previously ordered were Category IV(h) export-controlled items. Hurley told us that Beatty initially told him the items Kingery purchased were grenade hulls, but that later Beatty began referring to the items as "novelties." Hurley told us this concerned him because if the item was "just a hollow iron ball that looked like a grenade" it might not qualify as a grenade part. At the time of the conference call with the ICE agents, Hurley was in Phoenix. He told us that he was not in a position to make an independent determination of whether the grenade hulls were military in nature or capable of being converted into live grenades because he was not in Yuma and could not take possession of the hulls to examine them. As a result he was reliant upon the agents with whom he was speaking. In regard to other possible offenses, Hurley said he had no recollection of discussing charging Kingery with violating the National Firearms Act for possessing an explosive device.

Hurley also told us that another reason he did not support charging Kingery on a complaint that evening was because ATF had told him that they wanted to "work" Kingery as an informant. He told us that "it seemed like a good idea to try and get additional information out of him." Hurley and Smith both told us that Smith told Hurley during the conference call that Kingery was cooperating and would return the next day if requested to do so.

Beatty told the OIG that Smith called him that night and told him that Kingery was cooperating and wanted to be an informant and that he was going to be released and asked to return the next day. Smith told us that the agents released Kingery that evening and that Kingery understood that it would be "in his best interest" for him to cooperate with ATF and ICE agents by providing them with information about cartel activity in Mexico and that he needed to return the next day for an additional interview.

Forcelli and Smith told us that Kingery was released on the night of June 15 only because Hurley would not agree to let ATF charge Kingery with a crime through a criminal complaint. Forcelli documented some of the developments on

June 15 in a Significant Incident Report that he drafted two days later. The report described the information provided by Kingery on June 15 and stated:

GS Forcelli contacted the United States Attorney's Office for the District of Arizona and discussed the facts of the case and possible prosecution strategies. Based upon this conversation, it was determined that KINGERY would not be facing a substantial prison sentence for this violation, and further interviews may be necessary to build a stronger case against KINGERY and to identify his associates.⁶⁴

Smith prepared a ROI about the border stop a few days after the event that described the conference call. The report stated that the interview of Kingery ended at approximately 8:46 p.m. The report continued:

SA Smith then consulted by phone with ATF GS Forcelli and provided a brief synopsis of the interview. GS Forcelli advised that ATF's position was that KINGERY should be released and requested to appear the following day for a follow-up interview.

The next entry in the ROI stated:

SA Smith then consulted with ICE agents and [the] Acting ICE ASAC A conference call was arranged with AUSA Hurley, who was also briefed on the interview. AUSA Hurley discussed the potential charges against Kingery and the potential penalties were he to be convicted. AUSA Hurley concurred that Kingery should be released and given a chance to cooperate with law enforcement.

Smith told us that all of the participants in the conference call agreed with the position described in ATF's ROI. The ICE agents provided their own report of the interview with Kingery, which concluded, "KINGERY was willing to cooperate and agreed to be re-interviewed on June 16, 2010," and that Hurley "was contacted and advised of the details of the case. Federal charges against Kingery will be pursued utilizing a Grand Jury indictment. Kingery was released pending review."⁶⁵

⁶⁴ We were unable to find any independent record of a conversation between Forcelli and the U.S. Attorney's Office on June 15 and, in his written response to a draft of this report, Forcelli confirmed that he did not personally speak with Hurley that evening. We note that the substance of the contact reported in Forcelli's Significant Incident Report is consistent with what we were told by Needles and Territo about Hurley's position at the time, as outlined above.

⁶⁵ In our report, *A Review of Operation Fast and Furious and Related Matters*, we described a similar situation that transpired on May 29, 2010, just a few weeks prior to the Kingery stop, where the main subject of ATF's Fast and Furious firearms trafficking investigation was stopped at a POE. Agents conducted an inspection of the vehicle in which the subject was traveling and discovered underneath the spare tire in the trunk a drum magazine of ammunition. The ATF case agent for Fast and Furious interviewed the subject at the POE, who (unlike Kingery) denied knowing the ammunition was in the vehicle. The case agent said she consulted with Hurley about whether there was a chargeable crime. Despite having sufficient information to subsequently indict the main subject, a decision was made to not arrest the subject and to release him. In comments the Department submitted after reviewing a draft of this report, it stated that with respect to initiating a prosecution,

(Cont'd.)

2. Further Interview of Kingery on June 16

Just after midnight on June 16, 2010, Newell sent an e-mail to McMahon and West requesting Clark's presence "in Yuma asap to interview Kingery. ICE Hermosillo is sending a rep to interview him [later today]." A few minutes later, Newell e-mailed Reid and Clark stating: "[Kingery] is cooperating" and noting that "ICE is all over it including sending their Hermosillo guys to interview him. I need [Clark] in Yuma [later today]." Clark responded by e-mail to Newell, Reid, and Hewitt that he had spoken with Forcelli and that he would be in Yuma at 11:00 that morning to participate in the interview.

At 4:40 a.m., Newell emailed Burke, informing him that Kingery "had 114 grenade bodies and 114 fuse assemblies as well as 2,204 rounds of ammo hidden in the spare tire." Newell continued: "He is cooperating so we want to get as much info from him as to his sources in the US and the ultimate destination and recipients in Mexico." Newell indicated that they would pass this information to their representative with the Mexican Prosecutor General's Office and he closed by telling Burke: "Emory Hurley is all over it."

Later that morning, Burke forwarded this e-mail from Newell to Hurley and Hurley's Section Chief, Duane Rodgers. Hurley responded to Rodgers in the afternoon by summarizing the "current status of the investigation based on the information I received last night and this morning." In that e-mail, Hurley stated that more than 2000 rounds of ammunition and more than one hundred metal castings in the shape of hand grenade bodies were concealed in the spare tire, but that "no fuse assemblies, strikers, springs, or spoons were found."⁶⁶ Hurley also noted that Kingery admitted placing the ammunition and grenade castings in the tire, admitting to having done "similar things" in the past, and admitted that he knew it was illegal. Hurley concluded his e-mail to Rodgers by stating:

After talking with all of the assembled [ICE and ATF] agents over their speaker phone, they all seemed in agreement that [Kingery] would be released that evening and told that they wanted to meet with him again the next day (today). He would be told that this was his opportunity to help himself by cooperating, but agents would be careful not to make any promises about not charging him.

the U.S. Attorney's Manual provides that "as a matter of fundamental fairness and in the interest of the efficient administration of justice, no prosecution should be initiated against any person unless the government believes that the person probably will be found guilty by an unbiased trier of fact." USAM, Section 9-27-220, Comment B. The OIG, of course, fully agrees with this admonition. We note that, in the Kingery case, we found no evidence that this principle was the basis for the decision by the prosecutor to not bring charges in June 2010. To the contrary, as described above, Hurley acknowledged there was sufficient evidence to charge Kingery in a complaint; he claimed he did not do so at that time for other reasons.

⁶⁶ The incident report prepared by ICE confirmed that the seizure included the 114 grenade fuses, as referenced in Newell's initial e-mail.

Less than an hour later, Hurley again e-mailed Rodgers, this time referencing the potential sentence for Kingery if convicted of attempting to export the items that were confiscated at the POE. He stated:

There is no good way to address the guidelines without addressing the fact that a dummy grenade produced as a novelty is not an actual grenade part.

The base offense level is either 14 (15-21 months/10-16 after acceptance) for the ammunition, or 26 (63-78 months/46-57 after acceptance) **if** the grenade castings qualify as munitions under 22 C.F.R. 121.1. (Emphasis in original.)

Forcelli told us that he drove on June 16 from Phoenix to Yuma for the interview of Kingery and that he spoke with Hurley that morning by telephone regarding Kingery. Forcelli and Hurley had differing recollections of this conversation. According to Forcelli, he “begged” Hurley to charge Kingery on a complaint, citing to Kingery’s confession and the fact that he had hidden the contraband in the tire. Forcelli told us that Hurley disagreed, stating that he wanted more information and that Forcelli should call him after the interview with any additional information. Hurley said he did not recall the specifics of his conversation with Forcelli on June 16, but denied that Forcelli asked to have Kingery arrested or that the two of them had a disagreement about how to proceed with Kingery that day. He also stated that if he had a disagreement with Forcelli on how to proceed with Kingery on June 16, he would have advised his supervisor of the disagreement as a warning that he might receive a call from the agent or the agent’s supervisor. Hurley told us that ATF wanted to “work” Kingery, track him, and see who he was working with in Mexico.⁶⁷

Forcelli also told us that, due to his frustration with Hurley’s position, he later that day called a criminal investigator in another U.S. Attorney’s Office from his cell telephone, and that the two discussed with an AUSA in that office whether that office would be willing to prosecute Kingery on drug conspiracy charges. We interviewed the criminal investigator and AUSA and reviewed relevant telephone records. The criminal investigator and AUSA recalled speaking to Forcelli about ATF’s investigation of Kingery and perhaps about prosecuting him through their U.S. Attorney’s Office, but neither witness could recall when they spoke with Forcelli. While we could not find documentary evidence of contact by Forcelli with either individual on June 16, or between June 16 and June 21, we did find information in telephone records reflecting a two-minute telephone call by Forcelli

⁶⁷ In comments Forcelli submitted to the OIG after reviewing a draft of this report, he stated that he had two additional telephone conversations with Hurley on June 16. According to the letter, Forcelli’s conversations with Hurley were “quite heated” and Forcelli “literally begged for authorization to arrest” Kingery and Hurley continued to decline to authorize an arrest. We reviewed Forcelli’s cell phone records for June 16, 2010, and identified a single telephone call to Hurley at 9:10 a.m., which would have been placed while Forcelli was travelling from Phoenix to Yuma, Arizona. As noted earlier, Beatty told us that he participated in a telephone call with Hurley on speakerphone on June 16 at which Forcelli was present. Beatty said he could not recall the details of the conversation.

to the criminal investigator on June 21, 2010, which was the same day (as described in Section E below) that Beatty lost contact with Kingery. Telephone records show that Forcelli also called the criminal investigator on June 23, and June 24.⁶⁸

Shortly before the interview of Kingery was scheduled to begin on the morning of June 16, Newell e-mailed Clark and Forcelli and instructed them that they should "find out all we don't know about Mexico and prepare to pass along to [a Mexican Government liaison and/or another Mexican law enforcement agency]. I'm very interested in knowing who [Kingery] was working for, was he building them himself, where, etc?" Newell continued: "ICE is being a pain in the ass, as expected but we've got the USAO on our side so let's keep [Hurley] up to speed on our investigation and I'll do the same with the USA." Forcelli responded affirmatively two minutes later and indicated the interview of Kingery would resume at 11:00 Arizona time.

Beatty arrived in Yuma for the interview that morning, and he and Smith then transported Kingery from his mother's house to ICE's Yuma office for the interview. According to ATF and ICE reports, Kingery was interviewed for approximately three hours by ICE and ATF agents, including Clark and Spencer, who travelled from Mexico to Yuma to participate in the debriefing. Beatty described to us the dynamic between the ATF and ICE agents at the location of the interview as follows:

[Forcelli] showed up and there's all these agents, like other agents from Phoenix showing up . . . [a]nd it was sort of like well, we need . . . backup because there's all these ICE guys, . . . so we've got all these ATF guys to kind of counter that.

Beatty agreed that the law enforcement agencies acted like "two gangs" in Yuma, and indicated that ATF was having "a pissing contest with ICE . . . over Kingery," including who was going to interview him, who was going to be the lead, who would administer Miranda warnings, and the like.

ICE agent Territo provided similar testimony to Beatty regarding ICE's and ATF's interactions. He told us that when he arrived to assist in the interviews, "there was already a heated . . . debate going on between ATF and ICE" because "ATF apparently had been investigating Kingery for . . . two years" and it was "mentioned that [ATF] had been [marking] grenades [in a manner that would allow them to be identified later]." Territo told us that it was his impression that "when [the ATF agents] came [to Yuma] they were . . . furious with us for stopping Kingery." He stated further that it was his impression that "ATF wanted Kingery to go and . . . do things on their behalf down in Mexico." Territo described the

⁶⁸ In comments Forcelli submitted to the OIG after reviewing a draft of this report, he restated his recollection that he called the investigator and AUSA when Kingery was stopped on June 15, 2010, stating that that contact occurred "on or about June 15." As described above, we did not find evidence in the relevant cell phone records of any contact between Forcelli and the investigator or AUSA "on or about" June 15, 2010.

environment as being "very tense" because there were "two conflicting interests;" ICE "was very interested in just arresting [Kingery]" and ATF was "very interested in working [Kingery]."

Kingery provided substantial detailed information during the interview about a range of very serious criminal conduct. He admitted that he showed Mexican drug cartel members how to build AK-47s and supplied another organization that ATF believed acted as enforcers for the cartel with components to manufacture live hand grenades. According to Smith and ATF documents, Kingery also provided more specific and potentially actionable information regarding the illicit sale of a military grade weapon to a Mexican drug cartel by an individual in California. Kingery also provided information regarding a cartel's efforts to involve him in a plan to kidnap a U.S. citizen who owed a debt to a cartel and transport that person to Tijuana where he or she would be tortured and killed. Kingery also admitted that he had assisted in narcotics trafficking activity, and that he personally used cocaine about once a week, with his most recent admitted use having occurred approximately five days earlier.

Beatty told us that Forcelli approached him during the interview at the ICE office and instructed him to "work" Kingery, which Beatty understood to mean to maintain contact with Kingery and to use him to get information about criminal activity. Smith told us that Forcelli told him "to continue to get as much information . . . out of [Kingery] And try to keep control of him." Beatty said he consequently asked Smith whether he should fingerprint Kingery or do an "informant packet," as required by ATF guidelines. Beatty told us that Smith said he should not fingerprint Kingery or complete an informant packet and that Beatty should "soak as much information" out of Kingery as possible. Beatty said that he followed Smith's instructions.

According to Smith, Forcelli told him and Beatty that they were "to just get as much information [out of Kingery] as [they] could until [Kingery] was charged" and that "signing [Kingery] up [as an informant] was [n]ever even a consideration." Smith also told us that Kingery was released after the interview ended with the understanding that he was working for ATF and that he should maintain contact with Beatty, let him know what was happening in Mexico with his contacts in the cartel, and provide information about the sale of the military grade weapon to an individual in California.

After the interview concluded, Clark sent an e-mail to Hewitt stating, "Coming back. ATF and ICE are signing [Kingery] up to do a machinegun maker who lives in [California]." ⁶⁹ In a follow-up email, Clark later added "P.S. - I wasn't exactly warmly welcomed here. Can't say I blame them." Clark told us that he recalled speaking with Newell about Kingery being an informant and that in "one or

⁶⁹ Clark mistakenly referred to the individual in California as being a "machinegun maker." As described earlier, Kingery told ATF and ICE that this individual was offering to sell a particular military grade weapon.

two subsequent conversations with [Forcelli], [Beatty] or [Newell]" it was a "stated goal" in June 2010 to use Kingery as an ATF informant.

Needles's phone records show that, in the late afternoon of June 16, after telephone calls with Forcelli, Needles called AUSA Hurley's personal cell phone. In an e-mail written later that evening to Burke, Rodgers, and others in the U.S. Attorney's Office about the Kingery interview and his conversation with Needles, Hurley wrote:

Kingery showed up today for further interviews. ATF and ICE brought in liaison agents from Mexico to participate. Kingery was more forthcoming and much of what he said could be corroborated by the agents from Mexico. According to ASAC Needles, [Kingery] gave information about a cartel hit that was supposed to take place in the Phoenix area, as well as other things. ATF plans on working him and does not want to pursue an indictment right now. Jim Needles, Pete Forcelli, the case agent Walter Beatty, and I will meet this coming week about their general plans for him. It appears at the moment that everyone is pleased with ATF's course of action to interview but not arrest Kingery.⁷⁰

Needles told us that he did not recall having this conversation with Hurley or telling him about information regarding a possible cartel hit. As discussed elsewhere, Needles told us that he made clear to Hurley that he wanted Kingery charged.

That afternoon, following the conclusion of the interview, Newell sent e-mails to McMahon and Burke discussing that morning's interview of Kingery and ATF's plan to "use" him. In the e-mail to McMahon, Newell stated:

Jean Baptiste Kingery showed up as planned today and we interviewed him for about 3 hours, along with ICE. He admitted to transporting grenade hulls, fu[s]es, parts, etc. for a guy who supposedly is doing it for [a Mexican drug cartel]. He doesn't know where the grenade "factory" is, or he's not saying, and he said he's already received calls from his "connection" regarding yesterday's seizure at the San Luis POE. It made the news in the local Mexican paper due to the POE being shut down when the grenades were found. Can't prevent it making the local news when that happens. I read the article and it mentioned "6 grenades" were seized but nothing was mentioned about the individuals, their vehicle, etc. [Kingery] says he doesn't think he's burned since he's been so successful in the past but we are going to see how long we can use him. He has connections to [a city on the west coast] and said he was supposed to travel there to pick up another load there next week and deliver it to Mexico. We are going to run with it and see if he'll work out before we file [charges] on him.

⁷⁰ As discussed below, this meeting between Hurley and ATF never occurred. According to an e-mail sent by Hurley to the ATF agents, he was too busy on another matter to meet.

ICE agrees, surprisingly. Richard Clark from TJ was there and took down all the Mexico related info and is going to run with it down south.

In his email to Burke, Newell mentioned the same intent to "run with it and see if he'll work out," but did not state that this would be before filing charges on Kingery and did not mention anything to Burke about ICE's concurrence.

Burke responded to Newell's email "I love this. Truly. Thanks." Newell forwarded this response from Burke to McMahon, stating "I think I have the USA on our side" McMahon replied with one word: "Outstanding." Newell replied directly to Burke by promising to keep him posted, and reminding him of ATF's previous efforts to tag grenade hulls.

Newell told us that he did not think Kingery was ever signed up as an informant and it was his understanding that in the days after Kingery was stopped, ATF was waiting for a complaint to be filed. When we asked Newell about the June 16 e-mails, in which he stated that ATF was going to "see how long [ATF could] use him," Newell told us that although the e-mails made it sound like ATF was going to use Kingery as an informant, ATF never "signed him up as an informant," and it was never his understanding that ATF was going use Kingery as an informant.

Finally, also on June 16, the State Department's Deputy Chief of Mission to Mexico sent an e-mail to a member of his staff requesting information as to why Kingery was released. In the e-mail, the Deputy Chief of Mission stated that "if S. Kingery is free, we kinda prove the [Government of Mexico's] allegation that we're not tough on arms smugglers."

3. Attempt to Use Kingery and Loss of Contact with Kingery on June 21, 2010

On June 17, 2010, McMahon requested that Newell draft a short report discussing Kingery's June 15, 2010, stop for Chait because the U.S. Ambassador to Mexico "was upset" that there was no media coverage regarding Kingery that would demonstrate the United States was taking action against weapons smuggling. McMahon further advised Newell that the ambassador "was told that this was an ongoing investigation with a cooperator."

As described earlier, on June 17, 2010, Forcelli drafted a Significant Incident Report describing CBP's stop of Kingery and the subsequent interviews of him conducted by ATF and ICE agents on June 15 and 16. After discussing what was found in the spare tire on June 15 and summarizing Kingery's admissions during the interviews, the report stated,

[m]edia inquiries were deflected and no media requested because Kingery further advised that he can work proactively with U.S. Law Enforcement Officials and help ATF identify individuals involved with cartel violence both North and South of the Mexican Border. Any media would jeopardize future investigative efforts and could result in the endangerment of Jean Baptiste Kingery's family who reside in close proximity to the border at San Luis POE.

The report closed by stating that "Kingery will be charged with federal violations upon completion of ATF's Investigation."

Forcelli's Significant Incident Report was initially sent to Chait, McMahon, Newell, and Needles. Chait then forwarded it by e-mail on June 17 to ATF Acting Director Melson and Deputy Director William Hoover.⁷¹ Chait stated in the e-mail that "this was the Yuma grenade hull investigation you are familiar with. We had a lookout for Kingery crossing the border. CBP received the hit and stopped his vehicle recovering 114 hulls, fuse assemblies and spoons. It looks as if he is willing to cooperate and id [sic] his Mexico connection. For obvious reasons we are tying [sic] to keep this info close hold. More to follow." We found no evidence that Melson or Hoover responded to Chait's e-mail.

Hoover forwarded Chait's e-mail, which included the Significant Incident Report, that same day to Edward Siskel, who had general responsibility for ATF matters in the Office of the Deputy Attorney General, indicating that he (Hoover) would update Siskel the next day. We found no response by Siskel to the e-mail and no evidence that he had forwarded it to others. When we interviewed Siskel, he indicated that he had no recollection of receiving the email, though he did not dispute that he had received it. He also indicated that he did not have any recollection of ATF's efforts to recruit Kingery as an informant or of having any further involvement with the matter.

Also on June 17, Clark sent an e-mail to Shaw updating him on the June 16 interview of Kingery. In the e-mail, Clark stated: "[t]he Yuma guys along with ICE are signing [Kingery] up as a cooperating defendant to attempt to do some work in [California] on what [Kingery] says is a machinegun dealer." Clark continued:

The only charge that the Gov't has at this point is the exportation of ammunition, he had 1500 rounds of pistol ammo, when CBP arrested him. The AUSA is already heming [sic] and hawing about charging that. Also, [Newell] has told the PGR [representative] . . . to seek prosecution of Kingery through his contacts in Mexico."

He added: "Frankly, I was not needed yesterday nor was I particularly welcomed at the interview. . . . If there was something for me to add to the interview then I missed it. There is no actionable information that can be used in Mexico"

Beatty told us that he had several telephone communications with Kingery in the days following the June 16 interview, including after Kingery returned to Mexico. The communications related to the potential sale of the military grade weapon by an individual in California that Kingery told agents about during his June 15 interview, as well as a large cocaine trafficking deal. The ATF case management log reflects calls by Beatty with Kingery on both Thursday, June 17, and Friday,

⁷¹ We interviewed Hoover briefly about ATF's investigation of Kingery while conducting our review of Operation Fast and Furious. We did not conduct a follow-up interview with Hoover regarding Kingery because he retired from ATF.

June 18, as well as Beatty updating the ICE agent on June 18 regarding his calls with Kingery.

Beatty lost contact with Kingery on Monday, June 21, 2010, when he was unable to reach him by telephone despite several attempts to do so, and learned from Kingery's mother that Kingery had not returned to her house the day before. The case management log also reflects that Beatty contacted the ICE agent on that same day and "[d]iscussed potential problems and charges."

The final entry in the ATF case management log for June 21 reflects a call from Beatty to Hurley "ref case and meeting." According to the entry, "Hurley advised he was busy this week and would not be available for meeting with Forcelli, Needles, Beatty, and ICE SAs as previously discussed. He advised he would tell Beatty when meeting would be and should be available to meet next week." Additionally, as noted above, on the morning of June 21, Forcelli's cell phone records reveal a two-minute telephone call by him to a criminal investigator in another U.S. Attorney's Office. Forcelli, who recalled this conversation taking place on June 15, told us that he placed the call as a result of his frustration with Hurley's refusal to charge Kingery.

Although Kingery was never signed up by ATF as a confidential informant or charged as a defendant by the U.S. Attorney's Office, several ATF documents drafted after the border stop refer to Kingery as being a "CI" (confidential informant) or a "cooperating defendant." For example, Beatty sent Forcelli an e-mail on April 12, 2011, containing a timeline of events in the Kingery investigation including the following:

06/21/2010 – KINGERY becomes hard to reach on the phone and it appears that he may become unworkable as a CI.

In addition, Beatty referred to Kingery as a "CI" in Outlook and ATF management log entries relating to meetings and contacts with Kingery that occurred on June 17 and 18, 2010.

4. Analysis

We found that the decision to release Kingery on June 15 and not to charge him with a crime was primarily attributable to AUSA Hurley's resistance to bringing charges that night. Hurley told us that he did not support charging Kingery on a complaint because of the evidentiary issues identified above, the relatively low sentence that Kingery was facing based on the charges Hurley thought he could bring, and because ATF had told him that they wanted to "work" Kingery as an informant. We did not find Hurley's explanations persuasive.

As we described earlier in this report, one of the challenges Hurley told us he faced in prosecuting Kingery under the AECA for exporting munitions was establishing specific intent – that is, proving that Kingery was aware his actions were unlawful. However, during interviews with agents on June 15, Kingery admitted that the munitions in his vehicle were his, that he was transporting them across the border, and that he knew it was illegal to export at least some of the

items in the vehicle. Moreover, the fact that Kingery had hidden the contraband in his tire was strong corroborating evidence of his state of mind. He also lied to the agents when he initially denied having any munitions in the car. Thus, a defense argument at trial that Kingery lacked specific intent was no longer viable after these discoveries and admissions.

Hurley also had some doubt about the status of the grenade hulls – whether they were export-controlled munitions or mere “novelty” items. However, there was no question that the 2,500 rounds of ammunition were export-controlled, that they were hidden in the vehicle’s spare tire, and that Kingery also had made false statements to the agents in violation of 18 U.S.C. §1001. The prosecution of Kingery on AECA charges would have still required the U.S. Attorney’s Office to obtain the formal determination from the U.S. Department of State that the ammunition was on the U.S. Munitions List. The request for that determination certainly could have included a request for additional determinations regarding the grenade hulls and fuses. With those additional determinations in hand, a new complaint or an indictment could have included these additional charges and carried a more significant potential sentence for Kingery if convicted.

It appears that Hurley saw the available choices on June 15 as either charging Kingery with a relatively low level offense or releasing him without charges in the hope of gaining information and cooperation and, perhaps, indicting him at some later date thereafter on charges that carried a potentially longer jail sentence. Needles told us that he argued to Hurley on the evening of June 15 that those choices were not mutually exclusive, and the ability to obtain helpful information and assistance from Kingery may even have been enhanced by the filing of charges against him that evening, particularly given ATF’s earlier unsuccessful attempt to speak with Kingery in the absence of charges. Hurley was unpersuaded and, as described in this section, Needles directed the agents to conduct a more extensive interview of Kingery.

After receiving the results of the second interview, Needles, based upon his earlier conversation with Hurley where Hurley would not approve ATF’s arresting Kingery, directed Forcelli to tell Smith that Kingery should be released that evening and asked to return the next day for further interviews. Forcelli passed this direction along to Smith and told him that it was “ATF’s position that Kingery should be released and requested to appear the following day for a follow-up interview.” After Needles had given this instruction to Forcelli, he called Newell and then called Hurley.

In sum, we were unpersuaded by the explanations we received from the U.S. Attorney’s Office for the decision not to arrest and charge Kingery on June 15, or even on June 16. Indeed, as discussed below, even after Kingery failed to remain in contact with ATF, was located on June 22 attempting to re-enter the United States, and made additional admissions about his illegal conduct, Hurley continued to refuse to charge Kingery despite ATF’s unequivocal request at that time for his arrest. We also took note of the fact that Hurley apparently was too busy during the months preceding the June 15 stop of Kingery to handle investigative requests from the agents for assistance with an MLAT and with requests for tax orders, and

also could not find time to even meet with the ATF agents in mid-June, as had been previously agreed. This unavailability to assist with the Kingery case continued, as we describe in the remaining sections of the report, until Hurley was removed from the case in May 2011.

Several ATF witnesses told us that Hurley's resistance to arresting Kingery on June 15 because of the short sentence for a conviction and his doubts about whether the grenade hulls were export-controlled were the reasons that ATF decided to "work" Kingery. However, Hurley told us that he did not recall anyone at ATF telling him they wanted Kingery arrested, despite Needles' statements to the contrary. Needles also stated that he did not recall a conversation with Hurley in which the two discussed "working" Kingery. Hurley said that based on his discussions with agents, ATF appeared eager to "work" Kingery and obtain more information from him. Hurley said he supported this approach in light of the short sentence Kingery would face for attempting to export the ammunition. In any event, faced with a prosecutor who appeared unwilling to bring charges against Kingery, ATF was left with the options of elevating its frustration with Hurley to his supervisors, obtaining what cooperation they could from Kingery, or just determining that Kingery could not be worked and releasing him. Under the circumstances, it was not unreasonable for ATF to try obtaining Kingery's cooperation though, as detailed below, it was not long before it proved unsuccessful.

Although we found evidence suggesting that some ATF and ICE agents disagreed with Hurley at this time about whether to arrest Kingery, it appears that Needles, believing it was the best option available to ATF, acquiesced to Hurley's position on not charging Kingery on June 15 and that Newell was supportive of the decision and communicated his support to U.S. Attorney's Office management. We did not identify evidence that Needles or Newell elevated the dispute either to Hurley's supervisors at the U.S. Attorney's Office or to officials at ATF Headquarters. To the contrary, on June 16, Newell praised Hurley to then-U.S. Attorney Burke as being "all over [the case]" and indicated to both Burke and McMahon in emails later that same day that ATF was "going to see how long we can use [Kingery]." In his e-mail to McMahon he added that "We are going to run with it and see if he'll work out before we file on him."

Neither Newell's nor other contemporaneous communications by ATF's senior management identified any disagreement with Hurley at that time, or expressed any reservations about the approach of releasing Kingery in order to conduct further interviews to obtain additional information. The approach being supported at the senior levels of ATF was to "work" or "use" Kingery in lieu of arresting and charging him on June 15 or 16, an approach that was consistent with Hurley's initial position. Far from opposing this path, Newell actively encouraged it, working to keep the U.S. Attorney and his office on "ATF's side" in the apparent hope of pursuing a larger ATF-led case.

We also found no evidence that ICE management complained to the leadership of the U.S. Attorney's Office about Hurley's decision to not bring the readily available charges under the AECA against Kingery on June 15 or 16, despite

ICE Agent Territo's unsuccessful effort to persuade Hurley to charge Kingery on the evening of June 15.⁷² To the contrary, e-mails of both Newell and ATF Agent Clark stated that ICE was supportive of the plan to use Kingery as an informant.

We strongly believe that in light of the seriousness of Kingery's munitions offenses, his connection to a drug cartel, the cartel's efforts to involve him in an assassination in Phoenix, his residence in Mexico, and his repeated border crossings into Mexico without detection from law enforcement, Kingery represented both a danger to the community and a risk of flight when he was first stopped on June 15. Indeed, by the time Kingery was stopped by CBP agents at the San Luis POE, both ATF and the U.S. Attorney's Office were aware in connection with the two prior unsuccessful marking and surveillance operations that Kingery likely had already transported across the border 120 grenade hulls with fuse assemblies, 100 fuse assemblies, 203 spoons (levers), 100 hand grenade pins, 4,000 safety clips, and 4,000 spring kits. ATF was also aware by June 15 that Kingery's activities in Mexico, according to a witness Beatty interviewed, included providing assistance to drug cartels in the form of building AK-47-style rifles and manufacturing improvised explosive devices. And as we described in this section of the report, when Kingery was stopped on June 15 by CPB agents, he had in his possession 114 grenade hulls, 114 grenade fuses, and more than 2,500 rounds of ammunition. He also was an admitted regular cocaine user, yet there is no evidence that Hurley or ATF management considered this fact in deciding whether to release him or to try to use him as an informant.

In short, Kingery was a dangerous individual who the U.S. Attorney's Office and ATF had a responsibility to stop and either charge immediately or, at the very least, take other action to ensure meaningful oversight or control over his movements. Such action would not have precluded soliciting Kingery's cooperation in providing information about others' criminal activities and, indeed, it may well have facilitated it. We believe that failing to take either of these actions demonstrated an inadequate consideration of public safety. As we describe in the next section, the lack of urgency by the U.S. Attorney's Office in bringing charges against Kingery continued for nearly another year.

E. Kingery's Lack of Cooperation and the Delay by the U.S. Attorney's Office to Prosecute Him: June 2010 to September 2011

Following the decision to not arrest Kingery on June 15 and 16, and ATF's loss of contact with him on or before June 21, ATF made several unsuccessful requests over the next 15 months to the U.S. Attorney's Office to indict Kingery. In this section, we describe the events surrounding the U.S. Attorney's Office's delay in taking any prosecutorial action against Kingery.

⁷² Given our lack of access to ICE e-mails, we could only assess whether ICE officials complained to the U.S. Attorney's Office (whose e-mails we had) and were unable to determine whether this issue was elevated within ICE.

1. Facts

On June 22, 2010, after ATF had lost contact with him, Kingery attempted to re-enter the United States from Mexico and was stopped at the Calexico POE by CBP. CBP agents contacted Beatty and he and an ICE agent traveled to the POE to interview Kingery. During this meeting, Kingery provided information relating to the illegal activities of cartel members in Mexico.⁷³ According to Beatty, Kingery admitted at the interview that he had been using cocaine and alcohol. Beatty also told us that he concluded at that time that he could not work with Kingery because he could not corroborate Kingery's information and Kingery was becoming more distant. Furthermore, Beatty told us that there was nothing he could do to prevent Kingery from returning to Mexico.

Beatty told us that on that same day he spoke with Forcelli and Hurley separately and told each of them that Kingery was "completely unworkable," "out of his mind," and that there was "nothing [ATF] could do with [Kingery]."⁷⁴ The entry in Beatty's case management log for that day indicates that Beatty advised Hurley that ICE wanted to immediately arrest Kingery on a complaint. According to the case management log, Hurley "advised that Kingery would be indicted in future." The log entry further states that Hurley needed for the indictment Kingery's licensing status, the State Department certified declaration, and a determination of the origin of the grenade components. It concluded, "Hurley advised that Kingery could potentially be charged w [sic] export of ammo and grenades."

Hurley stated to us that Beatty was asking him to "approve a complaint when no additional information [had] been provided to [the U.S. Attorney's Office]." Hurley added that arresting Kingery on a complaint would have not likely led to Kingery being held on bond and he would have had to indict Kingery within 30 days, and that he thought ATF needed to "work up their case so that [Kingery] could be indicted." After Beatty consulted with Hurley, Kingery was released and not charged with an offense.⁷⁵

The next entry in the case management log for June 22 further indicates that one of the ICE agents had met with Beatty and indicated that his superiors at ICE had indicated that he "needed to be handling Kingery as a CI and that ICE would be taking the lead on the case and ATF would assist." According to Forcelli's log, Beatty replied that the "case originated with ATF, would be handled by ATF, and charges would not proceed w/o AUSA concurrence and ATF cooperation." A

⁷³ Kingery provided similar information in subsequent meetings with agents between June and September 2010.

⁷⁴ ATF records indicate that there was no contact between Beatty and Hurley between June 16 and June 21, 2010, when Hurley informed Beatty that he was too busy to meet with Needles, Forcelli and Beatty that week, as he indicated he would do in his e-mail of June 16, 2010.

⁷⁵ ATF records indicate that Beatty had 13 additional contacts with Kingery after his detention at the border on June 22 in which Kingery sought to meet with Beatty or provided information relating to cartel activity. All of these contacts were by telephone or through text message and ended on September 9, 2010.

subsequent entry for that same date reflects that Forcelli met with Kingery after he was stopped, and that Kingery “advised that he was concerned that ICE was involved with case and that he did not want to work for or provide information to them.”

As noted previously, phone records indicate that on June 21, June 23, and June 24, 2010, Forcelli called a criminal investigator in another U.S. Attorney’s Office. According to Forcelli, he contacted the other U.S. Attorney’s Office because he wanted to determine whether the other U.S. Attorney’s Office would be willing to prosecute Kingery on drug conspiracy charges. As discussed previously, both the criminal investigator and an AUSA told us that they recalled speaking to Forcelli about ATF’s investigation of Kingery and perhaps about prosecuting him through their U.S. Attorney’s Office. As further described below, in September 2010, Forcelli and his supervisor, Needles, had additional discussions with a prosecutor in that U.S. Attorney’s Office about charging Kingery in light of Hurley’s continued failure to do so.

According to Hurley, it was his practice when he had a disagreement with an agent to advise his supervisor – Rodgers – of the situation. According to both Rodgers and Hurley, Rodgers had little direct involvement with Hurley’s cases and would only get involved if there were questions or issues that he could assist resolving.⁷⁶ Hurley wrote Rodgers an e-mail following his call with Beatty on June 22, informing Rodgers that Kingery had been stopped at the border attempting to re-enter the United States and that he was about to be interviewed. According to the e-mail, Beatty told Hurley that “although Kingery had provided some information, he was now not being as helpful as he said he was going to be and that he had turned off his cell phones.” Hurley then described the reasons he had provided Beatty for his belief that charging Kingery through a criminal complaint was inappropriate at that time. Hurley identified four reasons:

1. Hurley and ATF had previously discussed indicting Kingery rather than arresting him on a complaint if Kingery proved uncooperative;
2. That questioning of Kingery on June 15-16 likely involved some form of 5th Amendment complication due to ATF and ICE questioning Kingery on matters in which Kingery had previously invoked and retained counsel;⁷⁷

⁷⁶ Rodgers stated that he “supervised the AUSAs, I didn’t supervise their cases unless they asked for [his] input or help.” After reviewing a draft of this report, Rodgers submitted comments to the OIG in which he stated that before joining Rodgers’s unit, Hurley was named Senior Advisor and Trial Attorney for Firearms by U.S. Attorney Burke and had a direct reporting relationship to Burke.

⁷⁷ Kingery had previously invoked his right to counsel in January 2009 in response to ATF agents’ questions about his purchase of AK-47 rifles. As described earlier, Beatty and Smith, working with a local police department, executed a search warrant at the residence of Kingery’s sister and attempted to interview Kingery at that time.

3. ATF had not provided the U.S. Attorney's Office with reports of its interview of Kingery or an accurate accounting of the "munitions and so-called munitions" seized on June 15; and
4. There was no determination that Kingery did not possess an export license with regard to the munitions seized on June 15.

Hurley also stated in his e-mail:

As we left it, Beatty understood that approval of a complaint was very unlikely and ill-advised, but held out that once Kingery was interviewed [on June 22], there may be a heretofore unknown and compelling public safety issue that would mandate an arrest and complaint.

Hurley also told Rodgers in the June 22 e-mail that Beatty had not alerted the U.S. Attorney's Office that Kingery had started showing signs of noncompliance on June 18. Hurley also stated in the e-mail, and in his testimony to us, that he told Beatty that ATF should provide the U.S. Attorney's Office with all reports, interviews of Kingery, and an accurate accounting of the evidence and that the U.S. Attorney's Office would then "see if [it] wanted to indict [Kingery]." Hurley's e-mail concluded by stating that Beatty "sounded crestfallen, but said he understood . . . unless, of course, he finds a compelling public safety issue." Hurley told us that Beatty did not provide him any new information during their telephone call on June 22 that convinced him there would be a reason to charge Kingery by criminal complaint at that time.

We asked Hurley whether he believed Kingery was a risk to public safety. Hurley told us that ATF was in his view using Kingery as an informant, and because it "[did not] look like [Kingery was] up to anything further," Hurley was of the opinion that Kingery did not present a "compelling public safety issue" at that time. Hurley also said that he told Beatty that if Beatty thought Kingery was "up to something" and arresting Kingery would prevent him from harming others, Beatty should make the arrest and that he would "find some way to charge [Kingery]" with an offense.

Two days later, on June 24, 2010, the Chief of the U.S. Attorney's Office's Criminal Division circulated an e-mail to Rodgers, Hurley, and others in the U.S. Attorney's Office, as well as copying Burke, regarding the June 15 grenade seizure and asking if anyone knew about it. Hurley responded and stated:

This was the Kingery seizure. ATF and ICE came to an agreement that they were going to work Kingery a bit and see what he could give them. I spoke with ATF SA Walter Beatty a couple of nights ago. He said that Kingery was becoming less cooperative and was going to talk to him at the port at Calexico where he was detained crossing back into the U.S.

I told [Beatty] to work up the 22:2778 charges [under AECA] and submit him for indictment (as previously discussed) if he isn't going to work out as a CI.

We asked Rodgers about his view of the investigation at this time. Rodgers told us that Hurley was the "authoritative voice" in the U.S. Attorney's Office on the AECA and that he trusted Hurley to overcome any hurdles that may have presented themselves or to arrest Kingery on a criminal complaint if Kingery posed a threat to public safety. Rodgers said Kingery would have presented a public safety concern if ATF had learned that Kingery was not cooperating and was once again attempting to smuggle grenade hulls into Mexico. He also told us that in that event the U.S. Attorney's Office would have "act[ed] quickly" and charged Kingery through a criminal complaint. Rodgers said it was his understanding, based on the information provided to him by Hurley, that ATF Agents – none of whom Rodgers spoke to directly – agreed with Hurley's decision to not arrest Kingery on June 22 and to not charge him by a criminal complaint, and that Kingery was continuing to cooperate.

On June 28, 2010, Beatty emailed Forcelli, copying Hurley and Smith, and indicated that he had spoken with ATF in Mexico City and thought "it would be very important for us to have a meeting as soon as possible." He described the possible ways to proceed as: "1) continue working Kingery as a cooperating defendant and keep the information to Mexico limited or 2) prosecute Kingery both here and there and forget the possibility of going any further with the case." He added: "I know [Hurley] has been very busy lately, but I think the sooner we address these issues the better."

On July 8, 2010, 16 days after Beatty interviewed Kingery at the Calexico POE, Beatty submitted to the U.S. Attorney's Office an indictment recommendation that the U.S. Attorney's Office charge Kingery with false statements in connection with the acquisition of a firearm, conspiracy, narcotics conspiracy, and a violation of the AECA. ATF included in the recommendation some of the materials Hurley had requested during the June 22 telephone call with Beatty, but did not include the necessary export license or munitions determinations, items ATF had not obtained earlier in the investigation despite the U.S. Attorney's Office's and NSD's instructions to do so.

Hurley told us that in order to indict Kingery for violating the AECA, he needed to know that a person from the State Department would testify that the grenade components Kingery possessed on June 15 were munitions and that Kingery did not have an export license. He told us that ATF did not provide a finalized indictment recommendation to the U.S. Attorney's Office until September 2010, and that even then ATF did not provide the State Department certifications. We asked Hurley why he would need a State Department certification if he could rely on a witness to testify regarding the certification. He told us that he would want "something in writing" stating that the items seized from Kingery, upon which the indictment would rest, were on the U.S. Munitions List and not a determination based upon a description of those items by the agent. Furthermore, he stated that

he would want to have the actual evidence he would use at trial to present to the Grand Jury.⁷⁸

According to Rodgers, during the period from June 2010 to August 2010, no one from ATF complained to him about Hurley's handling or supervision of the Kingery matter. Rodgers told us that he did not know of or see the indictment recommendation that ATF submitted for Kingery. He said that Hurley was responsible for reviewing, analyzing, and distributing indictment recommendations that ATF submitted to the U.S. Attorney's Office for prosecution.

On August 29, 2010, the Mexican military received an anonymous tip regarding four suspicious vehicles parked on the street in the outskirts of Tijuana. Mexican soldiers detained six individuals and during a search of the vehicles recovered, among other weapons, several live grenades. The next day, the Mexican military contacted the ATF office in Tijuana to request assistance in identifying and tracing firearms and grenades seized from the six suspects. Soon thereafter, Beatty and other ATF agents examined the items and identified two grenades that contained markings similar to those applied by the ATF Laboratory in November 2009 to the grenade parts purchased by Kingery.⁷⁹

An entry in the ATF case management log on September 2, 2010, reflects this recovery in Mexico and states that Hurley was advised of the "new case status." In addition, the timeline that Beatty sent Forcelli on April 12, 2011, included the following entry for September 2, 2010:

possible grenade recovery in Mexico; AUSAs Hurley and Knowles notified. AUSAs hesitant to prosecute under narcotics conspiracy, etc. They are also hesitant to prosecute regarding grenade hulls. They will prosecute for AECA for ammunition seized southbound at POE in June. Hurley advised that he was still working on ex-parte Tax order discussed in June, 2010.

⁷⁸ According to the Department, the Counterespionage Section Monograph on USA Book presumptively requires a certification in writing prior to indictment. The monograph states,

Before seeking a search or arrest warrant, or filing a complaint or indictment in any AECA case, or any type of export case, it is necessary to obtain a licensing determination from the appropriate licensing authority in writing. A licensing determination is an official determination by the licensing authority that the equipment in question required a license and that the defendant in question failed to obtain the license. The State Department has varying levels of licensing determinations, including: (1) an initial or preliminary determination based on the defendant's prior licensing history and information that the licensing officer obtains from law enforcement; (2) a second-level review that is typically required for indictments; and (3) a certified licensing determination that is generally prepared only for trial. The Counterespionage Section, National Security Division, can assist in obtaining the appropriate licensing determination.

⁷⁹ The markings on the two grenade hulls were consistent with the markings from the first ATF marking and surveillance operation in November 2009; however, they could not be processed in the field to definitively determine if they were, in fact, from that operation.

In addition, this recovery and identification of grenade hulls believed to have been exported by Kingery was reported to the Office of the Attorney General through the Office of the Deputy Attorney General in the weekly report submitted by ATF for the week of September 13 to 17, 2010. The report stated:

Additional analysis revealed that the grenades are suspected of being part of the lot that the ATF laboratory marked . . . in an effort to track grenade hulls smuggled into Mexico by [Jean Baptiste] Kingery.

The report did not contain additional information about the Kingery investigation, and we did not identify any other reports provided to the Office of the Attorney General or the Office of the Deputy Attorney General about the case during the investigation.

Beatty told us that, in approximately September 2010, at around the time ATF was consulting with this other U.S. Attorney's Office, he and Forcelli personally delivered an updated indictment recommendation to Hurley and Knowles as well as the recordings of ATF's and ICE's interviews with Kingery on June 16, 2010. According to Hurley, Forcelli advocated charging Kingery with a narcotics conspiracy charge based solely on Kingery's June 16 admissions that he supplied grenade components to a Mexican drug cartel and taught members how to build AK-47s. Hurley told us that he did not believe Kingery's admissions were enough to support a narcotics conviction and that he wanted to pursue only the AECA charge for exporting the grenade components and ammunition. Hurley also stated that ATF had by September still not obtained the requisite State Department certifications.

We were advised by Needles that, in September 2010, he and Forcelli spoke on the telephone with an AUSA in the U.S. Attorney's Office that Forcelli had previously contacted in June 2010. During this telephone call, Needles and Forcelli described the Kingery investigation and inquired if that Office would be interested in prosecuting Kingery under a narcotics conspiracy theory. According to Needles, the AUSA was interested, but she could not establish a connection between Kingery's activities in Arizona and their jurisdiction that would allow her Office to pursue the matter. On September 2, 2010, Forcelli e-mailed an investigator in that U.S. Attorney's Office and stated, "[w]ish you guys had venue. The [U.S. Attorney's Office] here only wants to charge the export violation."

On September 20, 2010, Beatty and an ICE agent with whom Beatty was communicating regarding Kingery spoke because neither had heard from Kingery since at least September 9. According to an ATF document, the ICE agent told Beatty that he was ready for the AUSA to indict Kingery. One week later, the ICE agent submitted a request to the Department of State's Directorate of Defense Trade Controls for the pre-trial certification for the items seized from Kingery's automobile on June 15, 2010. About one month later, on October 18, 2010, the ICE agent advised Beatty that he was still waiting on the pre-trial certifications from the State Department.

On December 21, 2010, the State Department Directorate of Defense Trade Controls provided a final pre-trial certification to the ICE agent. The written

certification shows that a copy of the pre-trial certification was sent to Hurley that same day, although Hurley told us that he recalled receiving the copy in February 2011.⁸⁰ The State Department certification states that MK-II, M-67, and M-61 grenade hulls, and M213 and M228 fuse assemblies are covered by Category IV(h) of the USML and are export controlled.

We found no evidence that receipt of the certification prompted Hurley to begin drafting or taking other steps toward an indictment, or that there was any consideration given to adding another prosecutor to the case to speed the indictment (Knowles had by this time transferred to another unit in the U.S. Attorney's Office). Hurley told us that he was very busy during the time period with the prosecution of ATF's firearms trafficking investigation Operation Fast and Furious, which was indicted on January 19, 2011.⁸¹

About one month later, on February 22, 2011, the ICE agent sent Hurley another copy of the pre-trial certification stating that the grenade components were export-controlled and confirming that Kingery did not have an export license. The ICE agent also sent an e-mail to Beatty the same day reporting that Hurley had another case – Operation Fast and Furious – that prevented him from looking at the Kingery matter for the time being. Beatty forwarded the ICE agent's e-mail to Forcelli stating, "KINGERY is indictable now, however, [Hurley's other case] is our roadblock."

On March 9, 2011, Burke sent an e-mail to Hurley inquiring about the Kingery case. Hurley responded that he had received the State Department certification in December, but had not had the time to indict the case. In another e-mail sent that same day, Hurley explained to Burke the certification process and stated that the "process takes quite a bit of time." Hurley also sent an e-mail to Rodgers on March 9 that stated:

This would be an awesome case to indict right now because the investigation included ATF allowing Kingery to cross grenade parts into Mexico over the AUSAs objections. ATF marked the grenades . . . so that when they were recovered . . . , [REDACTED] [REDACTED] they would be able to link it to the grenade bodies that Kingery purchased.

⁸⁰ Hurley sent an e-mail to Burke on March 9, 2011, stating that the ICE agent provided the final pre-trial certification to Hurley in December 2010. Hurley told us that while he said in this e-mail he received the certification in December 2010, he has no recollection of doing so and that he recalled receiving it in February 2011.

⁸¹ As we described in the Introduction to this report, Operation Fast and Furious was conducted by the ATF's Phoenix Field Division from approximately October 2009 to January 2011. Hurley was the prosecutor assigned to the investigation. As described in our September 2012 report on Operation Fast and Furious, despite the ATF's and the U.S. Attorney's Office's decision in August 2010 to bring the investigation to a close, no subject was arrested or charged until December 2010 and an indictment was not obtained until January 2011. We found that given the danger to the community posed by the subjects and the crimes they were alleged to have committed, Hurley and the U.S. Attorney's Office should have demonstrated urgency for bringing charges sooner.

Hurley told us that his statement in this e-mail was intended to be sarcastic in light of reports in the news media claiming that ATF "walked" guns into Mexico during Operation Fast and Furious. He also said that he believed the Kingery case, unlike the Fast and Furious case, highlighted the fact that ATF purposefully allowed weapons to cross into Mexico and that it would further damage ATF's credibility.

On March 20, 2011, Mexican soldiers exchanged gunfire with members of a drug cartel in Colima, Mexico. After the exchange ended, the soldiers recovered 15 live hand grenades and 6 rockets. On April 1, 2011, several ATF agents were allowed to examine the recovered munitions. The agents determined that four of the grenades had components that were previously marked by ATF in connection with the Kingery investigation. On April 5, 2011, Beatty learned about the possible recovery of marked grenades in Colima. According to ATF documents, Beatty advised Newell that Kingery had not yet been indicted and that Hurley had advised him that he was too busy to assist in an indictment of Kingery at that time.

On April 19, 2011, Beatty called Hurley to inquire about the status of the Kingery indictment. In an e-mail Beatty sent to Forcelli that same day summarizing the conversation, Beatty said that Hurley advised he was busy with an unrelated investigation. The e-mail continued:

[Hurley] also advised that, with regard to the [Kingery] case, the "official answer" was that it was under review and would be for the foreseeable future. I asked him if he thought KINGERY could ever be indicted, but he advised that right now he could not indict him and that he had issues with the State Department determination that the grenade hulls were actually munitions, etc. He advised that, if KINGERY could be indicted, it would not be for at least 60 days. He also advised me that any questions I had about the case should be directed to ASAC Needles and he recommended that I call Needles and not e-mail him.

Hurley told us that he was busy with the prosecution of the Fast and Furious case during this period and did not have time to work on the Kingery case. According to Hurley, he asked Rodgers to reassign the Kingery case to another prosecutor.⁸²

Rodgers told us that sometime between the March 9, 2011, e-mail from Hurley and early April 2011, he met with Hurley and discussed reassigning the Kingery case. Rodgers told us that he decided to reassign the case because he believed it needed a resolution and this was not going to occur with Hurley handling it. Rodgers told us that Hurley agreed to the case being reassigned.

On May 5, 2011, the ATF Phoenix Field Division's then Acting SAC Tom Brandon, Forcelli, two acting ASACs, and Division Counsel met with Rodgers and other attorneys from the U.S. Attorney's Office. According to individuals who

⁸² After reviewing a draft of this report, Hurley submitted comments to the OIG in which he stated it was his recollection that it was in March 2011 that he requested the Kingery case be reassigned and that he turned the case file over to Rodgers at that time.

attended the meeting, ATF requested that the U.S. Attorney's Office reexamine the Kingery case and assign a new prosecutor to the matter. Rodgers told us that ATF's "unhappiness with Emory Hurley was evident at the meeting" and it was clear that ATF viewed the Kingery case as being "better off" without Hurley. Rodgers assigned another AUSA – Richard O'Connor – to the Kingery prosecution shortly after this meeting and removed Hurley from the case.⁸³

The next month, on June 22, 2011, O'Connor submitted a draft indictment to his supervisors and, as required by the U.S. Attorney's Manual for prosecutions under AECA, to NSD. On July 8, 2011, NSD approved the indictment and advised O'Connor to also "firm up" money laundering charges. On July 11, 2011, O'Connor submitted a revised draft indictment to Burke, Rodgers, and the Chief of the U.S. Attorney's Office's Criminal Division for approval. On July 25, August 2, and August 3, 2011, O'Connor submitted additional revised indictments and prosecution memoranda to Rodgers based on edits made by management at the U.S. Attorney's Office. However, O'Connor never received final approval from U.S. Attorney's Office management to indict the case.

In mid-August 2011, O'Connor and Beatty met with Mexican prosecutors. Beatty told us that there were two purposes for the meeting: first, to ensure that the Mexican government was pursuing Kingery and, second, to dispel a rumor emanating from the U.S. Attorney's Office that the ATF had not communicated with the Mexican government regarding its investigation of Kingery. O'Connor told us that Mexican officials at the meeting informed him that they were "fully aware" of Kingery and had copies of ATF's entire Kingery file.

On August 30, 2011, amid public controversy over Operation Fast and Furious, Burke resigned as U.S. Attorney for the District of Arizona and the Department removed ATF Acting Director Melson from his position. The next day, August 31, 2011, the Executive Office for United States Attorneys advised the Office of Deputy Attorney General that U.S. Attorney's Office for the Central District of California was willing take over the responsibility of prosecuting Kingery from the U.S. Attorney's Office for the District of Arizona.

That same day, August 31, Mexican authorities arrested Kingery and charged him with violating that nation's organized crime laws. Mexican authorities also executed search warrants which resulted in the recovery of live grenades, grenade components, and, according to Forcelli, "enough explosives to manufacture over 500 grenade[s]."

On September 2, 2011, the Executive Office for United States Attorneys, Office of the Deputy Attorney General, and U.S. Attorney's Office for Arizona began the process of transferring responsibility for prosecuting Kingery to the U.S. Attorney's Office for the Central District of California.

⁸³ Richard O'Connor is a pseudonym.

One week later, on September 6, 2011, the Clark Street Journal published an article entitled, "Grenades Case Hits Justice," about the Kingery case. The article described the dispute between ATF and the U.S. Attorney's Office regarding the detention and subsequent release of Kingery on June 15 and 16, 2010.⁸⁴

Two days later, on September 8, 2011, the Department officially reassigned responsibility for prosecuting Kingery to prosecutors from the U.S. Attorney's Office for the Central District of California.

As of March 2014, the Mexican government's prosecution of Kingery for violating Mexican organized crime and trafficking-in-arms laws is ongoing.

2. Analysis

For the reasons discussed in the previous section, we concluded that under the facts and circumstances that existed when Kingery was stopped on June 15, 2010, at the San Luis POE, it was imperative to either arrest and charge Kingery on a criminal complaint, or to take action to ensure oversight or control over his movements. We believe that imperative was even more compelling after Kingery failed to remain in contact with ATF as he was instructed to do following his release on June 16, he was stopped at the border attempting to re-enter the United States on June 22, he admitted to ATF agent Beatty during an interview on June 22 that he had been using cocaine and alcohol, and Beatty concluded on June 22 that Kingery was "completely unworkable" and that there was "nothing [ATF] could do with him." We found Hurley's explanation for not promptly charging or indicting Kingery at this time unpersuasive.

A purported obstacle Hurley identified to indicting the case was the need to obtain certifications from the State Department officially establishing that the grenade components confiscated from Kingery on June 15 were export-controlled under AECA and that Kingery did not possess an export license for the items. The U.S. Attorney's Office first made ATF agents aware of this requirement on October 30, 2009, and NSD confirmed the requirement several days later. By the time of the November 4, 2009, operation, Beatty, Forcelli, Needles, and Newell had been informed of the requirement. Yet ATF agents did not seek to obtain the certifications at that time or at any point prior to the June 15, 2010, border stop for grenade hulls or components that agents knew Kingery had purchased. We believe this would have been a responsible step to take in light of their knowledge of the requirement and the likelihood that Kingery would continue to order similar items.

Even after the confiscation was made incident to the June 15 border stop, ATF agents still did not take steps to obtain the certifications. In fact, the certifications were not requested from the State Department until late September 2010. Though we believe Hurley should have pushed agents more forcefully on the

⁸⁴ See Evan Perez, "Grenade Case Hits Justice," *Clark St. Journal*, September 6, 2011, <http://online.wsj.com/article/SB10001424053111903648204576552511067409414.html> (accessed January 9, 2014)

certification request – by, for example, regularly inquiring with ATF if the request had been made – we concluded that ATF agents were primarily responsible for this delay in light of their long-standing knowledge that the certifications were needed.

However, we also concluded that the delay in obtaining the certifications was not an acceptable explanation for Hurley's inaction on the case. The certifications were not necessary in order to arrest Kingery immediately in light of his admission on June 15, when he was stopped trying to enter Mexico, that he had hidden ammunition and grenade bodies in the spare tire of the car he was driving, and his further admission that same night that he knew it was illegal to transport the ammunition into Mexico. As noted above, in our view, it was imperative that Kingery be charged immediately, given what was known about his illegal smuggling in 2010 and 2011, the circumstances of his detention while trying to leave the United States on June 15, his failure to remain in contact with ATF as instructed, and his admission on June 22, 2010, that he had been using drugs and alcohol.

However, even after Hurley received an indictment recommendation from ATF in July 2010, and again in September 2010, we did not identify any effort by him to draft or prepare for an indictment. Moreover, after Hurley received the State Department certifications in December 2010, we found no evidence that this prompted him to draft or take other steps toward an indictment. As Hurley told former U.S. Attorney Burke in a March 2011 e-mail, he received the certifications in December, but did not have time to indict the case. Hurley said his efforts at that time and in the months that followed were consumed with the Operation Fast and Furious prosecution.

We found that even if Hurley's time was consumed by Operation Fast and Furious, and thus he had no time to indict Kingery, he should have alerted his supervisor that he was not working on Kingery in a timely fashion. We concluded that the case should have been assigned to another prosecutor far earlier than May 2011, when the move was finally made after new executive management at ATF's Phoenix office complained about Hurley's failure to indict Kingery. At the latest, the case should have been reassigned in December 2010 when it was clear to Hurley and U.S. Attorney's Office management that Hurley's time was going to be occupied by Operation Fast and Furious for the foreseeable future. Rodgers's and Hurley's decision that the case needed to be reassigned, which was made in March or April 2011, came months after such action was needed. We also believe that ATF's leadership should have elevated ATF's frustration with Hurley's delays either to his management at the U.S. Attorney's Office, or to officials at ATF Headquarters, long before it finally did in May 2011.

The fact that a new prosecutor assigned to the Kingery case was able to produce a draft indictment within a month of receiving the matter demonstrates that much of the delay in preparing charges against Kingery was unnecessary. Nevertheless, we found it troubling that over two months after this indictment had been submitted to management in the U.S. Attorney's Office, the case had still not been approved for indictment when it was reassigned to another U.S. Attorney's Office in September 2011. Hurley's inaction both before and after the State Department certifications were obtained, the failure to timely reassign the case to

another prosecutor, and the failure of management in the U.S. Attorney's Office to ensure the timely indictment of Kingery even after a draft indictment was prepared by the new prosecutor resulted in Kingery remaining uncharged and unchecked for over one year after being caught on June 15, 2010, and admitting to unlawfully attempting to transport thousands of grenade components into Mexico.

VI. Conclusions and Recommendation

In this review, we examined ATF's investigation of Jean Baptiste Kingery, an individual suspected of smuggling thousands of grenade components from the United States to Mexico where it is believed that he was building live grenades for use by Mexican drug cartels. Our review also examined the role of the U.S. Attorney's Office in the investigation and prosecution of Kingery. For purposes of this report, we divided our examination and analysis into four chronological segments that aligned with the investigation's most significant events: the November 2009 marking and surveillance operation, the January 2010 marking and surveillance operation, the June 2010 detention and release of Kingery, and the U.S. Attorney's Office's failure to produce a draft indictment until May 2011. For the reasons summarized below and detailed in the report's analyses of these events, we found that the investigation of Kingery was seriously flawed in several respects and that Kingery should have been arrested and charged with violating the Arms Export Control Act (AECA) by criminal complaint or indictment long before he finally was. We also believe that some of the decision-making in the Kingery case reflected agents' and prosecutors' inadequate consideration of the risk to public safety in the United States and Mexico created by Kingery's illegal activities.

In the November 2009 and January 2010 operations, ATF agents believed that Kingery was planning to transport grenade hulls into Mexico where they would be manufactured into explosive devices. The agents intercepted grenade components ordered by Kingery, marked the components so that they could be identified later, allowed the components to be delivered to Kingery's mother's house, and then conducted surveillance of Kingery mother's house with the objective of following Kingery as he transported the components.

We found that ATF agents' planning and execution of the November 2009 operation was seriously flawed. As described in Section V.B., the agents attempted to conduct a cross-border operation that was inconsistent with clear guidance from U.S. Attorney's Office prosecutors that grenade hulls were export-controlled items under AECA and that agents should confiscate the items if Kingery attempted to cross the border with them into Mexico. The operation executed by the agents did not include a plan to confiscate the marked hulls, did not include adequate resources to conduct surveillance of the marked hulls delivered to Kingery, and did not include meaningful coordination with ICE, the agency primarily responsible for enforcing AECA, or CBP, the agency responsible for monitoring the border that Kingery was expected to cross. While it is uncertain whether the marked hulls in the November 2009 operation were transported into Mexico, grenade hulls bearing similar markings were recovered by Mexican soldiers in March 2011 following an exchange of gunfire with members of a drug cartel.

The January 2010 operation, in which ATF agents unsuccessfully attempted to coordinate the plan with their Mexican counterparts, was also poorly conceived and executed and was particularly irresponsible in light of the totality of information about Kingery available to agents at that time. For example, agents knew from the failed November 2009 operation that Kingery had entered and returned from Mexico undetected on two occasions within two weeks of taking delivery of the grenade hulls and fuse assemblies. They knew that his residence in Mexico was in a neighborhood "populated by individuals engaged in narcotics activity" and that Kingery had a history of manufacturing machine guns and silencers, and they believed that Kingery was assembling and activating grenades in Mexico for sale to drug trafficking cartels. They also knew that he had ordered thousands more grenade hulls and other components, which they believed he would export, and they had received additional advice through the DOJ National Security Division, the U.S. Attorney's Office, and the Department of State's Directorate of Defense Trade Controls that grenade hulls were, in fact, export controlled under AECA and subject to seizure at the border. They further knew that U.S. law enforcement agents in Mexico were not authorized under law to surveil or detain Kingery in Mexico and that the plan for Mexican law enforcement officers to monitor Kingery once he crossed the border had little chance of succeeding. We concluded that the risk to public safety created by Kingery's unlawful activities made it imperative that agents devise an operation that at minimum called for seizing the thousands of grenade components Kingery had purchased if he attempted to smuggle them into Mexico. Instead, agents planned, again, to allow Kingery to cross the border with grenade components.

However, as described in Section V.C., unlike in connection with the November 2009 operation, where the U.S. Attorney's Office clearly objected to any plan that allowed grenade parts to be brought into Mexico, we found that ATF agents could have reasonably believed the U.S. Attorney's Office concurred with ATF's plan for the January 2010 operation. We concluded that, in light of the U.S. Attorney's Office's unambiguous objection to what agents had proposed to do in November 2009, and the clear expectation that Kingery would again be attempting to smuggle grenade components into Mexico, the U.S. Attorney's Office should have made clear that it remained its position that ATF should not allow grenade components to cross the border and that the items should be confiscated.

Kingery was stopped at the border in June 2010 by CBP agents just days after the ATF case agent finally requested that CBP be on the lookout for Kingery. The circumstances of the stop, and Kingery's admission to agents that he had concealed and was transporting munitions across the border that he knew to be illegal, created circumstances that we believe should have caused the U.S. Attorney's Office and ATF to immediately bring charges against Kingery or, at a minimum, take action to ensure meaningful oversight and control over his movements and the danger he posed to the public. Instead, the prosecutor decided not to charge Kingery and ATF's senior leadership in Arizona did not raise any objections about this to higher levels, instead allowing their agents to attempt to "work" him briefly thereafter as a source of information about the cartels and other suspected criminal conduct.

As described in Section V.D. of this report, one of the senior ATF supervisors, ASAC Needles, who was consulting with the prosecutor during this time, indicated that he pressed for Kingery to be charged and that Kingery thereafter be provided with an opportunity to cooperate, but that the prosecutor declined to do so. The prosecutor, however, said that he did not recall anyone at ATF telling him they wanted Kingery arrested and that he supported what he described as the agents' approach of "working" Kingery, particularly given the short sentence Kingery likely would have received for attempting to export ammunition alone. We were unpersuaded by the prosecutor's explanation for the decision to not arrest and charge Kingery. We concluded that there was not a simple choice between charging Kingery and soliciting his cooperation. Moreover, given the seriousness of Kingery's offenses, his connection to Mexican drug cartels, his residence in Mexico, his drug use, and his repeated, undetected border crossings, Kingery represented a danger to the public and risk of flight and action should have been taken in early June 2010 to try to stop his illegal activities. The U.S. Attorney's Office failed to do this, and ATF's senior management in Arizona acquiesced in that decision. In fact, we found that the Special Agent-in-Charge was, through his e-mails, actively supporting the prosecutor's approach, both with the U.S. Attorney and with his superiors within ATF.

Within a week, however, it became clear to the agents that Kingery was "completely unworkable" and that there was "nothing [ATF] could do with him." At that point, the imperative to charge Kingery was obvious and the agents told the prosecutor unequivocally that they wanted Kingery immediately arrested and charged. We found the prosecutor's excuses for not promptly charging or indicting Kingery at that time unpersuasive, and believe that ATF's senior leadership in Phoenix should have elevated their frustration with the delays to supervisors at the U.S. Attorney's Office or to officials at ATF Headquarters long before they finally did so almost a year later in May 2011.

As we described in Section V.E. of this report, we also found that agents did not timely obtain the certifications from the U.S. Department of State officially establishing that the grenade components seized in June 2010 were export controlled and that Kingery did not possess an export license. However, this delay was not an acceptable explanation for the U.S. Attorney's Office's inaction on the case. We did not identify any effort by the prosecutor to draft or prepare for an indictment even after he received indictment recommendations from ATF in July 2010 and again in September 2010. Even after the prosecutor received the certifications in December 2010, we found no evidence that this prompted him to draft or take other steps toward an indictment. We noted that the prosecutor was occupied during this period with numerous wiretaps and other aspects of Operation Fast and Furious, and that he repeatedly indicated he was too busy to take requested steps to assist the agents in the Kingery investigation or even to meet with them as planned to discuss the matter.

The Kingery case was finally reassigned to another prosecutor in May 2011 following complaints about the delay from ATF executive management in Phoenix. The new prosecutor produced a draft indictment within one month. In short, the original prosecutor's inaction both before and after the agents finally obtained the

requisite certifications, and the delay by the U.S. Attorney's Office in reassigning the case to another prosecutor resulted in Kingery remaining uncharged and unchecked for over one year after being caught and admitting to unlawfully attempting to transport thousands of concealed grenade components ammunition into Mexico, despite the fact that he posed a significant risk to public safety and a substantial risk of flight.

We found that the Kingery investigation suffered from some of the same flaws that we observed in ATF's firearms trafficking investigation, Operation Fast and Furious, and that we described in our report, *A Review of ATF's Operation Fast and Furious and Related Matters* (September 2012). For example, both were relatively complex investigations with international implications that suffered from inadequate resources being devoted to meet the cases' objectives, poor supervision by ATF Field Division supervisors, and insufficient oversight from officials at ATF Headquarters and supervisors and management officials at the U.S. Attorney's Office. Prosecutors and agents in both investigations also failed to take or insist on overt enforcement action against the subjects of the investigations when there was sufficient evidence to do so. Our reviews of both cases concluded that, in failing to act, they did not adequately consider the risk to public safety in the United States and Mexico created by the subjects' illegal activities. We believe the similarities between the investigations reinforce the recommendations in our Operation Fast and Furious report and the importance of ATF's and the Department's efforts to implement those recommendations, particularly with respect to improved guidance for and oversight of sensitive and major cases. We are currently conducting a follow-up review of our Operation Fast Furious report that will evaluate the Department's progress implementing our recommendations.

We also observed in our review of Operation Fast and Furious that there were coordination and information sharing issues between ATF and ICE on the Southwest Border, and we noted in our report instances where ATF resisted having ICE conduct any independent and coordinated investigations of matters related to Operation Fast and Furious through recovered firearms. We found that in light of ICE's jurisdiction over export violations involving munitions and firearms, close coordination with ICE was essential in an investigation that purported to target a Mexican cartel and identify the crossing mechanism the cartel was using to obtain firearms from the United States. We questioned whether adding a single ICE agent to the investigation was sufficient to ensure or promote the coordination that should have occurred, but was lacking.

Our review of the Kingery investigation highlighted ATF's failure to adequately coordinate its operations with ICE. We describe in our report the attitude of some ATF agents that exhibited a resistance to meaningful cooperation with ICE, as well as the tensions that exist between the agencies in investigations of criminal activity that implicate each agency's jurisdiction. Our report also is critical of ATF's failure to request that CBP agents be on the lookout for Kingery at the border in connection with the November 2009 and January 2010 marking and surveillance operations so that agents could detect when Kingery was crossing the border and confiscate the grenade components. We concluded that ATF's approach

regarding ICE and CBP predictably produced poorly conceived and executed operations that did not adequately consider the public safety.

In Section III.A. of this report, we describe ATF and ICE jurisdictional responsibilities and summarize a June 2009 Memorandum of Understanding (MOU) that addresses information sharing between the agencies. In the OIG's report, *Review of ATF's Project Gunrunner* (November 2010), we recommended that ATF provide guidance to field supervisors and agents to better coordinate with ICE, including direction on how to "coordinate all pertinent and necessary information" in areas of "concurrent jurisdiction," as defined in the MOU. Our review of the Kingery investigation should reinforce for Department and ATF leadership the importance of fully implementing this recommendation, and we are aware of the positive steps ATF has been taking on this issue. However, we also believe that the effectiveness of such guidance depends to a significant extent on the attitudes and relationships of the supervisors and line agents at the respective agencies responsible for the investigations, and the active support of the U.S. Attorney's Offices in helping to resolve any disputes in the interests of effective law enforcement and securing the public safety.

The ability to safely and securely enforce the nation's laws along our borders is inevitably seriously harmed if ATF and ICE officials are unable to work together because they are engaged in turf battles with one another. Based on what we were told by agents during this review and the Operation Fast and Furious review, the issues between the two agencies go far beyond these two investigations. We believe the leadership of the Department of Justice and the leadership of the Department of Homeland Security must address them promptly. We therefore recommend that the Office of the Deputy Attorney General, ATF leadership, and the Attorney General's Advisory Committee engage with the leadership at the Department of Homeland Security, ICE, and CBP in an effort to identify and develop opportunities to improve these important and highly consequential relationships.

APPENDIX A



Office of the Deputy Attorney General
Washington, D.C. 20530

October 28, 2014

Mr. Michael Horowitz
Inspector General
U.S. Department of Justice
Washington, D.C. 20530

Dear Mr. Horowitz:

Thank you for your report entitled "A Review of ATF's Investigation of Jean Baptiste Kingery." I appreciate the work by you and your team in reviewing this investigation and drafting this report. The Department of Justice shares many of your office's concerns about the conduct that occurred during this investigation, which occurred contemporaneously with Operation Fast and Furious and appears to have suffered from the same flawed approach to assessing and addressing risk. As you know, in early 2011, even before your office issued its report regarding the Operation Fast and Furious investigation, the Department began taking decisive, extensive action to address these flaws.

We appreciate that the report recognizes that the Department has been actively addressing the issue of risk management in criminal investigations. As one example of our extensive work in this regard, my office formed a Risk Assessment Working Group to draft guidelines to enhance oversight of sensitive and major cases, operations involving otherwise illegal activity, and the use of confidential informants. Based on the work of this group, last year, I issued to all Department law enforcement agencies and federal prosecutors a comprehensive list of baseline risk assessment policies and principles and directed these agencies to implement these concepts into their policies, procedures, and regular training of their line agents and attorneys. I also issued separate guidance to all United States Attorneys and heads of litigating components on a prosecutor's role in overseeing sensitive operations. My office has been following up with each law enforcement agency and U.S. Attorney's Office to ensure implementation of these principles.

Moreover, because strong risk assessment practices and coordination are critical to all law enforcement agencies, I shared this document with Department of Homeland Security Deputy Secretary Alejandro Mayorkas. Our staffs have since been engaged on disseminating these principles with the Department of Homeland Security's law enforcement agencies, to include Immigration and Customs Enforcement (ICE).

In addition, as you note in your report, ATF has made positive steps toward improving coordination and information sharing with ICE. In particular, I understand that ATF participates in the ICE-led Export Enforcement Coordination Center, which provides centralized law

enforcement assistance and coordination for investigations that implicate arms export considerations, to include matters involving the Arms Export Control Act, the International Traffic and Arms Regulations, and certification requests with the State Department's Directorate of Defense Trade Controls. Moreover, in September 2014, ATF hosted the first-ever summit for key ATF and ICE personnel, including Special Agents in Charge of ATF and ICE Southwest Border Field Divisions in Texas and Arizona, to discuss better collaboration and coordination strategies. Additional summits will be held throughout the United States in upcoming months, beginning with areas of operation along the Southwest border.

Finally, in response to the report's reference to the Department's providing your office with grand jury material protected by Federal Rule of Criminal Procedure 6(e), I reiterate that the Department is committed to ensuring that OIG has access to the information it needs to perform effectively its oversight mission. As we have previously discussed, in every occasion where OIG has sought access to Rule 6(e) material from the Attorney General or me—including for this particular report—we have ensured that OIG obtained the requested material.

To assist the Department in resolving the legal issues implicated by the interaction of Section 6(a)(1) of the Inspector General Act and other statutes limiting the disclosure and dissemination of particular categories of sensitive information, the Department has requested a formal opinion from the Office of Legal Counsel (OLC). As I have said before, if the outcome of OLC's legal review does not assure the OIG of the access it needs to do its job, we are willing to work with you to develop legislative remedies. In the meantime, the Attorney General and I are committed to working with you to provide your office with efficient access to all materials necessary to complete your reviews, consistent with existing law.

Sincerely,



James M. Cole
Deputy Attorney General

The Department of Justice Office of the Inspector General (DOJ OIG) is a statutorily created independent entity whose mission is to detect and deter waste, fraud, abuse, and misconduct in the Department of Justice, and to promote economy and efficiency in the Department's operations. Information may be reported to the DOJ OIG's hotline at www.justice.gov/oig/hotline or (800) 869-4499.



Office of the Inspector General
U.S. Department of Justice
www.justice.gov/oig