

**GALLAGHER & KENNEDY**

P.A.

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February 1, 2012

**VIA SERVICE OF PROCESS AND  
CERTIFIED MAIL – RETURN RECEIPT REQUESTED AND  
U.S. MAIL – FIRST CLASS POSTAGE PREPAID AND**

U.S. Department of Alcohol, Tobacco,  
Firearms and Explosives  
Acting Director B. Todd Jones  
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Washington, DC 20226

U.S. Department of Justice  
Deputy Attorney General James Cole  
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Washington, DC 20530

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U.S. Department of Alcohol, Tobacco,  
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Thomas G. Atteberry  
Special Agent in Charge  
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**FORM 95 NOTICE OF CLAIM  
AGAINST THE UNITED STATES OF AMERICA**  
(Pursuant to 28 U.S.C. §§ 2401(b) and 2671)

Responsible Federal Agency: United States Bureau of Alcohol, Tobacco, Firearms and Explosives

Claimants: The survivors of Brian Terry: father Kent Terry, Sr. and mother Josephine Terry

Address: c/o Patrick J. McGroder, Esq.  
Lincoln Combs, Esq.  
Gallagher & Kennedy, P.A.  
2575 East Camelback Road  
Phoenix, Arizona 85016  
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Date and Time of Incident: Brian Terry killed December 14, 2010, approx. 11:30 p.m.; ATF wrongful conduct causing Brian Terry's death ongoing since at least January 16, 2010

Location of Incident: Brian Terry killed near Rio Rico, Arizona

Amount of Claim: \$25,000,000.00

## **I. REPRESENTATION**

This firm has been retained by the Terry Family in furtherance of their wrongful death claims against the U.S. Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF") arising out of ATF's wrongdoing, including ATF's failed "Operation Fast and Furious," that led to the murder of Border Patrol Agent Brian Terry. ATF's failures were not only negligent but in violation of ATF's own policies and procedures.

We have included with this notice of claim a completed Department of Justice Standard Form 95 at **Tab 1**. A copy of the retention agreement between the Terry Family and the undersigned attorneys is also attached at **Tab 2**.

## **II. OVERVIEW**

On the night of December 14, 2010, Border Patrol Agent Brian Terry was on a patrol near Rio Rico, Arizona when he was shot and killed by criminals carrying AK-47 type assault rifles. The assault rifles recovered at the scene of Brian's murder had been purchased from a gun shop in Glendale, Arizona on January 16, 2010 by Jaime Avila. Avila was known by ATF to be a straw purchaser for Mexican drug trafficking cartels. ATF had previously observed Avila make multiple illegal straw purchases of weapons, and knew that Avila was illegally and fraudulently purchasing firearms as part of a criminal conspiracy to traffic drugs and commit acts of violence in both the United States and Mexico. But rather than intercepting the firearms and arresting Avila, ATF allowed him to deliver the guns to the Mexican drug cartels. The murder of Agent Terry and other acts of violent crimes were the natural consequence of ATF's decision to let dangerous weapons designed to kill human beings "walk" into the hands of violent drug-trafficking gangs.

Nor was this an isolated incident, or a single case of law enforcement inattention. Rather, the decision to let the guns purchased by Avila "walk" to the cartels was apparently an intentional one, part of a failed ATF plan called "Operation Fast and Furious." Directly contrary to both ATF policy and basic principles of law enforcement, the plan was to let guns bought by straw purchasers for the

drug cartels walk and then observe the ultimate recipients of the guns in order to build a large, complex conspiracy case. But with ultimately thousands of guns purchased by straw purchasers under – at best – occasional ATF surveillance flowing into the hands of criminals, there was no way for ATF to track all of the weapons. The only way that ATF found Operation Fast and Furious firearms again after they had been purchased and delivered to the cartels was when the guns began showing up at crime scenes on both sides of the border.

One of those crime scenes was the scene of Brian Terry's murder. Although potentially dozens of murders in Mexico have been linked to Operation Fast and Furious, Brian is the first known victim in the United States of this nonsensical law enforcement "strategy" of letting dangerous weapons pass directly to violent killers. As the report of a joint Congressional investigation put it, "Fast and Furious has claimed the life of an American federal agent."<sup>1</sup>

The United States is liable to all who have suffered harm as a result of Operation Fast and Furious, including Brian's statutory wrongful death beneficiaries, Kent Terry, Sr. and Josephine Terry (the "Family"). The sum certain that the Family is willing to resolve this claim for is \$25,000,000.00.

### III. BACKGROUND OF BRIAN TERRY AND THE TERRY FAMILY

#### A. Brian Terry

"Hero" is a word thrown around too often and too easily in our society. Brian Terry, however, was a true American hero. He served his country and his fellow citizens his entire adult life. He lived his life to its fullest, pushing himself physically, mentally, and emotionally to be the best that he could be at all times. He literally inspired others around him to be better, whether from talking to them or sometimes just by the example he led. Even among elite federal agents, the pinnacle of law enforcement in this country, his dedication, leadership, physical feats, willpower, and inspiration were spoken of in heroic terms. His untimely, tragic death is a loss for not only the Terry Family, but all Americans.

Brian Allen Terry was born on August 11, 1970 in Lincoln Park, Michigan, a suburb south of Detroit. Brian was the third of Kent and Josephine "Josie" Terry's four children. His older sister Michelle was



<sup>1</sup> Joint Congressional Staff Report prepared for Rep. Darrell E. Issa and Senator Charles E. Grassley, *The Department of Justice's Operation Fast and Furious: Accounts of ATF Agents*, June 14, 2011 ("Joint Report"), at 43.

born on June 4, 1968, older brother Kent Jr. was born on July 24, 1969, and his younger sister Kelly was born on September 30, 1972.

Brian was a beautiful and happy baby. Even as an infant he was not much of a crier or complainer. He was also already an overachiever, walking before he could crawl at around eight to nine months.

As he got older, the character traits that would come to define Brian as an adult began to manifest themselves. From a very young age he was extremely meticulous; his room always had to be clean and his bed was made every morning. His clothes were always neat and color-coordinated; occasionally he would miss the school bus because he was busy making sure his outfit was perfect. In kindergarten, Brian's parents received a call from the teacher explaining that Brian was choosing to stay inside during recess because he wanted to help the teacher clean and organize the messy paint jars in the classroom. This was just how Brian was. Brian was also very intelligent, and would often entertain himself for hours with games and activities of his own invention.



Brian always stood out from his peers due to his sharp mind, his attention to detail, his perfectionism, and because he was a born leader. Brian and his older brother Kent Jr. were very close, and Brian and Kent quickly became the leaders of a group of neighborhood boys. By then the Terrys had moved to Flat Rock, Michigan, another suburb south of Detroit. Their house was on a dead end so the group became known informally as the "Dead End Gang."

Brian and Kent led the Dead End Gang into all sorts of adventures. They built forts in the woods around their house, played baseball on the neighborhood diamond, and once built a soapbox race car they named "Greased Lightning." Like most young Michigan boys, Brian and his brother also loved spending time outdoors hunting and fishing, whether with their friends or with their dad.



Brian's Dead End Gang adventures also highlighted Brian's propensity as a child for getting injured in accidents (a character trait that Brian fortunately did not take into adulthood). It seemed that as a boy he was constantly having to be taken to the hospital to get stitches after a mishap. One time the boys were playing in the dug-out basement of a home under construction in their neighborhood when one of his buddies dropped a large boulder right on Brian's head. A surgeon needed to stitch the large wound back together. Another time Brian and one of his friends were goofing around while waiting for the school bus and Brian slipped on ice and fell down face-first. His top teeth went through his bottom lip, and it was off to get stitches again. Yet another time, Brian's dad had taken the kids to a local park, where the boys started throwing rocks at a big red caboose. Kent Sr. heard his name over the loudspeaker, and sure enough Brian had been hit by a rock and needed stitches by his eye. Brian had the scar from that injury the rest of his life.

The most serious accident Brian had in his childhood came when Brian was 11 and he and Kent Jr. were helping their dad by chopping some wood. Kent was swinging the axe and Brian – ever meticulous and wanting to make sure the logs were perfectly in place to be cut – reached down to adjust the piece of wood just as the blade came down. The axe cut off the tips of three of Brian’s fingers on his left hand. The surgery to repair the injury took over two hours, but luckily the surgeons were able to reattach the fingers and Brian never suffered significant disability from that accident. Brian screamed for and ran to his dad when the accident happened. But even though his dad comforted him and told him it was ok to cry, and despite the mutilation and fear that his hand would never be the same, Brian refused to shed a tear.



Besides his accidents as a kid, and as good of a kid and son as he was most of the time, Brian would sometimes get into other kinds of trouble, usually in a team with his brother. When he and Kent Jr. were very little, they went over to their uncle’s house with the family. The boys kept going back and forth from the garage, and when their parents went to check on them they discovered that the boys had spray painted up and down the side of their uncle’s new car. Later, when they were teenagers, the boys took their father’s beloved hot rod, a ’57 Chevy he was rebuilding, for a joyride. They were spotted on their excursion by one of their dad’s friends, and there was hell to pay when Kent got home. Another time Kent took the boys with him on a painting job. When they arrived he told them to get started painting the downstairs while he worked on the upstairs. After a while, Kent Sr. came downstairs to find the job barely started, with both boys engaged in a massive paint war. Paint was everywhere! That was the last time their dad took the brothers on a job with him.



Occasional boyish shenanigans aside, Brian was a great kid who worked hard in school and sports, got good grades, and stayed out of trouble. He always had his eye on his future. Even from a very young age Brian was focused on his goal for his life – a career in law enforcement. Brian told anyone who would listen that he wanted to be a police officer when he grew up. His eyes would light up when he saw a police officer in uniform or heard the sirens on a police patrol car. When Brian was about five years old, Kent bought a beat-up old Ford to use to commute to work. The Ford needed several parts replaced and had bald tires. The Ford was so decrepit that a state trooper pulled Kent over one day while he and little Brian were on a drive. When the trooper came up to the car, Brian stuck his head out and exclaimed, “I’m gonna be a police officer when I grow up!” The trooper was so amused by Brian he let Kent off with a warning.

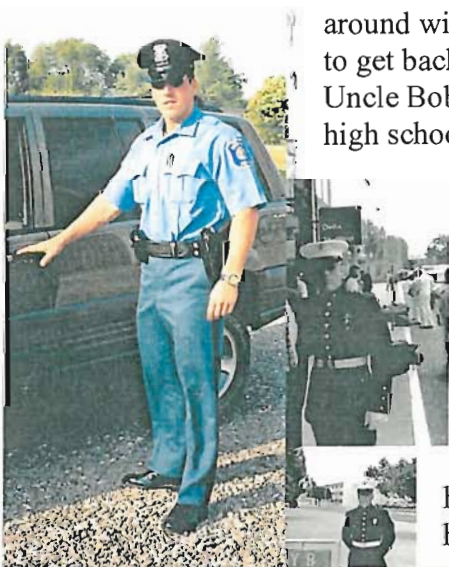
Brian’s interest was probably sparked by his dad’s brother-in-law Bob, who was a police officer with the Lincoln Park PD. On weekends, Brian would get very excited to visit Uncle Bob because just seeing his uncle’s police car up close made Brian’s day. Brian looked up to his uncle, who eventually became Chief of the Lincoln Park PD and later was elected Mayor. Uncle Bob would give Brian tours of the police station and pep talks about becoming a police officer himself one day.

In high school Brian was popular and had many friends. He was always helping out other students and people enjoyed his sense of humor. This included his teachers; Brian's charm gave him the ability to make all the teachers at the high school melt in his hands. People just seemed to gravitate towards his charismatic personality. Brian graduated as runner-up valedictorian in his high school class. Besides academic and social life, Brian lettered in cross-country and track at Flat Rock High.



In the late 80s, around the time Brian graduated from high school, Kent and Josephine separated. They later divorced in 1990. As would be expected, the end of his parents' marriage was hard on Brian. But even though his parents were no longer living under the same roof, he remained very close with both of them.

Brian went through a brief wild phase after high school, running around with his friends at all hours. But he quickly realized that he needed to get back on track towards his goals and start preparing for the future. Uncle Bob's son Bobby, Brian's older cousin, had joined the Marines after high school as a precursor to following in his dad's footsteps in law enforcement. Brian decided that was the path for him as well, and would be a way to pay for college. He enlisted and served in the U.S. Marine Corps for four years. After boot camp and a stint at Camp Pendleton in southern California he spent most of his tour of duty in Italy as a Military Policeman, preparing for his future law enforcement career.



The Marine Corps changed Brian's life forever. Brian loved the discipline, work, and prestige of being a Marine, and he came out of the service with even more self-confidence and a higher self-esteem. He developed his personal motto during his time in the Corps: "Putting in the Work." This was Brian's answer to getting what he or anyone else wanted out of life. Anything was achievable, but you had to "Put in the Work." Brian also met several life-long friends through his military service.



Brian finished his duty even more focused on a career in law enforcement. After receiving his honorable discharge from the Corps (finishing with the rank of Corporal), Brian came back to Michigan to attend college. He graduated from Henry Ford

Community College with an Associates degree in Criminal Justice in 1995. And after a brief period working odd jobs to save money for tuition, he started Schoolcraft College's law enforcement training program. Brian graduated President of his class in 1998, once again showing his family and everyone else what he could achieve when he "Put in the Work."

After graduation, Brian was hired as a police officer with the Ecorse Police Department (Ecorse is another suburb next to Lincoln Park). He was extremely proud of seeing his childhood dream become reality, and all his friends and family were overjoyed for him as well. Not long after starting his career, he moved to the Lincoln Park PD. On his first day at his new job, there was a shootout at the Senior Court Towers in Lincoln Park in which three innocent victims were killed. The violent rampage was a major news story and the standoff with the shooter was broadcast live on the local news. Brian was one of the first responders and helped to successfully defuse the situation with no civilian injuries. For his quick response to the situation and efforts to successfully apprehend the shooter without further loss of life, Brian earned a certificate of merit.

Brian had grown into the type of man that others looked up to and admired. He worked hard ("Putting in the Work") but also lived life to the fullest. He carefully saved his money so he could splurge on the finer things he treasured like nice clothes and fancy watches, and took great care of and great pride in everything he owned. He loved sports cars, and throughout his adult life worked hard to afford a string of Mustangs and Corvettes. Brian kept the cars immaculately clean and in perfect condition. He would detail them himself, even using a toothpick to clean the grooves in the dash.

His meticulousness and perfectionist nature only increased as he got older and began to acquire more nice things for himself. His clothes were always perfectly kept and pressed. His home and his other personal possessions were neat, well-organized, and in fully-working condition. His mother taught Brian to iron so that he could get his shirts exactly how he wanted them before he would go out for the evening. Brian always wanted to look his best, for every occasion.

Brian had a charisma about him; he could take over any room he walked into with his stature and confidence. He was never in competition with anyone except himself, but still always pushed himself to be the best he could be. He lived by inspirational quotes from famous people, which he posted all over his house and frequently cited to others. He inspired everyone around him. His drive and determination were so impressive that he made family, friends, and even casual acquaintances want to do better and be better people.

Brian was also witty and funny, with an upbeat personality. Because of his charm, charisma, and positive outlook he had tons of friends. Everywhere you went in public with Brian he would run into someone who knew him. He was tremendously honest and loyal to all his friends, most of whom remained close to him for the rest of his life no matter when or how they met him.

He and his buddies did lots of fun activities together. Brian loved sports, especially the Detroit Lions, Red Wings, and Tigers, so he often went to games or got together to watch games with his friends. Every year a group of his friends from high school – including a couple members of the old Dead End Gang – met in Detroit at Tiger Stadium for Opening Day of the baseball season. Some

of those guys along with other friends of Brian's would also go on a big guys trip to Las Vegas every year.

Brian met many of his friends at the gym. Working out was his passion, and Brian always both took care of his body and made time for weight lifting, running, and other physical activity. Brian had been skinny as a teenager and even during his time in the Marines, but as he matured he bulked up until he was enormously strong with a bodybuilder's physique. By the time he was a Border Patrol agent, the local gym in Sierra Vista,



Arizona had to special order extra-heavy (150 lb.) dumbbells just for Brian's use. The special-order dumbbells arrived the day after Brian was murdered. Brian was very close with the owners of the gym, and to honor Brian they turned the corner of the weight room where Brian always worked out into a memorial and decreed that no one else could ever use his special dumbbells.

After a few years on the Lincoln Park police force, Brian decided that he wanted to keep advancing in his law enforcement career. His cousin Bobby was by then a successful federal agent with the Secret Service, and that's what Brian decided he wanted to be too. He began applying for federal law enforcement positions in 2005. Bobby encouraged Brian to apply to the United States Border Patrol because Border Patrol is under the auspices of the Department of Homeland Security like the Secret Service, and that would make a potential transfer to Secret Service someday easier.



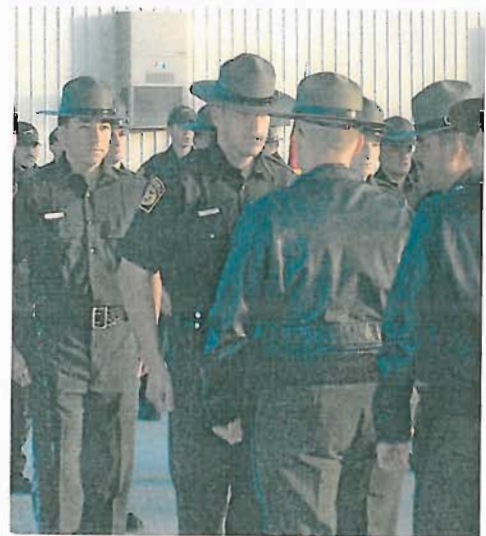
In July 2007, after many interviews and paperwork Brian finally got the call he had been waiting for: his application to the Border Patrol had been accepted. He left Michigan and his family within two weeks of his acceptance to attend the Federal Law Enforcement Training Academy in Artesia, New Mexico. Brian was completely confident in his abilities and knew he would do well. His family likewise knew he would do them all proud.

Brian was relatively old (in his late 30s) to be applying to Border Patrol. When he got to the Academy some of his superiors were skeptical that he could keep up physically. But Brian dominated the training in every aspect. Once again, he graduated President of his graduating class (of 699). The entire family traveled to El Paso for graduation in November 2007, and got to see Brian lead his classmates in field drills and accept the honor of being #1 in his class. Following graduation, Brian was assigned to the Naco station in Bisbee, Arizona.

It was difficult for Brian to leave his friends and especially his family in Michigan, where he had grown up and lived his whole life (aside from his time in the Marines). The Terry family was still extremely close as adults, with all four Terry children living within a ten minute drive of Flat Rock and the house they grew up in. The Terry kids shared many of the same friends and spent most weekends visiting or attending events with one another. When Michelle and Kelly were married Brian stood up in both of their weddings, and he became Godfather

to two of his nieces. Brian was extremely close with all his nieces and nephews, who looked up to Uncle Brian as a hero just as Brian had looked up to his Uncle Bob when he was growing up.

Brian briefly returned home after graduation to say goodbye and pack up his belongings. The family was sad to see Brian leave but knew he was following his dream. Brian charmed his family into helping him with the move, which had to be made immediately, and even convinced them to clean and repaint his house for him after he reported to Arizona. Because of his meticulous nature, Brian couldn't help but check on his family's progress every 15 minutes the whole day, giving them detailed instructions on exactly how to do the job and even making them take pictures and send them to him on their cell phones so he could stay apprised of their progress. As much as Brian's direction and incessant calls wore on their nerves that day, his family missed and loved him so much they were happy to do the job and tried their best to do it how he wanted. Once he was gone, Brian's family and



friends felt the loss of not being able to see him on a daily basis but knew he was off doing what he loved most. When he had a free chance he would call and tell everyone stories about his job and the new friends he made. They could tell from the excitement in his voice how happy he was serving his country along the border.

With his dream of becoming a federal agent realized, Brian focused on a new goal: the elite Border Patrol tactical unit known as BORTAC. BORTAC's website describes the elite unit:

*The U.S. Border Patrol Tactical Unit (BORTAC) is the global special response team for the Department of Homeland Security's (DHS) Bureau of Customs and Border Protection (CBP). Its mission is to respond to terrorist threats of all types anywhere in the world in order to protect our nation's homeland. Its agents are counted among the nation's most dedicated and highly trained special operators.*

*Since its inception in 1984, BORTAC has developed a reputation in the special operations community as one of the premier tactical units in law enforcement. The Unit has continued to expand its scope and capabilities to address the growing threats to the United States and its interests abroad. Each year, it continually receives support requests from both U.S. and foreign military and law enforcement entities. To date, BORTAC members have operated in 28 countries around the world. Missions have included international training/advisory functions, counter terrorism operations, counter narcotics operations, high-risk warrant service, dignitary protection, interdiction & patrol operations, and tactical training to other U.S. agencies and military units.*

*During the 1980's "War on Drugs," BORTAC, in conjunction with the DEA, conducted*



*counter narcotics operations in South America during Operation "Snow Cap." In 1992, BORTAC was deployed to Los Angeles to help restore order after rioting broke out in the wake of the Rodney King trial. In April of 2000, the BORTAC conducted Operation "Reunion," in which it executed a raid on a home in Miami, Florida and safely returned Cuban refugee Elian*

*Gonzalez to his family in Cuba. Following the World Trade Center Attack in September of 2001, BORTAC personnel were sent to high-risk areas around the country to help secure against future attacks. In 2002, BORTAC worked jointly with the United States Secret Service to secure sports venues at the Salt Lake City Winter Olympic Games.*

*Recent natural disasters have vaulted BORTAC personnel into tactical relief operations (TRO) by providing hurricane relief aid to Gulf Coast residents and law enforcement support to law enforcement agencies affected by Hurricane Katrina.*

*Current BORTAC operations in support of United States interests include, ongoing support of the U.S. military in Iraq. As a result of current and past missions, significant arrests and seizures have been made which have helped prevent terrorist and narcotic infiltration into the United States. Plans are currently being made to extend such operations into other countries in Central and South America.<sup>2</sup>*

The requirements and training for BORTAC described on the website are extremely rigorous:

- *Have a minimum of three (3) years of continuous Border Patrol service in good standing*
- *Obtain a passing score of 90% or better on the Border Patrol Physical Efficiency Battery (PEB) & the firearms qualification course of fire (at least 324/360)*
- *Pass an oral interview panel conducted by current BORTAC members*
- *Successfully complete a BORTAC Selection Course*
- *Be available for extended deployment (90 days or more) anywhere anytime.*
- *Make proper application for consideration to HQ-BORTAC*

*The five week BORTAC basic training course is considered one of the most difficult and arduous training courses in civilian law enforcement. Qualified BP personnel may volunteer for the unit. After an initial screening process, which includes a strenuous physical fitness test, prospective BORTAC operators are scheduled to attend the next BORTAC Basic Training Session. The course covers such diverse subjects as operations planning, land navigation, patrolling, tactical tracking, rappelling and fast roping, close quarters battle (CQB), riot control techniques, defensive tactics, drown proofing, trauma medicine, combat firearms, and air assault operations.<sup>3</sup>*

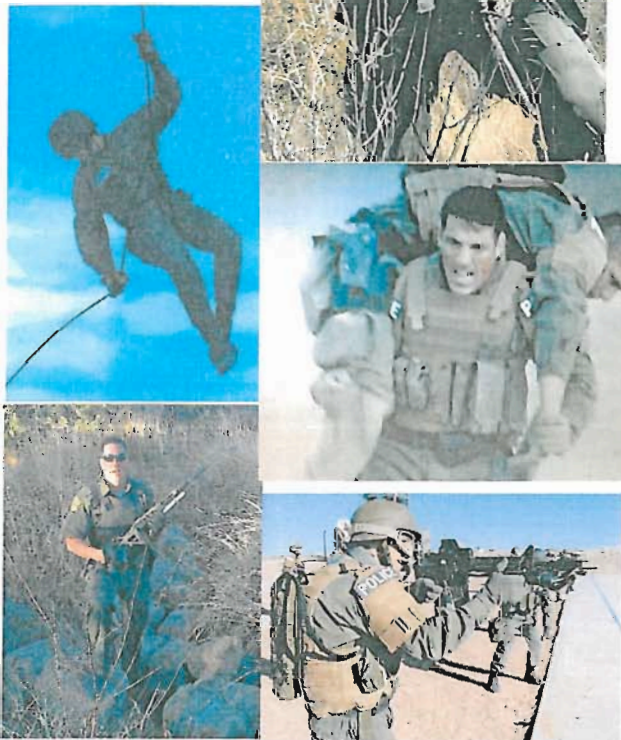
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<sup>2</sup> U.S. Border Patrol website, "Bortac History and Overview," at <http://bortac.com/> (last accessed Sept. 28, 2011).

<sup>3</sup> U.S. Border Patrol website, "Join BORTAC," at <http://bortac.com/howtoapply.html> (last accessed Sept. 28, 2011).

Although BORTAC was a natural next step for Brian given his achievements in the Border Patrol Academy, his incredible physical condition, his leadership skills, and his military training, BORTAC was considered to be an unattainable goal for Brian by some of his fellow Border Patrol agents. No one of Brian's age – 38 at the time – had ever tried out for BORTAC before, and they thought he was too old to handle the training and physical demands of the unit. But they underestimated his talent and determination. Brian wasn't afraid in the least. He knew that nothing could stop him when he "Put in the Work," certainly not his age. He wrote his letter of request and was approved for training.

The intense tactical BORTAC training lasted five, grueling weeks. Brian not only completed the training, he performed legendary feats of leadership and physical stamina. During a training exercise one of Brian's squad leaders determined that Brian had performed a task incorrectly. The



U.S. Department of Homeland Security  
Artesia, NM 88210



U.S. Customs and  
Border Protection

November 20, 2007

Brian A. Terry  
698<sup>th</sup> Session  
U.S. Border Patrol Academy  
Artesia, New Mexico

Dear Mr. Terry:

As a Section Leader you have played an important part in the professional development of your fellow agents. You displayed a sincere devotion to duty as evidenced by the extra time and energy you expended as a Section Leader. In addition to the same strict training regimen in which your classmates participated, you were responsible for attending to many of the administrative details, which ensure that a Session functions smoothly. You were also constantly called upon to demonstrate leadership and professionalism in all of your actions.

I extend to you my sincere appreciation for a job well done. You are to be commended for your leadership, enthusiasm, professional attitude, and demeanor. The staff of the Academy and I wish you every success in your future career with the U.S. Border Patrol. Congratulations on your graduation from the Border Patrol Academy today and thank you for your efforts during the past eighteen weeks.

Sincerely,

Charles C. Whitfire  
Chief Patrol Agent

U.S. Department of Homeland Security  
U.S. Customs and Border Protection  
U.S. Border Patrol Academy



Present this certificate to  
*Brian A. Terry*

for satisfactory completion of the Basic Training Course for Border Patrol Agents

November 20, 2007  
Date

Chief Patrol Agent  
U.S. Border Patrol Academy

Federal Law Enforcement Training Center  
Artesia, New Mexico

**EXPERT**

U.S. Border Patrol Integrated Police Training Program

A. USBP-556/699

July 26, 2007 – November 20, 2007

This certifies that

*Brian A. Terry*

has qualified as Expert on the Practical Pistol Course and is awarded this certificate in recognition of satisfactory accomplishment.



James L. Smith  
Chief of Police Operations  
November 20, 2007

punishment for the error was to carry a fellow trainee on his shoulders, with full gear, for three miles. Halfway through the run Brian's instructors re-checked the task and realized Brian had *not* make a mistake and told him he could stop. But Brian refused to quit. He told them, "No, one of my officers ordered me to do this, so I'm going to do it." Instead of stopping and enjoying the vindication that it was the instructor and not he that been wrong, Brian kept going and finished all three miles. He proved to his team and squad leaders at that moment just how committed he was to joining BORTAC, and neither age nor anything else was going to stop him.

On another occasion in BORTAC training, Brian's team was in the middle of a ten-mile "hump" in full gear when one of Brian's teammates began to lag and threatened to have to drop out of the run. Brian strongly believed that one team member's failure meant the entire group had failed, and that a leader should always do everything he could to help a teammate. So he took his teammate's gear and carried it himself, so that his teammate and the entire team could complete the task.

Brian's fellow BORTAC trainees and officers were literally in awe of Brian's stupefying endurance and determination. They started calling him "Superman" to reflect his amazing abilities.

Brian graduated from BORTAC in 2008 and went back to Arizona in the Tucson sector as a BORTAC agent patrolling the desert hills and canyons of southern Arizona. Over the next two years his family made several trips to see him. Josie's sister Michelle and one of Brian's nieces visited in 2009, Josie came out in both 2009 and 2010, and Kent Sr. and Carolyn drove out and stayed five weeks in April and May 2010. Brian also came back to Michigan several times a year, the last trip being Halloween weekend in late October 2010. It was so great for the family to have Brian around again. Although they missed Brian tremendously, they were so happy for him that he had found success and happiness in Arizona. He was their pride and joy.

Brian was on top of the world in 2010. He had achieved the #1 goal for his career, fulfilling a lifelong dream of becoming an elite federal agent. His job allowed him to serve his country and his



fellow citizens by protecting the U.S. border using his leadership and training, a job that Brian loved. He still owned the house in Lincoln Park and had bought a house in Sierra Vista, Arizona as well. He was able to see his family and friends back home regularly between return trips back to Michigan and their visits to him in Arizona. And while he looked forward to someday settling down and starting a family, for the time being was enjoying his bachelorhood. He had the freedom to work out and spend time outdoors or traveling as much as he pleased. Brian's zest for life and action-packed lifestyle is probably best described by country star Billy Currington, one of Brian's favorite musicians, in his hit

song “That’s How Country Boys Roll.” It is almost like Currington had Brian in mind when he wrote these words:

*They wake up in the morning and they drink their coffee black  
They love their woman one beat shy of a heart attack  
On the way to work they might stop by a fishin’ hole  
That’s how country boys roll  
Yeah, they work, work, work, all week til the job gets done  
Weekends they bar-b-que and have a cold one  
They run on a big ol’ heart and a pinch of Skoal  
That’s how country boys roll*

*Yeah, they’re spinnin’ their wheels  
Castin’ their reels  
Way back on them ol’ county roads  
Singin’ in bars  
Soupin their cars just to see how fast they’ll go  
From a ball and glove to them fallin’ in love  
They do everything heart and soul  
That’s how country boys roll*

The family knew Brian faced danger each and every day he was working. They had lived with that knowledge almost Brian’s entire adult life, first when he was in the military and then when he worked in law enforcement. And they knew that with BORTAC Brian’s job was to patrol and police some of the most dangerous area on American soil, near Mexican border regions that are literally war zones in the battles between rival Mexican drug cartels. But they also knew that Brian was both highly trained and equipped with the best possible equipment to perform his job. They never really believed that Brian – Superman – could ever suffer serious harm.

Brian too knew that he faced danger every shift. But he was completely dedicated to his job and serving his country. Everything he did in life was dedicated to making himself fitter, better trained, and more capable than the adversaries he might face. One of his favorite quotes – that ultimately the family put on his tombstone – was a passage written Ernest Hemingway about the hunting of man.<sup>4</sup> At Brian’s funeral the family was given a copy of another poem that Brian lived by and kept on his desk at work, “One Warrior’s Creed” by U.S. Army Lt. Col. Steven Watt. The Warrior’s Creed sums up Brian’s devotion to his country, his bravery, his work ethic, and his determination to succeed against his adversaries no matter what obstacles he faced:

*If you seek to do battle with me this day, you will receive the best  
that I am capable of giving.*

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<sup>4</sup> “There is no hunting like the hunting of man, and those who have hunted armed men long enough and liked it, never care for anything else thereafter.” Ernest Hemingway, “On the Blue Water,” *Esquire*, April 1936.

*It may not be enough, but it will be everything that I have to give and it will be impressive for I have constantly prepared myself for this day.*

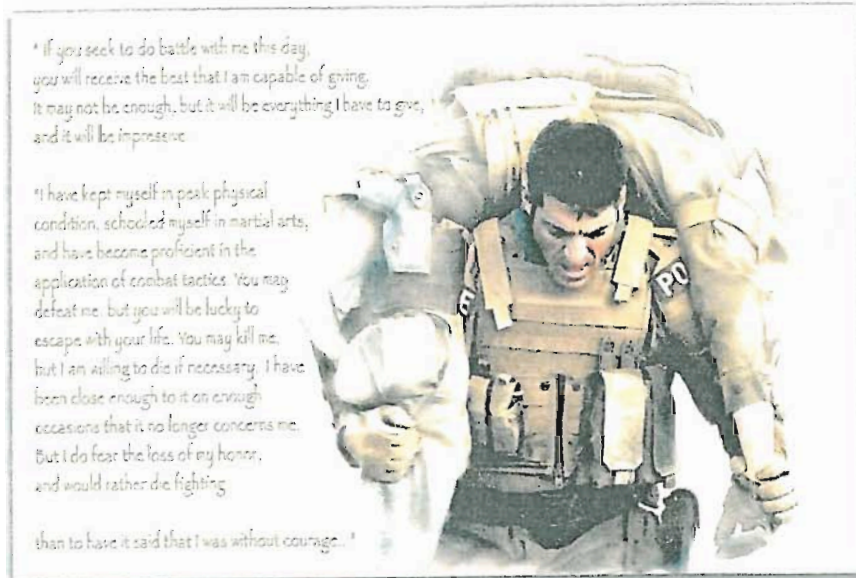
*I have trained, drilled and rehearsed my actions so that I might have the best chance of defeating you.*

*I have kept myself in peak physical condition, schooled myself in the martial skills and have become proficient in the applications of combat tactics.*

*You may defeat me, but I'm willing to die if necessary. I do not fear death for I have been close enough to it on enough occasions that it no longer concerns me.*

*But, I do fear the loss of my honor and would rather die fighting than to have it said that I was without courage.*

#### IF TODAY BE THE DAY



*Brian A. Terry*

PHOTO BY AP/WIDEWORLD; COURTESY OF FBI

*So I will fight you, no matter how insurmountable it may seem, to the death if need be, in order that it may never be said of me that I was not a warrior.*

**B. Brian and His Mother, Josephine Terry**

Brian's mother, Josephine "Josie" Terry, née Staugl, was born on February 12, 1940 and grew up in Wyandotte, Michigan. Her father, Emil Staugl, worked his whole career with Chrysler in the motor design department at the Chrysler engine plant in Trenton, Michigan. Josie was the second-oldest of five boys and girls, and had a fun but otherwise typical Midwestern, middle-class upbringing. She and her siblings and friends rode bikes, went sledding and skating, and played games at the local YMCA. Josie loved to perform and took ten years of piano lessons and seven years of dance lessons as a child. On warm summer evenings the whole family would gather at her Italian grandmother's house for big dinners outdoors, with all the grapes you could eat off of her grandmother's grapevines. Friends and other family members often stayed with the Staugls, so between the visitors and the kids the house was always filled with people and activity. Neither Emil nor Josie's mother Agatha ever drank alcohol or swore; they were like a real-life Ozzie and Harriett.



Josie was raised Catholic and attended all Catholic schools from grade school on. The Staugl Family went to catechism on Saturdays and Mass and Sunday School on Sundays. Josie attended Our Lady of Mount Carmel High for high school, graduating in 1958. She was in the glee club and school plays, and was an above-average student who liked Latin and social studies classes the most. She had lots of friends in high school, and even a lot of friends from rival St. Patrick's High. She met lots of different girls at the sweets shop around the corner from her house, although the rivalry was too intense for her to go to the football games with her St. Patrick's friends when the two schools played each other.

With so many children, Josie's parents could not afford to pay for their kids to go to college, so after high school Josephine started working full time at Shoppers Fair in Riverview, Michigan. She saved her money to afford night classes at IBM Business School in Detroit, learning to operate the most advanced business machinery of the day. After business school Josie worked as a receptionist with a mortgage broker, and later at Federals department store as a cashier and then manager.



In the summer of 1964 Josephine and Kent met at a Bob's Big Boy drive-in restaurant. Kent and some friends pulled up next to Josie and her friends and struck up a conversation as young boys and girls often do. No romance occurred that night, but a few months later Kent ran into Josie again at a local bar and grill, and the two began socializing. They were just friends for a while, but eventually began dating and fell in love. Kent and Josie were married on February 16, 1968.



The Terrys first lived in a small apartment in Wyandotte. They welcomed their first child, Michelle, in 1968, and Kent Jr. followed a year later. To have more room for their growing family Kent and Josie moved to an upper flat in Lincoln Park in 1970, where Brian and then Kelly were born. In 1977 the Terrys moved to Flat Rock, which is where Brian and the other Terry kids grew up.

Josie stayed home with the kids when they were small as much as she could, but the family was not wealthy and Josie worked most of the time. After many years at Federals she got a job in a stamping plant making wheel covers for cars so she could make more money. Then she became interested in cooking. She worked as a cook in a nursing home for seven years, and learned as much as she could. Eventually she moved up to being a cook at Oakwood Hospital, where she worked until she retired in 2005. The hospital threw Josie a big party for her retirement because the doctors had so enjoyed her cooking.

Brian and his mom were always very close; Brian was in a lot of ways a “Mama’s Boy.” He asked his mom for her opinion on everything, even the girls he dated when he got older. He always had to kiss her on both cheeks before he left for school, even when he was running late because he had been fussing over his clothes.



Kent always had to work to support the family, and the other kids had their own events and after-school activities, so usually Josie was the only one that could go to Brian’s sporting events and other after-school activities. Josie made sure to attend every one of his Pop Warner football games, and later in high school attended almost all of his cross-country meets. Every time Brian ran past he would wave to his mom. Josie was also the one who helped Brian with his homework as a boy. He would gather everything together on the kitchen table for her to help him and then say, “Ma, are you ready?”

Because Brian never married Josie remained the most important woman in his life as an adult, and she still loved to take care of him. When Brian lived in Michigan, once a week she would come over and clean his house. And several times a week she would come over and fix him dinner or he would go over to her house to visit and have a meal. Often Brian would call ahead to request that she make him her special fried chicken, Brian’s favorite meal.

Josie and Brian would go on long walks together to talk and catch up. And their favorite activity together was to work on massive jigsaw puzzles. Starting when Brian was a kid and continuing when Brian got older, the two of them would spend hours at the family dinner table putting the puzzles together.



Josie also liked crossword puzzles, and often Brian would finish them for her. She would be working on one and when Brian would come over and see it on the table or look over her shoulder, his active mind and meticulous nature wouldn't allow him to leave her alone until it was completed. Usually he ended up taking it from her so he could finish the hard answers she wasn't able to get, just so he could make sure it was completely solved.

When Brian was in the Marines, he sent his mom a birthday card in which he told her what she meant to him:

*Hi Mom,*

*I hope you're having a great birthday. I'll be thinking about you. It's really weird saying this from afar but it just makes me mean it and appreciate you more than as if I were near to you. You've always been by my side and it is deeply appreciated. I have become the man I have become because of you. I love you and miss you very much.*

*Your son,  
Brian*

The bond between Brian and Josie is also reflected in Brian's favorite song, "Simple Man" by Southern rockers Lynyrd Skynyrd. The song is the story of a woman instructing her son on how to grow up to be a man. The song was incredibly powerful and special for both Brian and Josie:

*Mama told me when I was young  
Come sit beside me, my only son  
And listen closely to what I say.  
And if you do this  
It will help you some sunny day.  
Take your time . . . Don't live too fast,  
Troubles will come and they will pass.  
Go find a woman and you'll find love,  
And don't forget son,  
There is someone up above.*

*(Chorus)  
And be a simple kind of man.  
Be something you love and understand.  
Be a simple kind of man.  
Won't you do this for me son,  
If you can?*

*Forget your lust for the rich man's gold  
All that you need is in your soul,*

*And you can do this if you try.  
All that I want for you my son,  
Is to be satisfied.*

*(Chorus)*

*Boy, don't you worry... you'll find yourself.  
Follow you heart and nothing else.  
And you can do this if you try.  
All I want for you my son,  
Is to be satisfied.*

When Brian was accepted into the Border Patrol and was deciding which assignment he should accept, as always he turned to Josie for advice and counsel. He and his mom had long talks about the decision, because Brian was torn. He wanted to leave Michigan and experience a different part of America, and especially wanted to be somewhere along the U.S.-Mexican border where he could best use his law enforcement and military training to serve his country. But he also

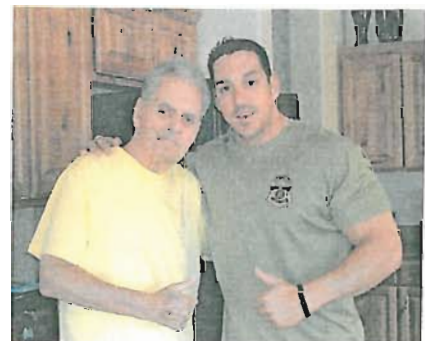
didn't want to leave his mother, and a position with the Border Patrol in Michigan policing the Canadian border was also an option. He told Josie, "If you don't want me to leave, I won't go." But Josie reassured Brian that she would be fine with her other family around, and that Brian needed to live his life. Her encouragement comforted him and made his decision easier.



After he left, it was hard for Josie to not see Brian as often as she had before, but Josie knew that letting him make his own decision had been the right choice. She still did get to see him several times a year when he returned to Michigan or when she visited him in Arizona. And they talked on the phone all the time. Josie was happy that her son was happy, and so proud of all that he had achieved and the man that he had become.

### **C. Brian and His Father, Kent Terry, Sr.**

Kent Terry was born on July 18, 1940 in Detroit, Michigan. His biological parents were very young and unmarried at the time he was born, however. His mother raised him in Detroit until he was two years old, but then was forced to give him up for adoption. Kent was never able to reunite with his biological parents before they passed, but as an adult Kent was able to connect with his biological parents' other children. Brian had a striking resemblance to Kent Sr.'s biological father from the pictures that Kent has been able to obtain.



In 1942 Kent was adopted by the Terry family, and spent the rest of his childhood in Lincoln Park and other suburbs south of Detroit. His father, Paul, was a supervisor with Ford and his mother, Irene, owned and operated several restaurants. With both parents often busy, Kent and his older sister Dolores spent much of their childhood with their grandmother, Edna. Kent's parents divorced when he was young and he and his sister spent even more time with Edna while Irene worked to support the family. He, Dolores, and Edna became very close.



Kent loved the typical fun activities of a young boy growing up in the Midwest, like hunting, fishing, swimming, and playing with friends. But he needed to work to help his mom out financially, so he went to work as soon as he was able. He delivered papers as a boy, and at 14 started his first real job as a bagger at a grocery store in Lincoln Park. In the summers as a teenager he picked up a second job cleaning fishing boats that would go out into Lake Erie from a dock in nearby Ecorse.



In his later teen years he started working in body shops, which began for Kent a lifelong fascination, hobby, career, and love affair with cars. He began saving up to buy a car of his own. His father's motto was "If you want it, you get it," and Kent took that motto to heart. In 1956, after saving all summer, Kent bought his first car, a black 1938 Ford sedan, for \$75.00. He fixed that car up and then traded it in for a 1950 Mercury. Driving the Mercury, Kent felt like the coolest guy in town.

Kent graduated from Lincoln Park High School in 1958, and after a brief move to California, returned home and started work with his father at Ford. Kent worked at Ford for more than ten years, on the assembly line assembling transmissions. He also married for the first time in 1960, and he and his first wife had two girls. The relationship did not last, however, and Kent was divorced in 1965.

Kent and Josie met in 1965 and were married in 1968. The kids followed shortly after over the next few years, in which time Kent left work with Ford, spent a couple years with an auto parts manufacturer, then started work in a Chrysler plant. He started again on the assembly line, then moved into the machine shop. Kent ultimately spent 24 years with Chrysler until his retirement in 1996. During those 24 years on the job for Chrysler he only took three sick days.

Money was tight for the Terry family with four young children, so Kent worked as much as he could, 10-12 hour shifts often seven days a week. When he could he would also paint drywall part-time at night for extra cash. Sometimes the drywall job became full-time when the Chrysler plant had layoffs until Kent and the other workers were re-hired.

When Kent and Josie separated in the late 1980s, Kent met Carolyn Foster in a bar in Trenton, Michigan after work. Carolyn at that time was a divorced single mother of two herself, and had been working as a truck driver for about a decade. Carolyn's father had been a supervisor at the same

Chrysler plant where Kent worked for over thirty years, but the two had never met because they worked different shifts. Carolyn and Kent began dating, then moved in together in a townhouse in Taylor, Michigan, and were married in 1990. Around that time she left trucking and went to work in a Ford plant in Plymouth, Michigan.

Kent and Carolyn bought property in Carlton, Michigan in the early 1990s and began building a house. With his kids now grown and with he and Carolyn both working full-time schedules in the auto plants, Kent spent most of his free time at the Carlton house either working on the house or lifting weights in the gym he had constructed in the basement. Like Brian, Kent was a weightlifter his entire adult life. In 1994, even at 54 years old, Kent could still bench press 300 pounds.



But in January 1995, Kent suffered serious injuries in a slip and fall accident on steps outside a store in Taylor. Kent was walking down the steps when his foot came in contact with a raised edge and he tumbled head first into the concrete. He suffered a closed head injury and a neck fracture, and spent two months in the hospital (his doctors told Kent he likely would have been killed or completely paralyzed if his neck wasn't so thick from weightlifting). The combination of brain and spinal injuries left Kent severely and permanently disabled, although his condition has greatly improved since the accident from years of intensive therapy. He suffers today from vision and hearing issues, memory loss and other cognitive difficulties, and paralysis which limits the use of his legs. Kent is a partial quadriplegic but with therapy has been able to regain the ability to walk with the aid of a cane.

Kent went on medical leave and then retired after the accident. He and Carolyn sold the home in Carlton, and after spending some time in Florida and then taking care of Carolyn's mother in Missouri, settled in 2005 in Jonesville, Michigan, about 90 miles southwest of Detroit.

When the kids were young, Kent wasn't around to spend as much time with his children as he would have liked because of his work schedule. But he made the most of the time he did have with them. He took both Kent Jr. and Brian hunting and fishing, teaching them to shoot with his prized hunting rifles. They would hunt deer, duck, and pheasant. Kent kept the rifles all these years, and handed them down to Brian during their visit to Arizona in May 2010. Brian was so happy to have those guns he took them to the gun range to test them out and show them off to his friends. It broke Kent's heart when the rifles were returned to Kent with other personal belongings of Brian's after Brian was killed only a few months later.

Kent restored several old cars over the years, and passed his love of working on cars down to his sons. The three of them would spend hours in Kent's garage/body shop working on their dad's cars, and it was a great bonding activity for the three of them.

Brian got his own automotive rebuilding project when he turned 16, a beat-up old car that needed a new fuel pump. He asked Kent to help him install the new pump, but Kent had to work so he told Brian to wait until the weekend. Brian's stubbornness and determination wouldn't let him wait. Brian spent two days in the summer heat working on the car by himself. Although his dad eventually had to help him complete the job, Brian never gave up and the job got done.

Kent's pride and joy was an old 1934 Ford that he purchased in the late 80s and spent years rebuilding into an incredible hot rod. After Brian completed his Marines duty and moved back to Michigan he would come down to his dad's house and help him work on it. Following Kent's accident Kent couldn't do the work himself any more, so Brian pitched in to help him finish it. When Kent obtained a new frame for the car in 1997, Brian was the one who loaded it onto the chassis. The restoration project was finally completed in 2000.

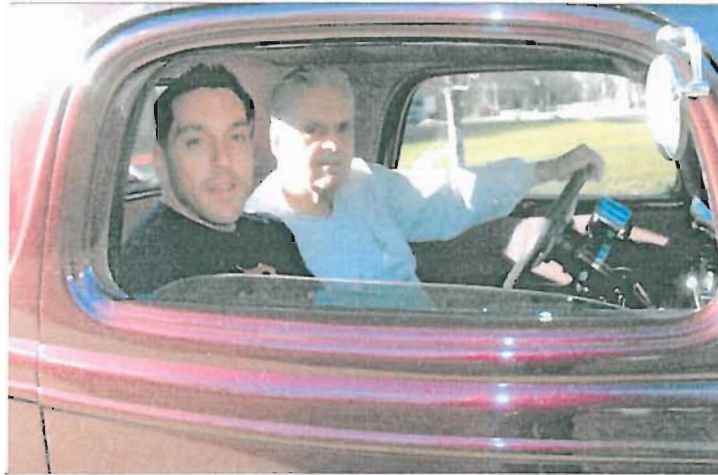


Sometimes when the boys were young Kent allowed Brian and his brother to tag along when Kent went to his painting or other part-time jobs or just doing work around the house. Although this sometimes ended in disaster – like when Kent Jr. and Brian got in the paint fight or when Kent Jr. nearly cut Brian's hand off chopping wood – usually the boys were just happy to be around their dad. Kent Sr. was a big, tough, hard-working guy, who automatically earned his boys' respect with his manly presence. Brian looked up to his dad and treasured the time they did get to spend together.

The most obvious manifestation of Brian's love and respect for his father as a boy was that when Brian was injured – which was often – Brian always wanted his dad to hold him and take care of him. Each time Brian had to have stitches or surgery as a kid, it was Kent who grabbed him and carried him in his thick, strong arms. Being held by his dad comforted Brian, even when he nearly lost three fingers on his left hand in the wood chopping accident. Kent was always there for Brian when he needed him most.

Brian was always there for his dad too. Although his parents' divorce was hard for Brian, he never let any feelings of anger or resentment manifest themselves towards either parent and tried his best to support both of them. And when his dad was injured, Brian did everything he could to help his father with his recovery, therapy, and adjustment to his new limitations. Seeing his once-strong

and powerful father crippled with serious injuries was difficult for Brian. He cried in the hospital when he saw his dad after the accident, and felt helpless to aid his father during the recovery. But the accident drew the two even closer as Brian became the one to care for his father as Kent had once cared for him.



Brian came around the house more and more often after the accident, and during this time he began to develop a relationship with Carolyn as his stepmother and his father's wife and caretaker. She and Brian would talk for hours while Kent rested, and Brian would share his worries about how his father was doing. They bonded over their shared love for Kent and their desire to help him get better. Brian also appreciated Carolyn's cooking. She would make a big meal when Brian and his friends would come over, and would often also bake Brian blueberry muffins. He

loved the muffins so much he would eat the entire plate; she would have to hide some of them when Brian came over so there would be some left for her and Kent. Other times when she knew he was coming over she would bake Brian a cake, and since he would sometimes eat the entire cake she started baking him two so that he had one to take home.

After Brian left for the Border Patrol Academy and then Arizona, Kent and Carolyn obviously saw Brian less often. Brian couldn't call much during the training, but once he settled in Arizona he called to talk to them regularly. He developed a habit of speaking with Kent before every work shift and then again when he returned, to let his dad know that he had got back home safely.

In May 2010 Kent and Carolyn made the long drive to Arizona for an extended stay with Brian. The trip was difficult because of Kent's health problems, but he toughed it out and made it. They lived with Brian for five weeks, and Brian loved every minute. Kent was crippled with pain and complications from the trip and had to stay in bed, but Brian didn't mind taking care of him and was just happy to have his dad there. One day they had to take Kent for medical treatment, and Carolyn noted to Brian that it was now his turn to carry his dad to the hospital. Brian loved having his dad there but was so concerned at times he would cry watching his dad rest in bed. When Kent and Carolyn left to return to Michigan, Brian ran to his friends' house for comfort because he was distraught from missing his father and worrying about Kent's condition.



In October 2010 Brian made what would be his last trip to see his dad. This trip turned out to be very special for another reason: Brian finally got to drive the '34 Ford. *No one else* other than Carolyn had ever been allowed to drive Kent's baby, not even Brian. But Carolyn insisted to Kent that this time he needed to let Brian drive the hot rod, knowing how thrilled Brian would be. So after Brian had arrived and they had visited for a bit, Carolyn stood up and said that she and Brian were going to go on a drive. Knowing what this meant and only begrudgingly going along with another man – even his beloved son – getting behind the wheel of his pride and joy, Kent stomped off into the other room in a huff. Carolyn and Brian went out to the beautiful car, and Brian fired up the engine with a huge smile on his face. Carolyn warned Brian not to get any dirt on the tires or they might as well not go home, but the drive went fine with no mishaps. And then Brian and his dad went for a drive too. They had a great day driving the Ford together, talking about everything, and catching up. The time he spent with Brian that day is one of Kent's fondest memories of his son. It is also the last time that Kent ever saw his son alive.

**D. Brian's Siblings.**

Brian has two sisters, a brother, and two half-sisters. Michelle has been married to Mike Balogh since 1989 and they have four daughters. Melissa is now 21, twins Rachel and Elizabeth are 18, and Lauren is 12. The Baloghs live in Southgate, Michigan, where Michelle works in real estate.



Kent Jr. is single, works in construction, and lives in Lincoln Park. Kent is in the process of applying with the Detroit Police Department as a police officer, hoping to follow in his brother's footsteps with a career in law enforcement. He wants to make a difference following Brian's death, and he knows that Brian would be thrilled with his new career.



Kelly is now Kelly Willis, and she and her husband Ron have been married since 1999. They also live in Southgate and have two kids, Logan, 8, and Brooke, 6. She currently works in the records department of the Southgate Police Department.



Brian also has two half-sisters from Kent Sr.'s first marriage. Both Lynn Freeman and Barb Robinson live in Linden, Michigan. Lynn has two daughters, Gabrielle, 14, and Erika, 11. Barb also has two daughters, Ashley, 11, and Cassandra, 9. The Terry siblings were not in touch with their half-sisters growing up or even as adults until about two years ago, but they have all grown closer since they reconnected and now all feel like one extended family. Brian's tragic murder prevented him from building on these newly-formed relationships with his half-sisters and their families.



#### IV. ATF'S FAILED "OPERATION FAST AND FURIOUS"

##### A. Operation Fast and Furious Was Designed to Provide Firearms to Criminals.

The precise origin of Operation Fast and Furious, including exactly which ATF officials conceived and authorized it, is still unclear. This lack of clarity is at least partially the result of affirmative efforts by Department of Justice officials to deceive the Family and obstruct their and others' investigations into the failed ATF operation. But from Congressional investigations and testimony, as well as media reports and the Family's investigations to date, the program's scope, goals, and tragic failure can at least be outlined if not described in fine detail.



In 2009, violence in northern Mexico between warring drug cartels was on the rise. To carry out their violent attacks, the drug cartels frequently looked to arm themselves with assault rifles and other advanced firearms by purchasing them from American gun shops through so-called "straw purchasers." Cartel representatives would hire young men and women with relatively clean criminal records who could pass the background check to buy large quantities of weapons. These purchases were legal as long as the buyer was purchasing them only for

his or her own use, but under the circumstances of these purchases no reasonable observer could believe that they were legitimate.

With violence escalating as a result of the increasingly sophisticated weaponry the cartels were bringing to bear on both each other and hundreds of innocent victims of violent crime, the Mexican government angrily lashed out at liberal American gun laws and a failure of American law enforcement as the purported cause of the bloodshed. In an attempt to respond to this criticism of American policy, after his inauguration President Obama personally promised Mexican leaders that the United States would step up its efforts to stop the flow of firearms to the south. President Obama subsequently announced “Project Gunrunner,” a new program designed to dramatically increase funding and resources available to law enforcement agencies in border states to fight gun trafficking.

Under mounting political pressure, and with a large new pool of available resources, ATF officials stepped up their efforts to fight the cartels’ illegal gun purchases throughout the Southwest. But in Arizona they were frustrated. A high-profile prosecution of a gun shop owner in the Phoenix

## **Judge tosses case against Phoenix gun-shop owner**

**Dennis Wagner** - Mar. 19, 2009 12:00 AM  
The Arizona Republic

State prosecutors suffered a public setback in efforts to combat border violence Wednesday when a judge dismissed high-profile charges against a Phoenix gun dealer accused of arming

area charged with illegally selling firearms to straw purchasers fell apart in March 2009 when a judge threw out the case. And there was a perception in ATF and other federal agencies that Arizona’s “gun culture” made these types of prosecutions politically difficult and made trials of alleged gun traffickers difficult to win.

ATF policy describes that in areas where local politics make prosecutions difficult, ATF officials and agents should focus on seizure and interdiction of illegally-trafficked weapons rather than building criminal cases.<sup>5</sup> But ATF officials in Phoenix and Washington decided to do the exact opposite. They came up with a radical new plan in which ATF would allow and facilitate the illegal trafficking of firearms in order to try to build a massive criminal investigation. The new idea – while certainly creative and “out of the box” – violated both fundamental principles of law enforcement and ATF policy and training. The plan, to be implemented by the leadership and administration in the Phoenix field office of ATF, was to let guns illegally purchased by straw buyers “walk” out of the observation and control of ATF and other law enforcement agents, so that when the guns were found later in the possession of the cartels an affirmative connection between the straw purchasers and the drug cartels could be proven.

<sup>5</sup> ATF Firearms Trafficking Investigation Guide at 34; ATF Firearms Enforcement Program, ATF O 3310.4B, Feb. 8, 1989, (“ATF Firearms Guidelines”) ¶ 160.

Starting in late 2009, the Phoenix office of ATF began to put the plan into place. They called the plan “Operation Fast and Furious,” after the popular Vin Diesel film out at the time. They created a special new Phoenix ATF group, “Group VII,” to implement Operation Fast and Furious. And they instructed Group VII agents to start cataloguing straw purchasers, to watch them purchase guns, and even to track them to stash houses or middle men for the cartels when they could. *But they specifically told the agents not to seize the weapons and to allow the illegally purchased guns to “walk” into the hands of the Mexican cartels.*

Hamstrung by these instructions, there was little the ATF agents on the street could actually do other than observe what transactions they could. As interdiction of illegal gun sales in the Phoenix area dwindled, unsurprisingly the number of sales and amount of guns purchased exploded. There was no way the agents involved with Operation Fast and Furious could track all those guns and surveil all of the purchasers. Many of the guns disappeared from ATF’s observation as soon as the purchaser walked out of the store. Many other purchasers were not even tracked, with ATF only finding out that one of the known straw purchasers had made another buy days later when they received the paperwork for the purchase. In most circumstances, the only enforcement efforts ATF agents were authorized to perform were to work with the gun shop owners (“Federal Firearms Licensees” or “FFLs”) to catalogue the serial numbers of the illegally-purchased firearms. Those serial numbers were then entered into a national law enforcement database, so that when the guns were located later they could be positively identified as linked to purchases from Phoenix-area FFLs.

It is important to put these straw purchasers and their huge quantities of firearms purchases in perspective. Most straw purchasers were very young, in their teens or twenties. Many had no job or were on welfare, and some were too poor to even have hubcaps on their cars (as one Group VII agent later told Congressional investigators). Yet they were walking into FFLs and paying cash for thousands of dollars’ worth of weapons, often dozens of guns in one purchase. In some cases, the same straw purchaser would then come into the same store a few weeks or even few days later and make another large firearms purchases. But all of these guns were purportedly bought for the purchaser’s own use; to comply with applicable law the straw purchasers had to fill out an affidavit certifying that they were buying the guns only for their own personal use and not for anyone else. The absurdity of these purchases raises the question of why the FFLs allowed them to occur, but ATF’s moral and legal failure is especially acute. The agency specifically charged with controlling the illegal spread of dangerous firearms in the United States – as set forth *in the very name of the agency* – was allowing obviously false firearms transactions to occur that would directly funnel sophisticated, deadly weapons into the hands of violent criminals.

The ultimate goal of this program is difficult to articulate even in hindsight. Was it to track the guns directly to higher-ups in the cartels? If so, that quickly went out the window when dozens, then hundreds, then thousands of guns purchased by known straw purchasers overwhelmed ATF’s resources and ability to maintain surveillance of the weapons. The more likely theory of the ATF leadership’s mindset is that they fully expected to lose track of the guns and locate them later *only when they turned up at crime scenes*. In other words, ATF would willingly let guns “walk” into the control of violent drug cartels, the cartels would then use those guns to commit violent crimes, and only after victims had been terrorized, injured, or killed by the guns purchased under ATF observation would the guns be recaptured. That would conclusively establish the “link” between the straw

purchasers and the Mexican cartels. But for what gain? It would be too late to stop the cartels from committing violent crimes with the guns at that point, and a conclusive link to illegal purchases in Phoenix would not bring the “big fish” in the Mexican cartels any closer to justice. ATF leadership thought with Operation Fast and Furious that they had hit on a strategy that would allow them to establish and prove a large criminal conspiracy case. But the illogic of the operation and how it would ultimately play out demonstrates that it was doomed from its inception.

The potential consequences to innocent people of allowing so many dangerous weapons to flow unfettered into the hands of the cartels was not lost on the veteran ATF agents assigned to Group VII and Operation Fast and Furious. In fact, they were outraged. Operation Fast and Furious not only made no sense as a law enforcement strategy, it went against everything they had ever been trained in or practiced in their ATF careers. It is a fundamental principle of law enforcement: because of their inherent danger and potential for serious harm, *you don't let guns walk*. Period. Perhaps for a larger investigatory goal you could let drugs or stolen merchandise occasionally “walk,” but not guns. As one Group VII whistleblower later testified before Congress, when it came to illegally purchased guns, “You don't get to go home,” the guns needed to be tracked until they were intercepted and confiscated, if the illegal purchase was allowed to occur at all.<sup>6</sup>

A rift quickly developed between the ATF chain of command in Phoenix and the rank-and-file agents involved with Operation Fast and Furious. Veteran agents openly expressed their displeasure with the plan and warned of the consequences of encouraging hundreds and even thousands of deadly weapons to go to the drug cartels. The agents felt that by December 2009 they already had enough information to arrest suspected straw purchasers, “flip” them, and use them to collect information on “bigger fish” in the cartels. This was the logical and time-tested law enforcement strategy to go after a large-scale crime organization like the cartels.

But the administrators in the Phoenix office of ATF were enamored with their new program, and defensive about criticism. When the veteran agents on the street began to complain about Operation Fast and Furious, the concerns were angrily dismissed. Group VII Supervisor David Voth harshly responded to the dissenting agents in a March 12, 2010 e-mail to the entire Group. He acknowledged the “schism” and that some veteran agents had “different opinions” as to Operation Fast and Furious, but patronizingly dismissed their concerns as “petty arguing” and “adolescent.” According to Voth, Fast and Furious was the “tip of the ATF spear” in combating illegal firearms trafficking along the border. Its tactics were the “pinnacle of domestic U.S. law enforcement techniques” and “the biggest tool in our law enforcement tool box. . . . **If you don't think this is fun you're in the wrong line of work – period!**”<sup>7</sup> For those ATF agents in Group VII that weren't on board with facilitating the delivery of guns to bad guys, Voth proposed that they seek employment

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<sup>6</sup> Joint Report 6/14/2010, note 1, *supra*, at 12-13 (testimony of ATF Special Agent John Dodson).

<sup>7</sup> *Id.* at 23 n.21 (Mar. 12, 2010 Email from Group VII Supervisor David Voth to Phoenix Group VII) (emphasis in original).

with at the Maricopa County Jail where “you can get paid \$30,000 (Instead of \$100,000) to serve lunch to inmates all day.”<sup>8</sup>

Despite (or perhaps because of) Voth’s tough talk and threats, both support for Operation Fast and Furious and morale among the Group VII agents continued to plummet. They knew that what they were being ordered to do would have deadly consequences and that the entire premise of Operation Fast and Furious violated ATF policy, all their law enforcement training, and common sense. In hearings before Congress later, agents testified that they were

A widely discussed e-mail from Group VII Supervisor David Voth best summarizes the divide that had emerged in Group VII, with senior special agents on one side, wanting to stop the operation, and those in the ATF chain of command on the other, wanting to continue the gun walking.<sup>21</sup>

It has been brought to my attention that there may be a schism developing amongst the group. This is the time we all need to pull together not drift apart. We are all entitled to our respective (albeit different) opinions however we all need to get along and realize that we have a mission to accomplish.

I am thrilled and proud that our Group is the first ATF Southwest Border Group in the country to be going up on wire. On that note I thank everyone for their efforts thus far and applaud the results we have achieved in a short amount of time.

Whether you care or not, people of rank and authority at HQ are paying close attention to this case and they also believe we (Phoenix Group VII) are doing what they envisioned the Southwest Border Groups doing. It may sound cheesy but we are “The tip of the ATF spear” when it comes to Southwest Border Firearms Trafficking.

We need to resolve our issues at this meeting. I will be amazed if this case is going to suffer due to petty arguing, rumors or other adolescent behavior.

I don't know what all the issues are but we are all adults, we are all professionals, and we have a exciting opportunity to use the biggest tool in our law enforcement tool box. If you don't think this is fun you're in a wrong line of work – period! This is the pinnacle of domestic U.S. law enforcement techniques. After this the tool box is empty. Maybe the Maricopa County Jail is hiring detention officers and you can get paid \$30,000 (instead of \$100,000) to serve lunch to inmates all day.

Despite this e-mail, agents continued to experience dismay and frustration as Operation Fast and Furious continued along its perilous path. An Agent Casa testified:

Q. And is it fair to say that . . . the folks on your side of the schism wanted to do everything they could to interdict these weapons so they wouldn't get any further down the street than they have to?

A. Yes, sir. We were all sick to death when we realized that – when

I don't know what all the issues are but we are all adults, we are all professionals, and we have a exciting opportunity to use the biggest tool in our law enforcement tool box. If you don't think this is fun you're in the wrong line of work – period! This is the pinnacle of domestic U.S. law enforcement techniques. After this the tool box is empty. Maybe the Maricopa County Jail is hiring detention officers and you can get paid \$30,000 (instead of \$100,000) to serve lunch to inmates all day.

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agents were  
ision about

“sick to death” and “distracted” when they realized that the guns that they were watching be purchased by straw buyers for the cartels were not being interdicted and were not even being further monitored once the purchase had occurred. ATF agents knew that they had a duty and responsibility to act to prevent these purchases from occurring, but their supervisors were ordering them not to intervene. There were occasions when agents surveilled straw purchasers for hours, watched them pick up money, make multiple purchases from different FFLs, then drop off the weapons for pickup by cartel operatives, yet were specifically told to do nothing. Despite literally screaming at their supervisors over the radio that they needed to intervene, they were repeatedly told to stand down.

Voth followed up on his e-mail with a meeting of all of the Group VII agents. In the meeting, he tried to explain that Operation Fast and Furious was perfectly legitimate. Relying on an obtuse interpretation of ATF guidelines, he claimed that ATF policy allowed agents to let illegally purchased guns be delivered to known criminals as long as it served the long-term goals of a bigger investigation. And they really weren’t “walking guns” according to Voth, since the agents never actually had possession of the guns and were only watching the illegal purchases and deliveries taking place. Under this overly narrow understanding of the term, the agents were doing nothing wrong or abnormal at all. He also said that Assistant U.S. Attorney for Arizona Emory Hurley had not only been briefed on Operation Fast and Furious but had endorsed the program as legal, proper, and compliant with all ATF and DOJ regulations.

ATF agents on the street disagreed with these interpretations, and became more and more concerned as 2010 progressed and hundreds of guns passed from their watch into the control of criminals. They were worried that these guns would start turning up at the scenes of violent crimes,

<sup>8</sup> *Id.*

<sup>21</sup> Email from Group VII Supervisor David Voth to Phoenix Group VII (Mar. 12, 2010).  
<sup>22</sup> Agent Casa Transcript, at 41.

and that there would be a spike in violence in the border region. This is exactly what happened. March 2010 was the deadliest month in the border area since 2005, with over 187 murders committed in the state of Sinaloa alone (including 11 Mexican policemen). The agents were horrified, but Voth was described later as “jovial, if not giddy” over the news.<sup>9</sup> Rather than being appalled at the monstrous consequences of allowing hundreds of deadly assault rifles to fall into the hands of the cartels, Voth believed that Operation Fast and Furious was *working*. The rise in violence showed that there was a clear causal link between illegal purchases in Phoenix and murders by cartel operatives. He sent out another e-mail to Group VII detailing the statistics. He noted that Group VII agents had allowed 359 firearms to be purchased by straw buyers in March 2010 alone, including “numerous Barrett .50 caliber rifles.”<sup>10</sup> He cautioned against responding to this increase in violence by going after the straw purchasers, stating that rather than “rush[ing] in to arrest any one person” they needed to wait until they

From: Voth, David J.  
Sent: Friday, April 02, 2010 10:31 AM  
To: [REDACTED]  
Cc: Phoenix Group VII  
Subject: No pressure but perhaps an increased sense of urgency...

MEXICO STATS

958 killed in March 2010 (Most violent month since 2005)  
937 killed in January 2010  
842 killed in December 2009

SINALOA - MARCH STATISTICS

187 murders in March, including 11 policemen

I hope this e-mail is well received in that it is not intended to imply anything other than that the violence in Mexico is severe and without being dramatic we have a sense of urgency with regards to this investigation. Our subjects purchased 359 firearms during the month of March alone, to include numerous Barrett .50 caliber rifles. I believe we are righteous in our plan to dismantle this entire organization and to rush in to arrest any one person without taking in to account the entire scope of the conspiracy would be ill advised to the overall good of the mission. I acknowledge that we are all in agreement that to do so properly requires patience and planning. In the event however that there is anything we can do to facilitate a timely response or turnaround by others we should communicate our sense of urgency with regard to this matter.

Thanks for everyone's continued support in this endeavor.

David Voth  
Group Supervisor  
Phoenix Group VII

I hope this e-mail is well received in that it is not intended to imply anything other than that the violence in Mexico is severe and without being dramatic we have a sense of urgency with regards to this investigation. Our subjects purchased 359 firearms during the month of March alone, to include numerous Barrett .50 caliber rifles. I believe we are righteous in our plan to dismantle this entire organization and to rush in to arrest any one person without taking in to account the entire scope of the conspiracy would be ill advised to the overall good of the mission. I acknowledge that we are all in agreement that to do so properly requires patience and planning. In the event however that there is anything we can do to facilitate a timely response or turnaround by others we should communicate our sense of urgency with regard to this matter.

could “dismantle the entire organization.”<sup>11</sup> Exactly how this was going to be accomplished was still a mystery (and is undescribed in his e-mail), but the increasing violence only encouraged Voth and the other senior ATF leaders in the Phoenix office.

Voth was not alone in his insensitivity to the consequences of Operation Fast and Furious. Multiple agents testified before Congress that the prevailing attitude among the ATF leadership in Phoenix in 2010 was that there was going to be collateral harm and loss of life from the flooding of the border region with dangerous weapons, but that such harm was necessary in order to reach the ultimate goal of a big “takedown” of one or more of the cartels. During the internal debate over Operation Fast and Furious, one veteran agent asked a Phoenix ATF supervisor if she was prepared to go to the funeral of an American law enforcement officer killed by a Fast and Furious gun. The ATF Special Agent – as yet unidentified – replied that “you have to scramble a few eggs to make an omelette.”<sup>12</sup> It is hard to imagine that federal law enforcement agents charged with the duty of protecting the public (and their fellow law enforcement officers) from firearms violence could so be so callous and uncaring about the inevitable, tragic consequences of their actions.

<sup>9</sup> *Id.* at 38 (testimony of Agent Dodson).

<sup>10</sup> *Id.* at 36 (e-mail).

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 38-39.

There were other warnings of the potential consequences of Operation Fast and Furious, including the threat the program and its outrageous tactics posed to other law enforcement officers. In March 2010, two Arizona DPS officers pursued a suspect who turned and fired on them before his vehicle spun out of control and he was arrested. Firearms later traced to Fast and Furious straw purchases were found in the vehicle, although it is unclear if one of those weapons was the one used to fire on the officers. And in July and August 2010, guns traced to Operation Fast and Furious began being seized from “safe” houses operated by drug dealers in the Phoenix area. But no one in ATF cared, and the program continued.

As 2010 progressed, and more and more guns made their way into the possession of the cartels and other criminals in both the United States and Mexico, there continued to be no progress on any investigation linked to Operation Fast and Furious. Although thousands of weapons had now been illegally purchased under ATF observation, ATF was no closer to any leads on cartel “big fish” than it had been as of the end of 2009. There was tons of evidence now on the straw purchasers and their contacts with low-level cartel operatives, but nothing more. And there was mounting concern from Mexican officials about the alarming rise in guns traced to Phoenix purchases showing up at Mexican crime scenes (although Operation Fast and Furious was kept secret from the Mexican government and even ATF officials stationed in Mexico until 2011).<sup>13</sup> With little gain balanced against the enormous losses caused by Operation Fast and Furious, and with a growing sense in both ATF and DOJ (who were at least aware and concerned that a large number of guns had been walked in Operation Fast and Furious) that the program was out of control, ATF leaders said they would put a stop to Fast and Furious as early as July 2010.

But nothing changed. Operation Fast and Furious continued through the rest of 2010 until Brian Terry was murdered. Fifteen months of facilitating the arming of violent criminals with military-grade weapons produced no positive results to counterbalance the incredible harm and loss of human life the program caused. There were no arrests or indictments during that time, and no evidence supporting the indictment of anyone other than straw purchasers was ever developed. Operation Fast and Furious was a colossal failure on every conceivable level. For Brian Terry, the failure was fatal.

**B. ATF Observed Jaime Avila Illegally Purchasing Firearms But Did Nothing**

As described in the January 19, 2011 Indictment of 20 of the straw purchasers – the only indictment to result from Operation Fast and Furious – Jaime Avila, Jr. was introduced into the conspiracy to arm the cartels by Juan Jose Martinez-Gonzalez and Uriel Patino in November 2009. On November 24, 2009, Patino accompanied Avila into Lone Wolf Trading Company, an FFL in Glendale, Arizona, for the first of



<sup>13</sup> A second Joint Congressional Report issued on July 26, 2011, “The Department of Justice’s Operation Fast and Furious: Fueling Cartel Violence,” contains 60 pages of detail of the harm the program caused in Mexico and the attempt by ATF to cover up its role in the escalating Mexican violence in 2010.

what would become many purchases of weapons for the cartels. Patino acted as a recruiter of straw buyers for the cartels, and would himself become the most prolific straw purchaser observed by ATF agents during Operation Fast and Furious, buying over 700 weapons. By late November, ATF agents in Phoenix had already watched Patino purchase 34 guns for the cartels. Now he had a new helper. At Patino's direction, Avila purchased five FN Herstal pistols, at the same time Patino was purchasing five AK-47-type assault rifles. The five pistols Avila purchased that day have never been recovered and are likely in the hands of cartel operatives today.

Both Avila and Patino filled out forms that day asserting that the purchases were for their own use, committing a federal crime. ATF officials monitoring their purchases thus had probable cause as of November 2009 to arrest Avila (and Patino) for violating federal firearms laws by lying on the form – so-called “lying and buying.” This was the crime that Avila was ultimately indicted for fourteen months later, after Brian's murder. ATF officials could and should have arrested Avila at this time and charged him with the federal firearms violation. Even if prosecuting Avila wasn't feasible for some reason, an arrest then likely would have caused he and Patino to stop their illegal purchases. And Avila wouldn't have been able to purchase the weapons used to kill Brian Terry.

Avila made another purchase of five AK-47 type rifles from Lone Wolf on December 17, 2009 (these five assault rifles have also never been recovered). Following the December 17, 2009



Avila purchase, Lone Wolf owner Andre Howard was suspicious and contacted ATF officials. They met with Howard and explained that they could not tell him not to sell to suspicious straw purchasers like Avila as long as all of the mandatory paperwork was completed. But they encouraged

him to pass along information about suspicious activity. Howard, who was profiting handsomely from these suspicious sales that ATF was all but admitting to him were illegal, agreed to continue to sell to the suspected straw buyers. Again, ATF could have used a variety of tactics to stop the suspicious sales at this point, even if they did not have probable cause or sufficient evidence to prosecute the straw purchasers (which they did). But at least then guns wouldn't be flowing to the bad guys, including guns used to kill Brian. Instead, they all but told Howard to make the sales.

So when Avila came into Lone Wolf again on January 9, 2010 and purchased three more Herstal pistols, Howard again sold them to him without issue. These guns quickly made their way into others' hands far away, further demonstrating that Avila's purchase of these weapons for his own use was a total sham. On January 14, 2010, the pistols were found (along with AK-47s purchased by Patino and other weapons) in a vehicle pulled over for suspicious driving in Columbus, New Mexico. Columbus is a border town in southern New Mexico 360 miles from Glendale. The weapons were not seized at the time because the occupants of the vehicle were not engaged in any criminal activity, and the weapons likely proceeded across the border at some later point. But if ATF officials had actually been following the weapons purchased by Avila and not letting them “walk,” they would



have been able to immediately seize them as illegally purchased and possessed, and also could have arrested Avila and charged him with being part of a criminal conspiracy to illegally traffic in firearms.

But they did not, so Avila was able to continue to illegally purchase weapons; this time with deadly consequences. On Friday, January 16, 2010 Avila bought two AK-47 type assault rifles and a third weapon, a WASR 7.62x39mm assault rifle. Howard again proceeded with the sale. ATF was not even monitoring Avila at the time and only learned of the purchase when they received the federal paperwork for it on January 19, 2010. But rather than rushing out to locate Avila and interdict the weapons before they could be shipped to the cartels (and eventually Brian's killers), ATF simply continued to monitor Avila. These two AK-47-style assault rifles, serial numbers 1971CZ3775 and 1983AH3977, were the only weapons found at the scene of Brian Terry's murder. The WASR has never been recovered.

Avila went on to make at least two more straw purchases, on March 1, 2010 and June 15, 2010. A pistol purchased on March 1 was recovered March 3 at a drug house in Phoenix. Once again, ATF officials at that point knew beyond any reasonable doubt that Avila was a straw purchaser for drug trafficking enterprises and that weapons he purchased immediately went into the hands of violent criminals. They could have at that point done something – anything – to try to recover the other weapons he had purchased. Maybe arresting Avila and turning him into an informant could have led to the recovery of the weapons used to kill Brian or otherwise damage the cartel so that its operatives would not later be able to commit murder. There were any number of things that could have been done to correct the mistake of letting the guns purchased by Avila walk. But ATF did nothing, at least until December 15, 2010. By then it was too late.

### **C. The Murder of Agent Terry and Jaime Avila's Immediate Arrest**

Like many of the details of Operation Fast and Furious, what exactly happened on the night of December 14, 2010 remains a mystery, even to the members of Brian Terry's immediate family. Here is what is known at this time.

On December 14, 2010, Brian was patrolling the hills and mountains east of Rio Rico, Arizona with three other BORTAC agents – Gabriel Fragoza, Timothy Keller, and William Castano. The agents were looking for a suspected “rip crew” of illegal alien criminals affiliated with the drug cartels who were attacking and stealing from other drug smugglers operating in the area. Brian and his fellow agents crossed path with a group of five illegal aliens – two of them carrying the AK-47 variant assault rifles purchased by Jaime Avila from Lone Wolf the previous January – at approximately 11:15 p.m.

How the confrontation unfolded is still unclear. We do know that Brian was shot one time, in his lower left back. The other BORTAC agents with Brian reported over the radio that shots had been exchanged with suspected bandits, and that an agent had been hit. Within minutes, EMS paramedics and a medevac helicopter were en route to the scene. The agents also radioed that while four of the bandits had escaped, one of them had been shot and captured at the scene. Other air units were scrambled to try to locate the rest of the escaping bandits, but they were never found.

Paramedics who arrived at the scene could not find a pulse for Brian. Although he was quickly evacuated by helicopter to a nearby hospital, he was pronounced dead a few minutes later. An American hero had lost his life, defending our border and our country from armed assassins. Tragically for Brian and his loved ones, those criminals had received the weapons used to kill him with the blessing and under the supervision of his own government.

How this confrontation in the middle of the night in the desert between Brian's team and the bandits could end with Brian dead and at least four suspects escaped is still mystifying, although the advanced firepower that the bandits had been equipped with by Operation Fast and Furious certainly played a role. News reports of the confrontation and shooting have been rife with rumor and misinformation, complicating the Family's efforts to figure out what happened.

#### **D. Operation Fast and Furious Is Exposed After Brian's Murder.**

Brian's death could have and should have been prevented by competent law enforcement personnel if those involved had simply followed ATF policy and common sense. But Brian did not die in vain. As the Joint Congressional Report described, "His passing exposed the practice of knowingly allowing the transfer of guns to suspected straw purchasers."<sup>14</sup> Brian's murder and the subsequent public condemnation of Operation Fast and Furious would bring the program to a halt. His death at least resulted in ATF no longer facilitating the arming of violent criminals, and possibly prevented other innocents from becoming victims of crimes committed using Fast and Furious weapons.

ATF officials immediately feared the worst following Brian's death, that the weapons used to kill him had been purchased under surveillance of Operation Fast and Furious. On the morning of December 15, 2010, ATF Assistant Special Agent in

From: [REDACTED]  
To: [REDACTED]  
Sent: Wed Dec 15 19:45:03 2010  
Subject: U.S. Border Patrol Agent killed in the line of duty - Two firearms recovered by ATF  
The two firearms recovered by ATF this afternoon near Rio Rico, Arizona, in conjunction with the shooting death of U.S. Border Patrol agent Terry were identified as 'Suspect Guns' in the Past and Furious investigation.

The firearms are identified as follows:

Romarm/CUGLR, 7.62 rifle, Model GP WASR 10/63, serial number 1971CZ3775  
Romarm/CUGLR, 7.62 rifle, Model GP WASR 10/63, serial number 1983AH3977

[REDACTED] contact me late this afternoon requesting intel assistance in the tracing of two recovered firearms.

I initiated an urgent firearms trace requests on both of the firearms and then contacted the NTC to ensure the traces were conducted today.

I was advised by the NTC that the firearms were entered into ATF Suspect Gun database by SA Medina and associated to the Past and Furious investigation. The NTC further advised that on 01/16/10 Jaime AVILA purchased three Romarm 7.62 rifles from Lone Wolf Trading Company, two of these firearms are the recovered firearms cited above.

I was advised by the NTC that the firearms were entered into ATF Suspect Gun database by SA Medina and associated to the Past and Furious investigation. The NTC further advised that on 01/16/10 Jaime AVILA purchased three Romarm 7.62 rifles from Lone Wolf Trading Company, two of these firearms are the recovered firearms cited above.

Charge George Gillett and Special Agent in Charge Bill Newell ordered all available ATF personnel to go down to the crime scene to "assist" the FBI. This would allow ATF to closely monitor the murder investigation and any link to Operation Fast and Furious. Gillett also ordered the weapons found at the scene to be traced as soon as possible. That trace was completed later that day. By 7:45 p.m. on December 15, 2010, ATF's worst fears had been realized: the guns used to kill Brian Terry had been purchased by Jaime Avila from Lone Wolf under ATF surveillance the previous January.

<sup>14</sup> *Id.* at 46.

Within hours, ATF located and arrested Jaime Avila. ATF had been monitoring his illegal activity for the previous thirteen months but did nothing to stop him until the consequences of his illegal purchases were realized. But now they took immediate action. This itself is an implicit admission by ATF of the wrongfulness of Operation Fast and Furious. Even worse, on December 16 the ATF Phoenix leadership and AUSA Emory Hurley agreed that – to avoid exposing the link between their failed operation and Brian Terry’s death – they would not charge Avila with purchasing the weapons found at the murder scene but rather with lying on the forms for the July 2010 purchase. Less than twenty-four hours after Brian’s murder, it appears that ATF and DOJ were already moving to cover up their role in his death.

Avila was subsequently released, re-charged, and then re-charged again on January 19, 2011 as part of an indictment of 19 other straw purchasers, including Uriel Patino. The 20 defendants were all – like Avila – low-level straw purchasers charged with “lying and buying,” hardly a major federal offense. That was all that Operation Fast and Furious was able to achieve. A few of the other defendants also had some drug trafficking charges rolled into the indictment, but also nothing major. None of the violent criminals higher in rank in the cartels were indicted as a result of Operation Fast and Furious, nor would they ever be. There was no evidence collected as to any other defendant other than the straw purchasers. And those defendants were so innocuous that they were back on the street shortly after being arrested.

Although this was hardly a big blow to the cartels (which could easily and quickly recruit another 20 straw purchasers), a news release was issued on January 25, 2011 in which Bill Newell, U.S. Attorney for Arizona Dennis Burke, and Assistant Attorney General Lanny Brewer all

**Charge of the ATF Phoenix Field Division. This investigation is also further proof that the 'straw purchase' of firearms continues to be a significant problem and that those individuals that knowingly falsify ATF firearms forms in order to supply Mexican drug cartels with firearms have as much blood on their hands as the criminals that use them."**

trumpeted the success of the investigation. The press release does not refer to Operation Fast and Furious by name, much less its “gun walking” tactics. In the statement, Newell directly linked the straw purchasers to the violent crimes committed using the illegally-purchased weapons, stating that “those individuals that knowingly falsify ATF firearms forms in order to supply Mexican drug cartels with firearms have *as much blood on their hands as the criminals that use them.*” (Emphasis added). Of course, neither Newell nor anyone else quoted in the press release mentioned that ATF was itself directly responsible for allowing those illegal purchases to occur.

ATF Agent John Dodson, one of the veteran agents in Group VII who had long been critical of Operation Fast and Furious, was devastated by the news that Brian Terry had been murdered by a



FOR IMMEDIATE RELEASE  
Tuesday, January 25, 2011

Office of the United States Attorney, Dennis K. Burke  
District of Arizona

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#### Grand Jurors Indict 34 Suspects in Drug and Firearms Trafficking Organization

Multi-Agency task force rounds up defendants accused of illegal gun purchases, money laundering and conspiracy

PHOENIX – Grand jurors have returned multi-count indictments in five cases against 34 defendants accused of assisting Mexican Drug Trafficking Organizations with illegally trafficking firearms from the United States to Mexico.

Beginning earlier this morning, a multi-agency law enforcement task force rounded up and arrested 20 defendants named in the 53-count Avila indictment, which was unsealed today. More than 100 officers were involved in the operation.

The Avila indictment alleges that from approximately September 2009 to December of

Criminal Division. “The Criminal Division is working hard with its partners in the U.S. Attorneys’ Offices and colleagues in Mexico to find and prosecute those who seek to transport weapons illegally across our borders.”

In parallel cases, another 14 people have been charged with gun-trafficking crimes in the District of Arizona under a series of grand jury indictments that have been recently handed down or unsealed. Defendants in those cases are pending trial.

“This investigation is further proof of the relentless efforts by Mexican drug cartels, especially the Sinaloa Cartel, to illegally acquire large quantities of firearms in Arizona and elsewhere in the U.S. for use in the ongoing Mexican drug war,” said Bill Newell, Special Agent in Charge of the ATF Phoenix Field Division. “This investigation is also further proof that the ‘straw purchase’ of firearms continues to be a significant problem and that those individuals that knowingly falsify ATF firearms forms in order to supply Mexican drug cartels with firearms have as much blood on their hands as the criminals that use them.”

weapon purchased by Jaime Avila under his watch. He felt he had let Brian and his family down by not doing what he knew was right. Many other Group VII agents shared Agent Dodson's sorrow and disgust. To come clean about Operation Fast and Furious and so the truth about the program could be exposed, Agent Dodson blew the whistle. Agent Dodson's knowledge led to a letter from Senator Chuck Grassley and the Senate Judiciary Committee to DOJ asking for more information about Operation Fast and Furious. CBS News reporter Sharyl Attkisson published a story based on Agent Dodson's information on February 23, 2011, and after her interview with Agent Dodson was published and televised March 3, 2011, a media and political firestorm exploded.

The conflagration has not subsided since. Other major media outlets like FOX News and the LA Times followed up with Dodson and the Congressional investigators. When DOJ refused to respond to much of Senator Grassley's requests, many felt that DOJ was trying to cover up what had happened. Congressman Darrell Issa, Chairman of the House Oversight and Government Reform Committee, joined Senator Grassley's investigation and, using the powers of his Committee, began subpoenaing documents and testimony. Several hearings were held. In a May 2011 hearing, Attorney General Eric Holder claimed to have only learned of Operation Fast and Furious a few weeks earlier. But documents leaked to the media in October 2011 – including memos and emails describing the operation from mid-2010 – have cast serious doubt that Holder was truthful in his testimony, although Holder has since tried to clarify what he said. The political scandal has now reached all the way into President Obama's Cabinet, and shows no sign of diminishing any time soon.

The scandal also eventually impacted the principal orchestrators of Operation Fast and Furious, although not a single ATF agent or official has been fired or forced to resign as a result of the murders committed using Fast and Furious weapons. Bill Newell and David Voth were removed from the Phoenix office and transferred to positions in Washington, D.C. ATF Acting Director Kenneth Melson – who allegedly not only approved and closely followed Operation Fast and Furious but actually had a closed-circuit feed on a screen in his office of a surveillance camera at Lone Wolf to watch straw purchases – was removed from leadership of ATF and transferred to another government position, as was ATF Deputy Assistant Director William McMahon. Emory Hurley was transferred out of the Criminal Division in the U.S. Attorney's Office. And his boss, U.S. Attorney Dennis Burke, resigned on September 1, 2011. Burke's colleagues in the Arizona U.S. Attorney's Office were removed from the prosecution of both Brian's murderers and the Avila straw purchaser case, and those cases were assigned to U.S. Attorney for the Southern District of California Laura Duffy and her office.

Manuel Osorio-Arellanes, the injured bandit detained at the scene of Brian's death, was indicted and charged with murder, but the case was and remains sealed. The Family's attempts to intervene in that matter as crime victims under the Crime Victims Rights Act were, remarkably, initially opposed by Burke's office, although the United States has since withdrawn its opposition under the new prosecution team. The Family has also moved to intervene as victims in the Avila straw purchaser case, but the government opposed their victims' status in that matter, despite the ATF and DOJ press release that announced that indictment equating those straw purchasers with Brian's killers. Two of the defendants in the Avila prosecution recently pled guilty to the charges against them, further cementing as fact the link between the criminal conspiracy to illegally purchase firearms and Mexican drug cartels.

It seems that there are new allegations of cover-ups and political shenanigans in the Operation Fast and Furious scandal every day. Most recently, on January 20, 2012, the Chief of the Criminal Division in the U.S. Attorney's Office in Arizona, Patrick Cunningham, announced that he would be invoking his Fifth Amendment right to refuse to testify before the House Government Oversight Committee. Cunningham is the first federal official involved in Fast and Furious to invoke the Fifth Amendment, but likely will not be the last as investigations of the failed operation continue.

None of the media attention on this scandal or the political infighting it has caused brings Brian back or eases the Family's pain over his loss. But they do take some consolation in the fact that this abominable, reckless, nonsensical ATF program has been exposed and discredited as a result of Brian's murder. They are optimistic that his death and the subsequent scandal will at least prevent such outrageous ATF conduct in the future, so that his loss will not have been completely in vain.

## **V. ATF'S LIABILITY**

### **A. Liability Under the Federal Tort Claims Act**

The Family's wrongful death claim falls under the Federal Tort Claims Act, 28 U.S.C. §§ 2671, *et seq* ("FTCA"). ATF is liable for the tort of negligence, based on its multiple breaches of its duty of care owed to Brian Terry. ATF's negligence directly and proximately caused Brian's death.

ATF unreasonably failed to perform its primary function, to control dangerous firearms to keep them out of the hands of dangerous criminals. Instead, ATF negligently allowed the weapons to be purchased by the most violent criminals in North America, who would foreseeably use those weapons to harm and murder law enforcement officers like Brian and other innocent civilians.

28 U.S.C. § 1346(b) specifies the six conditions which must be met in order to impose liability on the United States under the Act: (1) the claim must be for money damages; (2) the damage claim must be for injury or loss of property, or for personal injury or death; (3) the damage must have been caused by a negligent or wrongful act or omission; (4) the wrongful actor must have been a federal employee; (5) the employee must have been acting within the scope of his employment; and (6) the circumstances must be such that, if the United States were a private person, liability would be imposed under the law of the place where the wrongful act or omission occurred. All six of these conditions are met by this claim. The Family seeks money damages; the loss claimed is the death of their son, Brian Terry; Brian's death was caused by the negligence of ATF officials, agents, and administrators; and those actors are federal employees acting within the scope of their employment. The United States and ATF are also liable for Brian's murder just as any private person would be. The Family would have a viable claim for wrongful death against any negligent law enforcement agency under Arizona law, *see Austin v. City of Scottsdale*, 140 Ariz. 579, 582, 684 P.2d 151, 154 (1984) (holding that wrongful death action against municipal police department presented viable claim that defendant had violated duty to act as would reasonably careful and prudent law enforcement entity), and FTCA defendants are liable for tort claims "in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 2674.

**B. The Family's Wrongful Death Claim.**

In Arizona,

When death of a person is caused by wrongful act, neglect or default, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action to recover damages in respect thereof, then, and in every such case, the person who or the corporation which would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured . . . .

A.R.S. § 12-611. As alleged herein, ATF caused Brian's death through its wrongful acts and omissions allowing and encouraging the illegal trafficking of deadly firearms to violent criminal gangs, weapons which were used in and caused Brian's death. This exposes ATF to liability under A.R.S. § 12-611.

Who can serve as a party plaintiff in a wrongful death action is controlled by A.R.S. § 12-612(A). That section provides:

An action for a wrongful death shall be brought by and in the name of the surviving husband or wife, child, parent or guardian, or personal representative of the deceased person for and on behalf of the surviving husband or wife, children or parents, or if none of these survive, on behalf of a decedent's estate.

Brian was not married and had never had children, so his parents, Kent Sr. and Josie, are his statutory beneficiaries under Arizona law and the proper wrongful death plaintiffs for this claim.

The Family's damages for wrongful death are what the trier of fact finds to be their "fair and just" damages resulting from Brian's death, with regard to the mitigating or aggravating circumstances relating to his murder. A.R.S. § 12-613. These damages include "loss of love, affection, companionship, consortium, personal anguish and suffering." *Vasquez v. State*, 220 Ariz. 304, 310 ¶ 16, 206 P.3d 753, 759 (App. 2008) (quoting *Mullen v. Posada del Sol Health Care Ctr.*, 169 Ariz. 399, 400, 819 P.2d 985, 986 (App. 1991)); see also *Jeffery v. United States*, 381 F. Supp. 505, 510 (D. Ariz. 1974); *RAJI* (Civil 4th), Personal Injury Damages III. They also include the loss of Brian's ability to care financially for his parents. *Kemp v. Pinal County*, 8 Ariz. App. 41, 45, 442 P.2d 864, 868 (1968).

These damages will likely be aggravated given the gross negligence and flagrant violation of government policy involved with Operation Fast and Furious. The aggravating circumstances do not have to themselves have caused Brian's death. *Quinonez ex rel Quinonez v. Andersen*, 144 Ariz. 193, 197-98, 696 P.2d 1342, 1346-47 (App. 1984). Thus, all the evidence of ATF's egregious violation of fundamental law enforcement procedure – as well as evidence of the enormous harm in both the United States and Mexico caused by that violation – can be considered by the trier of fact and used as aggravating factors to enhance the damages awarded.

**C. Negligence.**

In Arizona, negligence is a breach of the duty of reasonable care that actually and proximately causes injury. *Shafer v. Monte Mansfield Motors*, 91 Ariz. 331, 333, 372 P.2d 333, 335 (1962). The individual elements of the Family's claim against ATF for negligence under Arizona law are set forth below.

**1. Duty.**

"Duty" refers to the issue of whether the defendant is obligated to take any action to protect the plaintiff. *See Markowitz v. Ariz. Parks Bd.*, 146 Ariz. 352, 355, 706 P.2d 364, 367 (1985). "[E]very person is under a duty to avoid creating situations which pose an unreasonable risk of harm to others." *Ontiveros v. Borak*, 136 Ariz. 500, 509, 667 P.2d 200, 209 (1983); *see also Gipson v. Kasey*, 214 Ariz. 141, 146 ¶ 24 n.4, 150 P.3d 228, 233 (2007) ("People generally owe a duty to exercise reasonable care to avoid causing physical harm to others . . . ." (internal quotation marks omitted)). Duties of care can arise from conduct undertaken by a defendant. *Vasquez*, 220 Ariz. at 313 ¶ 29, 206 P.3d at 762.

This duty to use reasonable care to avoid putting others at risk of injury extends to governmental entities, including law enforcement officers. *Austin*, 140 Ariz. at 581-82, 684 P.2d at 153-54. "The parameters of duty owed by the state will ordinarily be coextensive with those owed by others." *Ryan v. State*, 134 Ariz. 308, 310-11, 656 P.2d 597, 599-600 (1982) (holding corrections officers and juvenile detention facility owed duty of care to public). Accordingly, when ATF undertook Operation Fast and Furious and began monitoring gun shops and straw purchasers for illegal activity, it had a duty to act "as would a reasonably careful and prudent" law enforcement agency so as not to create a risk of physical harm to others, including Brian Terry. *Austin*, 140 Ariz. at 581-82, 684 P.2d at 153-54.

**2. Breach of the Standard of Care.**

This duty of reasonable of care is breached when a defendant fails to act with "reasonable care under the circumstances." *Markowitz*, 146 Ariz. at 356, 706 P.2d at 368. Breach is analyzed using an objective standard; courts frequently ask whether a particular defendant behaved in the same way as a person of "ordinary prudence" would in the same situation. *See Morris v. Ortiz*, 103 Ariz. 119, 121, 437 P.2d 652, 654 (1968); *see also Austin*, 140 Ariz. at 581-82, 684 P.2d at 153-54 (outlining evidence showing reasonable police department would have done differently). In practice, this objective standard involves a "risk/benefit analysis" that weighs the burden of the conduct against the chance and likely severity of any harm to plaintiff. *Rossell v. Volkswagen*, 147 Ariz. 160, 164, 709 P.2d 517, 521 (1985).

Reasonable law enforcement agencies do not let guns walk. This was hammered home by all of the current and former ATF agents testifying at Congressional hearings and commenting in media reports, as well as statements by Attorney General Eric Holder in his testimony and in letters directly to the Family as well. Indeed, even the ATF officials accused of orchestrating Operation Fast and Furious adamantly insist that they did not allow guns to "walk," relying on a bizarre and overly narrow definition of that term. The fact that Operation Fast and Furious immediately ceased and has

subsequently been exposed by internal ATF whistleblowers following Brian's murder is also extremely strong evidence of that operation's failure to meet the standard of care expected of a reasonable law enforcement agency. Should this matter proceed to litigation, the Family will present expert testimony further detailing how and why ATF's conduct in this matter falls below the standard of care.

### 3. Causation.

Causation has two elements. First, there is the "cause in fact." Arizona has adopted the "but for" test for cause in fact: "cause in fact exists if the defendant's act helped cause the final result and if the result would not have happened without the defendant's act." *Ontiveros*, 136 Ariz. at 505, 667 P.2d at 205. Closely related, Arizona courts also consider whether the defendant's act was a "substantial factor" in bringing about the plaintiff's injury. *Thompson v. Sun City Community Hosp., Inc.*, 141 Ariz. 597, 606, 688 P.2d 605, 614 (1984).

Avila's purchase of the weapons used to kill Brian was illegal, and occurred under the surveillance and with the tacit approval of ATF. ATF did nothing to interdict that purchase, thought it knew or should have known that it meant that deadly assault rifles would be delivered to violent criminals as a result of that illegal purchase. Yet ATF did nothing. But for the Avila purchase, and but for ATF's inaction and willful disregard of the illegality of that purchase, the guns used to kill Brian would not have been in the hands of his murderers on December 14, 2010. In fact, ATF's Operation Fast and Furious precipitated a flood of thousands of illegally purchased weapons into the Arizona-Mexico border area, making these types of assault weapons easily accessible for Mexican drug cartel operatives. In short, Operation Fast and Furious generally caused the border area to be much more dangerous, and specifically caused Brian's murderers to have the weapons in their hands that they used to kill him. While Brian's killers may have some comparative fault under Arizona law, but for ATF's reckless and negligent actions they would not have had the tools with which to murder him.

Second, there is "proximate cause." The Arizona Supreme Court has defined proximate cause as "that which, in a natural and continuous sequence, unbroken by any efficient intervening cause, produces an injury, and without which the injury would not have occurred." *McDowell v. Davis*, 104 Ariz. 69, 71, 448 P.2d 869, 871 (1968). As a practical matter, proximate cause is "determined upon mixed considerations of logic, common sense, policy and precedent." *Nichols v. Phoenix*, 68 Ariz. 124, 136, 202 P.2d 201, 208 (1949). As part of this analysis, great weight is usually placed on the foreseeability of the plaintiff's injury. *Markowitz*, 146 Ariz. at 358, 706 P.2d at 370. The finder of fact "may find proximate cause between the defendant's act and the plaintiff's injury if the plaintiff's injury was a foreseeable consequence of the act." *Ritchie v. Krasner*, 221 Ariz. 288, 298 ¶ 23, 211 P.3d 1272, 1282 (App. 2009). Proximate cause is usually an issue of fact to be resolved at trial. *Christy v. Baker*, 7 Ariz. App. 354, 358, 439 P.2d 517, 521 (1968).

The harm that befell Brian Terry – being murdered by drug cartel operatives – was foreseeable. ATF's Phoenix Division was well aware of the violence that Mexican drug gangs were committing in both the United States and Mexico in the border area, and Operation Fast and Furious



was ostensibly aimed at breaking up those cartels because of the high danger they posed.<sup>15</sup> In fact, the indictment in the criminal prosecution of Avila and the other straw purchasers exactly describes what ATF knew all along would happen. Avila was part of a conspiracy with “Drug Trafficking Organizations” to illegally purchase and distribute firearms, and those firearms were then used by Drug Trafficking Organizations “to protect their supply of drugs, supply routes, profits and distribution territory from . . . law enforcement agents.” Indictment ¶ 1; at 2. The cartels bought weapons from straw purchasers with tacit approval and under the observation of ATF, and ATF knew these weapons would be used to commit acts of violence against law enforcement agents like Brian Terry. These weapons would only add to the violent criminal activity along the border, increasing the amount of weapons and level of firepower available to drug cartel operatives. Thus the harm Brian suffered was both objectively and subjectively foreseeable.

#### **4. Damages.**

Although negligence requires damages, *see Linthicum v. Nationwide Life Ins. Co.*, 150 Ariz. 326, 330, 723 P.2d 675, 679 (1986), wrongful death plaintiffs in Arizona are not required to prove damages to state a valid cause of action. *Walsh v. Advanced Cardiac Specialists Chartered*, 227 Ariz. 354, 358 ¶ 12, 258 P.3d 172, 176 (App. 2011) (holding that “in a wrongful death case damages is not an essential element of the claim itself”). Rather, the damages inquiry is individualized and in proportion to the loss suffered by each plaintiff. A.R.S. § 12-612(C); *Quinonez ex rel Quinonez v. Andersen*, 144 Ariz. 193, 196, 696 P.2d 1342, 1345 (App. 1984); *Nunez v. Nunez*, 25 Ariz. App. 558, 561, 545 P.2d 69, 72 (App. 1976). The types of damages available for wrongful death claims by a parent on behalf of the loss of a child under Arizona law have already been described in Section V.B, above.

Arizona courts have held that damage awards should place the injured person in “as nearly as possible in the condition he would have occupied had the wrong not occurred.” *Felder v. U.S.*, 543 F.2d 657, 667 (9th Cir. 1976). While the loss of a beloved son and American hero can never be replaced with monetary compensation, the details of the Family’s losses caused by the murder of their son are discussed in Section VI, below.

#### **D. Other Similar Incidents Are Admissible at Trial.**

In Arizona, evidence of other similar incidents (“OSIs”) is admissible by a plaintiff to prove a number of critical elements of his *prima facie* case. As the Supreme Court of Arizona noted in the seminal case *Burgbacher v. Mellor*, 112 Ariz. 481, 483, 543 P.2d 1110, 1112 (1975), “[Evidence] of prior [incidents] is, with the proper foundation, relevant to establishing the elements of the plaintiff’s *prima facie* case. . . .”

Because OSI evidence is highly relevant to notice and a variety of other issues, all that is required for admission of such evidence is that the other incidents “have some degree of similarity to

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<sup>15</sup> See ATF, Gun Runner Impact Team (GRIT) Internal Assessment, Phoenix Field Division Deployment, May 1, 2010 - August 6, 2010, at 1 (beginning report with statement that “[f]irearms and explosives violence has escalated to unprecedented levels in Mexico, particularly along the border with the United States”).

the one under consideration.” *Grant v. Ariz. Pub. Serv. Co.*, 133 Ariz. 434, 450, 652 P.2d 507, 523 (1982). Perfect identity between the other incidents and the subject incident is not required; the incidents need only be “similar in general character.” *Burgbacher*, 112 Ariz. at 483, 543 P.2d at 1112; *see also Purcell v. Zimbelman*, 18 Ariz. App. 75, 83, 500 P.2d 335, 343 (App. 1972) (“it is not necessary, however, to show that such incidents occurred under circumstances precisely the same as those of the one in question – similarly in general character suffices”). Thus, Arizona embraces a liberal standard for the admissibility of OSIs.

New evidence of OSIs – i.e., other innocent law enforcement agents and civilians harmed by weapons ATF allowed to be illegally purchased by violent criminal gangs – emerges every day. The Mexican government has alleged that there are hundreds of other such victims. And given that over 1,500 Operation Fast and Furious weapons remain unaccounted for, it is likely that by the time this matter proceeds to trial there could be *hundreds more* victims in the United States and Mexico. All of these OSIs will be admissible to show the outrageous, foreseeable risk of harm that ATF created through its negligent conduct and the “aggravating circumstances” surrounding the Family’s wrongful death claim.

**E. ATF Is Not Immune Under 28 U.S.C. § 2680(a).**

Although plaintiffs have the burden of proving that their claims fall within the waiver of sovereign immunity established by the FTCA, “the United States bears the ultimate burden of proving the applicability of the discretionary function exception [in 28 U.S.C. § 2680].” *Prescott v. United States*, 973 F.3d 676, 701-702 (9th Cir. 1992); *Faber v. United States*, 56 F.3d 1122, 1124 (9th Cir. 1995). The negligence that caused Brian Terry’s murder was neither the implementation of a federal statute or regulation exercising due care nor a discretionary governmental action subject to immunity under 28 U.S.C. § 2680.

**1. ATF was not executing a statute or regulation using due care.**

The first clause of Section 2680(a) bars claims against the United States “based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not the such statute or regulation be valid.” The analysis of this exception to FTCA claims has two steps. If the allegedly tortious act complained of is specifically prescribed by federal law or regulation, then as long as the government employee has exercised “due care” the government is immune. *Crumpton v. Stone*, 59 F.3d 1400, 1403 (D.C. Cir. 1995) (citing *United States v. Gaubert*, 499 U.S. 315, 322 (1991)).

Neither portion of this analysis applies to the Family’s claims. There was no specific statute or regulation enacted by Congress or any other federal agency that permitted ATF to facilitate the illegal sale of firearms to operatives of Mexican drug cartels. And even if ATF tries to argue that Operation Fast and Furious was somehow an implementation of federal firearms trafficking laws (in fact ATF was facilitating the violation of those laws), there is no way it can successfully argue that this operation was implemented with due care. Over the outraged protests of ATF agents on the ground, ATF’s Phoenix Division allowed thousands of weapons to be illegally purchased by the straw buyers, and either intentionally or negligently lost track of all of those firearms as they passed into possession of the cartels. This strain of immunity – designed to protect the government from tort suits

challenging the enactment of statutes and regulations – simply does not apply. See *Baie v. Secretary of Defense*, 784 F.2d 1375, 1377 (1986) (holding that § 2680 immunity bars tort suits aimed at legislative and administrative decisions).

2. **Discretionary immunity does not apply because Operation Fast and Furious went against ATF policy.**

The other half of Section 2680(a) provides in relevant part that the United States is immune from claims “based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.” But neither Operation Fast and Furious nor ATF’s decision to let Avila illegally purchase firearms and deliver them to violent criminals involved a discretionary function.

Because the purpose of the discretionary function exception “is to prevent judicial ‘second-guessing’ of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort . . . the exception protects only governmental actions and decisions based on considerations of public policy.” *Gaubert*, 499 U.S. at 323 (quoting *United States v. Varig Airlines*, 467 U.S. 797, 813 (1984) and *Berkovitz v. United States*, 486 U.S. 531, (1988)) (internal quotation marks omitted). Thus, regulation promulgation and lawmaking activities, which balance these policy factors, are immune. *Id.* But when the government’s action is *contrary* to “established governmental policy, as expressed or implied by statute, regulation, or agency guidelines,” then no discretionary immunity can apply. *Id.* at 324. And when federal investigations go so far afield from established policy and lawful authority as to endanger citizens’ rights and safety, discretionary immunity unquestionably does not apply. See *Birnbaum v. United States*, 588 F.2d 319, 330-33 (2d Cir. 1978) (holding that CIA’s opening of private citizens’ letters was not discretionary act entitled to immunity); *Glickman v. United States*, 626 F. Supp. 171, 175 (S.D.N.Y. 1985) (holding that CIA operation involving surreptitious drugging of citizen with LSD was “of such serious and malevolent nature as to be beyond any reasonable discretion on the part of a Government agency”).

Discretionary immunity does not apply to the Family’s claim because Operation Fast and Furious was *directly contrary* to established ATF policy. Numerous sources establish this policy violation. The ATF agents called to testify before the Oversight Committee unanimously and adamantly stated – under oath – that allowing guns to walk as instructed by their supervisors during Operation Fast and Furious went against all that they had ever done or been trained as ATF agents. ATF policy was to interdict weapons before they passed to criminals, whenever possible. “Guns didn’t go,” no matter what, because “‘Follow the gun’ was the motto.”<sup>16</sup> Before coming to Phoenix to be part of Group VII, agents had never heard of letting guns pass to criminal without interdiction. “We do not let guns walk, absolutely, positively not.”<sup>17</sup>

ATF’s own policies and the federal statutes it is charged with enforcing also clearly articulate that the goal of ATF and its agents is to *stop* the illegal trafficking of firearms, not facilitate illegal

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<sup>16</sup> Joint Report, note 1, *supra*, at 14-18 (Section IV.B., “Trained to Interdict”)

<sup>17</sup> *Id.* at 17.

purchases. ATF's internal Guidelines described that the main purpose of the Gun Control Act of 1968 is to "Deny the acquisition of firearms by certain persons considered by law to be a threat to society."<sup>18</sup> The GCA also is intended to "[p]rovide for the investigation, apprehension, and prosecution of persons who willfully violate the provisions of the act and *ensure the seizure of firearms used, or intended to be used, in violation of the same.*"<sup>19</sup> Guidelines governing ATF actions to combat firearms trafficking emphasize that the objectives of such investigations include "deny[ing] access to firearms by the criminal element. . . by reducing the illegal supply of firearms available to violent criminals . . ."<sup>20</sup> Guideline 148 governing "Weapons Transfers" does allow for some alternative means of intervention beyond immediate seizing of the weapons but all the listed alternatives involve making sure the guns don't ultimately end up in criminal hands.<sup>21</sup> In situations where the agent may feel that prosecution of the offender may not be feasible, "*interdiction efforts* designed to impact illegal firearms trafficking should be pursued."<sup>22</sup>

The ATF Firearms Trafficking Investigation Guide has similar instructions. The express goal of firearms trafficking investigations "are to deny criminals access to firearms and reduce armed violent crime levels by reducing the availability of illicit secondary market firearms."<sup>23</sup> Where prosecution may not be feasible – including in those locations such as Arizona where prosecutions of firearms traffickers may be difficult for political reasons – interdiction rather than prosecution should be the tool ATF agents should use.<sup>24</sup>

Operation Fast and Furious was expressly designed not to impede the secondary market for illegal firearms but to open the floodgates of illegal arms trafficking in the border region. As such, it directly contradicted both ATF's mandate from Congress and ATF written policy which instruct ATF officers and agents to combat illegal firearms trafficking by interdicting illegally purchased firearms. *No written policy anywhere* authorizes ATF agents to allow the illegal purchase of firearms, lose surveillance of those weapons, then use those weapons' appearance at crime scenes later as evidence of criminal activity.

In testimony before the Oversight Committee and written responses to Congressional inquiries, DOJ has tried to offer tortured interpretations of ATF guidelines that it claims support the tactics employed by Operation Fast and Furious. At best for ATF these machinations could raise a question of fact as to whether discretionary immunity could somehow apply, an issue which could only be resolved through live testimony and other evidence at trial. Given the contrast in credibility in the Congressional hearings between the clear, direct, adamant testimony of the ATF agents on this point and the defensive hemming and hawing of Assistant Attorney General Ronald Weich as he tried to articulate ATF's and DOJ's position, no reasonable trier of fact could ever be persuaded that Operation Fast and Furious was a discretionary implementation of law enforcement policy.

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<sup>18</sup> ATF Firearms Guidelines, note 3, *supra*, ¶ 31.

<sup>19</sup> *Id.* (emphasis added).

<sup>20</sup> *Id.* ¶¶ 104, 141.

<sup>21</sup> *Id.* ¶ 148.

<sup>22</sup> *Id.* ¶ 160 (emphasis added).

<sup>23</sup> ATF Firearms Trafficking Investigation Guide, note 3, *supra*, at 34.

<sup>24</sup> *Id.*

DOJ has recently expressly disavowed even those weak efforts to construe Operation Fast and Furious as compliant with ATF and DOJ policy. Attorney General Eric Holder, in a letter addressed directly to the Family, flatly stated that “the tactic of allowing guns to ‘walk,’ as was permitted in Operation Fast and Furious, is completely unacceptable. . . . The tactics used in this operation violate Department of Justice policy and should never have been used.” The Family could not have put it better themselves; discretionary immunity could never attach to Operation Fast and Furious because it was not only not an implementation of DOJ and ATF policy, it directly violated DOJ and ATF policy. Attorney General Holder’s letter is dispositive of any argument that discretionary immunity applies to the Family’s claim.

**F. The Federal Employment Compensation Act Does Not Bar the Family’s FTCA Claims**

The government may try to argue that Brian’s status as a federal employee and the Federal Employment Compensation Act bars the Family’s FTCA claim. The “dual capacity doctrine,” however, excepts this claim from the FECA worker’s compensation bar. The doctrine – well-established in worker’s compensation law – provides that an employer may incur tort liability to an employee if the employer acts upon the employee through “a second persona so completely independent from and unrelated to his status as an employer that by established standards the law recognizes it as a separate legal person.” 2A Larson, *Workmen’s Compensation Law* 14-229, § 72.81 (1982).

Brian Terry was a U.S. Border Patrol Agent. Border Patrol is an agency under the auspices of the Department of Homeland Security. The Family’s claims are against ATF, a wholly separate agency under the control of the Department of Justice. The negligent and wrongful acts that form the basis of this claim were committed by a separate agency, at a much earlier time, and in a totally separate location from where Brian Terry ultimately suffered harm. Nothing about Operation Fast and Furious or ATF’s wrongful conduct related to Brian’s employment with Border Patrol and the United States government. ATF’s actions caused harm to Brian as a member of the public, and were not directed specifically at him or his status as a federal employee. As such, the United States’ negligence was “completely independent from and unrelated to [its] status as an employer,” and the FECA bar does not apply. The federal Office of Worker’s Compensation Programs, the agency which implements and administers FECA, has already endorsed this position and issued notice that it will seek offset for FECA benefits paid to the Family from any recovery from ATF. *See* Letter from Nellie L. Seward, U.S. Department of Labor, to Gallagher & Kennedy, June 3, 2011, attached hereto at **Tab 2**.

Federal courts have recognized and applied the dual capacity doctrine exception to worker’s comp bars since at least the early 1980s. *See Wright v. United States*, 717 F.2d 254, 259-60 (6th Cir. 1983) (quoting 2A Larson, *Workmen’s Compensation Law*, *supra*); *see also Shelly v. Johns-Manville Corp.*, 798 F.2d 93, 98-99 (3d Cir. 1986) (applying dual capacity doctrine to except employee’s claims against employer from Pennsylvania worker’s compensation bar). Two federal cases in particular are instructive. In *Wright*, a pregnant secretary at a VA hospital was at work when she began experiencing severe abdominal pains and was rushed to the VA hospital’s ER. *Id.* at 255. Although she was not eligible for VA hospital treatment, the hospital treated her for what turned out

to be an ectopic pregnancy. *Id.* She later brought an FTCA med mal claim against the VA doctors. *Id.* at 256. The Sixth Circuit held that even if FECA covered her alleged injuries, the dual capacity doctrine excepted her claim from the FECA bar. *Id.* at 259. The Sixth Circuit cited to the Larson treatise and several state law worker's comp cases applying the doctrine "where [the plaintiffs'] relationship to their employers has been other than that of employer-employee." *Id.* Because the plaintiff in *Wright* was both an employee and patient of the VA, the government acted in dual capacities towards her and the FECA did not apply. *Id.* at 260.

The facts of *Elman v. United States*, 173 F.3d 486 (3d Cir. 1999), are even more on point with the circumstances of the instant claim. In *Elman*, the plaintiff was an employee of EEOC when she fell and was injured on property allegedly negligently maintained by the National Park Service. *Id.* at 488. The plaintiff argued that the dual capacity doctrine should apply to except her FTCA claim from the FECA bar because her relationship to the National Park Service – as a member of the public invited to come onto the National Park Service land – was wholly separate from her employee-employer relationship with EEOC. *Id.* at 491. The Third Circuit agreed, finding that the United States acted towards the plaintiff "in more than one capacity . . . . The Park Service's role in maintaining the . . . sidewalk is not related to the EEOC's role as an employer." *Id.* Similarly, here ATF breached duties of care and safety owed to the general public. Because ATF's negligence has nothing to do with Border Patrol or its status as Brian's employer, the Family's FTCA claim is excepted from FECA.

The Ninth Circuit has never addressed the dual capacity doctrine in the context of FECA, but based on its rulings in similar cases the Ninth Circuit is likely to follow *Wright* and adopt the doctrine. Courts in the Ninth Circuit have for years allowed seamen to sue their employers in their "dual capacities" as vessel owners under the Longshore and Harbor Workers' Compensation Act (LHWCA), a very similar federal compensation scheme. *See Scheuring v. Taylor Bros., Inc.*, 476 F.3d 781, 788 (9th Cir. 2007) (allowing plaintiff to proceed with "dual-capacity" claim against his employer); *see also Phillips v. Tidewater Barge Lines, Inc.*, 2006 WL 1724542, at \*4 n.5 (D. Or. Mar. 21, 2006) (slip op.) (noting that under dual capacity doctrine injured seaman could bring Jones Act, 46 U.S.C. § 688, claim against employer at same time they collected LHWCA benefits). And in other circumstances Ninth Circuit courts have allowed FTCA claims by employees of the United States to proceed despite FECA, *Ritchie v. United States*, 210 F. Supp. 2d 1120, 1124 n.4, 1125-26 (N.D. Cal. 2002) (finding that "fortuitous" circumstance that federal employee was injured by national CIA program while on federal property did not invoke FECA bar), or similar state worker's comp statutes, *Lewis v. United States*, 680 F.2d 68, 70-71 (9th Cir. 1982) (finding issue of material fact as to relationship of United States to plaintiff prevented summary judgment in defendant's favor on FECA grounds). *See also Ritchie*, 210 F. Supp. 2d at 1124 n.4 ("[T]he FECA exclusivity provision by no means applies to every claim brought by a federal employee.").

It could be argued that as law enforcement arms of the federal government the Border Patrol and ATF are similar enough that the United States was not acting in a dual capacity as to Brian Terry through those two agencies. Or it could be argued that Border Patrol agents were foreseeable victims of ATF's misconduct such that Brian was not merely a member of the general public when he was harmed but rather linked more directly to ATF's negligence through his federal employment. But

these arguments raise questions of material fact. Any government attempt to dismiss the Family's claim on FECA grounds inherently incorporates these questions of fact and thus cannot be resolved until trial.

## **VI. DAMAGES**

Because of his duties with ATF, Christmas 2010 was to be the first Christmas Brian would be home in three years. The Family was tremendously excited to spend a traditional family holiday at home with plenty of food and laughter. Brian was himself elated at the chance to see his family, especially to spend time with his nieces and nephew and to give them the special gifts he had picked out. He called home every day to share his excitement and to teasingly drop hints as to what he had purchased for the kids. He couldn't wait to see everyone in person. His plan was to fly home on December 17, 2010, after he completed his final BORTAC shift of the year patrolling the Arizona desert.

Brian bled to death from his gunshot wound in the rugged mountains of southern Arizona around midnight on the morning of December 15, 2010, about 2 a.m. Michigan time. The Family learned that Brian was gone a few hours later. Border Patrol agents first came to Josie's house to deliver the news around 6:30 a.m., but Josie had recently picked up a part-time job working mornings in the deli at a local grocer, so she wasn't home. They next went to Kelly's house, and when Kelly answered the door and let them in, they told her that her brother had been killed.

Kelly was devastated and in shock, but did the best she could to facilitate the delivery of the terrible news to her parents and siblings. She remembers calling her sister, brother, and father, and arranging for Michelle's husband, Mike, to pick up Josie from work to bring her to Kelly's house so that they could break the news to her while the family was together. Kelly was particularly worried that Kent Jr. would "take off" and hurt himself when he heard, so she assigned a family friend to go get Kent and bring him to her house. Michelle and her family also came over to share in the grief. No one could believe what had happened.

When Mike arrived at Josie's work and told her she needed to come with him, she at first thought it was some kind of prank. She had that morning picked out and set aside three Red Wings sweatshirts to be Christmas gifts for her two sons-in-law and Brian, and she told her manager that she'd be back and to not let anyone have those sweatshirts in the meantime. But she quickly realized that this was no joke. Mike refused to answer her questions on the car ride, and when they got to the house and she saw all the cars, she knew something terrible had happened. Kent Jr. came out of the house sobbing as they pulled up and he told her the horrible news.

Carolyn took the call from Kelly that morning, and then told Kent. They were stunned by the news, and confused. Kelly had no information at that time as to exactly what had happened, so Kent and Carolyn called down to the Naco Station. They had only six months earlier spent five weeks with Brian in Arizona and had befriended several of Brian's fellow agents. But the people they spoke with could give them little information. In what would become a frustrating theme of the Terry Family's interactions with government officials since their son and brother was murdered, no one would tell

Kent and Carolyn what exactly had happened to Brian. The Family still wonders about some of the circumstances of Brian's death today.

Kent and Carolyn drove to Kelly's house that afternoon to join the rest of the Family to grieve. In those first few hours, time seemed to stand still for all of them. The vision of Brian dying in the cold desert and memories of his beautiful life flashed before their eyes. It could not be real, not their Brian, not Superman. As dangerous as his line of work was, he had molded his mind, body, and spirit for his career. They thought he was invincible. Kelly's house quickly filled with fellow mourners and those wanting to support the family, including Brian's many close friends. But it all seemed unreal. This could not be really happening because they were supposed to see Brian in just a couple days. It was hard to take in the information of what had happened because shock had taken over.

Brian did come home for Christmas. His body was delivered to Detroit by airplane on December 18, 2010. The family stood on the airport tarmac, as the plane carrying his flag-draped



casket pulled up to Gate A67. A color guard of Brian's fellow Marines and Border Patrol agents also attended. Bagpipes played as his casket was unloaded from the plane, then loaded into a hearse for a police escort to the funeral home.



From the time Brian was pronounced dead until the time he was laid to rest in the ground, Brian's body was never alone. An honor guard was with him in Arizona, flew with him to Michigan, and then watched over him in the funeral home until the funeral and then burial. For three days at the funeral home different groups of Marines and Border Patrol agents rotated their watch, 24 hours per day. They would not leave their brother-in-arms' side until he was laid to rest.



Brian's body laid in state at the funeral home from the night of the 18th until the funeral on the 22nd. The funeral home was filled with so many flowers that they carried into the hallway. There were formal visitation hours on the 20th and 21st, and the line at times stretched around the building.



While Brian's body lay in state in the funeral home, his Christmas presents arrived. Ever organized and meticulous, Brian had shipped them from Arizona the previous week before his final shift. The receipt of these presents was heartbreaking; another reminder that Brian was supposed to be there with them celebrating Christmas, not lying in a casket waiting to be buried.

Brian's funeral was held at Greater Grace Temple in Detroit, on December 22, 2010, one week after he was murdered. Grace Temple is the largest church in the state and is where funerals for law enforcement officers from the Detroit area killed in the line of duty are traditionally held. The church was almost filled to capacity for the funeral, approximately 3,000 people. Federal agents lined the entrance to the church and stood in salute as Brian's hearse went by. Later, during the processional drive from Detroit to Michigan Memorial Cemetery outside Flat Rock where Brian was to be buried, law enforcement and first responder vehicles lined the entire route. Giant American flags were hung from the rescue ladders of fire trucks at what seemed like every intersection along the way. What is normally a 20 minute drive took almost three hours because the procession had so many vehicles and they had to proceed slowly to be acknowledged by all of the first responders lining the route to honor Brian.

Brian was laid to rest in Michigan that day, but the honoring of his memory continued in January of this year in Tucson, Arizona. A memorial service was held at Kino Stadium on January 22, 2011. Over a thousand people attended at the baseball park, sharing their grief and paying their respects. All of the Terrys except Kent Sr. – who because of his health issues could not attend – represented Brian’s family at the service.

By that time, the Terry family had received lots of conflicting and confusing information about exactly how Brian came to be shot in the back and killed. None of it made any sense; Brian was as well-trained and prepared for combat as any soldier in the world so the Family could not understand how he could have been shot. Early reports had indicated that Brian and his fellow BORTAC agents were only equipped with or only allowed to use non-lethal weapons during the confrontation, but those rumors were refuted by other Border Patrol agents. Some people told the Terrys that Brian had died within minutes, others said he died hours later. The family was first told there were three guns at the scene, then later told only two. No one said anything about Operation Fast and Furious, even though before Brian was laid to rest ATF officials knew that the guns found at Brian’s murder scene and used to kill him had been among those ATF watched and allowed to go to the Mexican drug cartels.



So when federal officials asked the Terry family to attend a briefing upon their arrival in Tucson for the memorial, they were excited that they would finally get some clear answers about what had happened. They met with officials from the Border Patrol, FBI, and DOJ in a conference room at their hotel. But the officials gave them almost no information, and wouldn't answer the family's questions. Kent Jr. eventually got up and walked out of the meeting in disgust, and Carolyn did the same a few minutes later. All of the family now knew that their own government – despite all the posthumous awards and memorials that it had given Brian – was now dishonoring his memory by refusing to honestly and directly answer his loved ones' questions about just how he had been killed. The federal officials were obviously covering something up; and their actions only added to the Family's grief.

The Family's belief that the federal officials were hiding something were confirmed a few weeks later when media reports emerged describing Operation Fast and Furious and its role in Brian's

murder. After the CBS News reports were published in March 2011, U.S. Attorney Dennis Burke – whose office would be prosecuting Brian’s murderers – asked to come meet with the family to explain what was going on. But this meeting went even worse than the briefing in Tucson. In separate meetings with Josie and Brian’s siblings in Flat Rock and then Kent and Carolyn in Jonesville, Burke hemmed and hawed, bobbed and weaved, refused to give straight answers, and flat out lied about what he knew about Brian’s death and Operation Fast and Furious. He told the family that they would never be able to find the bullet that killed Brian (which was located in Brian’s body during the autopsy in December) and that the guns found at Brian’s murder scene had been bought from a gun store in Texas and were not linked to Operation Fast and Furious (Burke actually knew within hours of Brian’s murder that they were purchased from a Phoenix gun shop under ATF surveillance the previous January). He claimed not to know exactly what had happened during the shootout, but speculated that perhaps Brian had been running away for cover when he was shot. This infuriated the Family, because they knew Brian would never retreat from a firefight with a group of bandits. Burke brought several binders full of documents with him to the meetings, but bizarrely didn’t show any of them to the Family. In short, the meetings were a disaster. Rather than comforting and enlightening the Family, the visits only angered them and made them more convinced that Burke was focused on covering up what had happened to Brian rather than uncovering the truth.

The anniversary of Brian’s December 15 death has come and gone, but the emptiness and loss all his family feels remains. There has been some comfort from the outpouring of support the Family has received in Michigan, Arizona, and from all over the country, and Brian has been honored several times in memorials and benefits arranged in his memory. But all of Brian’s family still miss him every day; the celebrations of Brian’s life cannot fill the hole in their hearts left by his death. Brian’s nieces and nephew have been especially hard-hit. Though they are still inspired by their uncle even after his death, the loss of such a seemingly invincible hero has been hard to deal with. Kelly’s son Logan has had to have counseling to cope with his grief. Not having Brian’s smiling face and sense of humor at family functions will be impossible to get used to; the functions will never be the same.

The pain that Brian’s death has caused his parents is indescribable. No matter the age, burying a child is unnatural and something no parent should ever have to do. Josie checks Brian’s Facebook page and watches the videos he had posted on it every day when she wakes up. She hadn’t wanted to see anything else related to Brian’s work with the Border Patrol for a long time, but recently started watching *Border Wars*, a documentary show on the National Geographic Channel that documents Border Patrol agents as they perform their duties. She found that watching the show and seeing Brian’s fellow agents brought her closer to Brian and what he loved to do. She has cried a lot since losing Brian. She’s cried with her daughters and son and others, but often around them or other people she refrains because she feels like she needs to be strong for them. Many times it is after everyone has left and she is alone that the tears and emotion pour out.

Kent has been devastated by the loss of his son. For weeks he couldn’t sleep, and was prescribed tranquilizers to help him deal with the pain and resulting insomnia. Stress is not good for his cognitive problems and other health issues, and Kent’s overall condition has deteriorated since Brian’s murder. He finds himself crying all the time, even now over a year later. Sometimes something will remind him of Brian and bring out the emotion, but other times he cries for what seems like no reason at all. Carolyn usually joins him in the grief, as she lost a beloved stepson. Kent

just wishes everything had been different, and at times irrationally blames himself for not being there for Brian. If only he hadn't been disabled, he could have been the one to carry Brian in his arms when Brian was hurt, just like he did when Brian was a boy.

In June 2011, Josie, Michelle, and Brian's cousin Bobby participated in hearings held by the House Government Oversight Committee into Operation Fast and Furious. The loss suffered by the Terry family is probably best summarized by the statement that Bobby read on behalf of the Family at the Congressional hearing:

*It was just ten days before Christmas last year when our family received the devastating news; Brian A. Terry had been shot and killed while engaged in a firefight with a group of individuals seeking to do harm to Americans citizens and others. We knew that Brian faced imminent danger on a daily basis as part of his chosen career, but we also knew that he and his unit were highly trained and equipped with the best weapons this country could provide to their fighting men and women. They were confident in overcoming any threat that they might face in the desolate section of desert that they patrolled. He and his team prided themselves as being the tip of the spear that defended this country.*

*The telephone call came in the middle of the night. I know that this type of horrible notification has been received many times during the last 10 years by the families of our military's sons and daughters as the United States has fought wars in both Iraq and Afghanistan. After all, Brian had taken an oath to defend this country from all terrorist threats. What makes Brian's death so shocking to his family is that he did not die on a foreign battlefield; he was killed while in the line of duty as a U.S. Border Patrol Agent. He died not in some foreign land, but in the desert outside of Nogales, Arizona some 18 miles inside of the U.S. – Mexican border. His killers were not Taliban insurgents or Al Qaeda fighters but a small group of Mexican drug cartel bandits heavily armed with AK-47 assault rifles and plenty of military grade ammunition.*

*Brian was an amazing man. And I say that not just because he was family. Many people thought him to be almost super human. After his death, we visited his former duty stations in the Tucson, Arizona area. Each time we met one of his fellow agents, they spoke of how impressed they were him. He was what we expect in our brothers and sons; a strong, competitive, handsome, courageous, funny, and incredibly patriotic American. Some of his co-workers even had bestowed him with the nickname of "Superman". Brian was very proud to serve as a federal agent. He had joined the United States Marine Corps right after high school. He had gone on to college and earned a Bachelor's Degree in criminal justice. He then became a local police officer in the communities of Ecorse and Lincoln Park, Michigan. When he sought to have more of an impact on keeping this country safe, he joined the Border Patrol. Brian, it seemed had found his niche. Before long he tried out and became a member of the Border Patrol's elite Tactical Unit known as BORTAC. He wore his BORTAC winged insignia with great pride and excelled as a BORTAC team member.*

*Brian was due to complete his shift of duty that night in the desert outside of Nogales at midnight on December 15th and then take some much deserved time off. He had already made his travel plans to fly back to Michigan and spend the Christmas holiday with his family. Brian's attention to detail had insured that all the Christmas gifts he had meticulously selected for his family had already been bought and sent in the mail prior to his arrival. Brian did ultimately come home for Christmas; we buried him not far from the house that he was raised in just prior to Christmas day. The gifts that Brian had picked out with such thought and care began to arrive in the mail that same week. With each delivery, we felt the indescribable pain of Brian's death, but at the same time also remembered his amazing love and spirit.*

*We hope that you now know a little bit more about our Brian. We ask that you honor his memory by continuing to ensure what he worked so hard to do and ultimately gave his life doing; that is to keep this country safe and its borders secure. We hope that the Department of Justice is forthcoming with all information that the panel is seeking. We ask that if a government official made a wrong decision that they admit their error and take responsibility for his or her actions. We hope that all individuals involved in Brian's murder and those that played a role in putting the assault weapons in their hands are found and prosecuted to the full extent of the law. Finally, it is our hope that no more law enforcement officers die at the hands of these heavily armed Mexican drug cartel members operating on and inside the borders of the United States.*

*The Marines have the motto of semper fidelis which most of you know is Latin for always faithful. The Border Patrol has the motto of honor first. Brian lived a life of honor, duty and sacrifice which reflected both of these mottos and the two organizations he was so proud to serve in. It is now up to all of us to put honor first and to remain always faithful in the quest for justice. On behalf of the entire Terry family, thank you.*

## **VII. DEMAND**

The sum certain of \$25,000,000.00 will settle all of the Terrys' claims against ATF. The love and companionship of a beloved son, warrior, and American hero like Brian is impossible to quantify, but is worth at least that much.

The Terrys reserve the right to amend this demand as additional information is developed and the passage of time better informs them as to the scope of their damages.

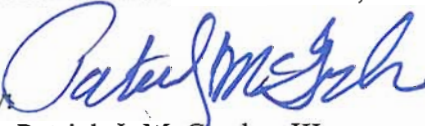
## **VIII. CONCLUSION**

The Family's tragic loss should have never occurred. If not for a negligently conceived and executed ATF plan to direct dangerous firearms into the hands of violent criminals, Brian's murderers would have never had the weapons they used against him. Because of ATF's negligence, a grieving family has lost forever their son and brother.

United States Bureau of Alcohol, Tobacco, Firearms and Explosives  
United States Department of Justice  
February 1, 2012  
Page 54

We have provided you sufficient information necessary to evaluate the Terry family's claim. If you need any additional information, please let us know. We look forward to your timely and reasoned response.

Very truly yours,  
GALLAGHER & KENNEDY, P.A.

By:   
Patrick J. McGroder, III  
Lincoln Combs

PJM/LC:ds

cc: Kent Terry, Sr.  
Josephine Terry

Enclosures:

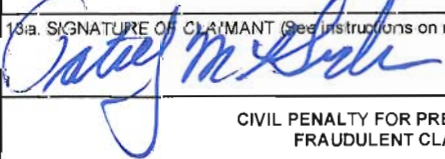
Tab 1: Department of Justice Standard Form 95

Tab 2: Fee Contract with Gallagher & Kennedy, P.A.

Tab 3: June 3, 2011 letter from U.S. Department of Labor to Gallagher & Kennedy, P.A.

2841704

# TAB 1

<b>CLAIM FOR DAMAGE, INJURY, OR DEATH</b>		<b>INSTRUCTIONS:</b> Please read carefully the instructions on the reverse side and supply information requested on both sides of this form. Use additional sheet(s) if necessary. See reverse side for additional instructions.			FORM APPROVED OMB NO. 1105-0008	
1. Submit to Appropriate Federal Agency:  United States Bureau of Alcohol, Tobacco, Firearms and Explosives				2. Name, address of claimant, and claimant's personal representative if any. (See instructions on reverse). Number, Street, City, State and Zip code.  The survivors of Brian Terry: father Kent Terry, Sr. and mother Josephine Terry c/o Patrick J. McGroder, Gallagher & Kennedy, P.A. 2575 E. Camelback Road, Phoenix, Arizona 85016		
3. TYPE OF EMPLOYMENT <input type="checkbox"/> MILITARY <input checked="" type="checkbox"/> CIVILIAN		4. DATE OF BIRTH	5. MARITAL STATUS	6. DATE AND DAY OF ACCIDENT		7. TIME (A.M. OR P.M.)
				12/14/2010                      Tuesday		approx. 11:30 p.m.
8. BASIS OF CLAIM (State in detail the known facts and circumstances attending the damage, injury, or death, identifying persons and property involved, the place of occurrence and the cause thereof. Use additional pages if necessary).  Brian Terry was killed by criminals using firearms illegally purchased from a gun shop in Glendale, Arizona on January 16, 2010 by Jaime Avila, a straw purchaser for Mexican drug trafficking cartels. ATF had previously observed Avila make other illegal weapons purchases for the cartels, but, pursuant to a failed ATF program called Operation Fast and Furious, ATF negligently allowed Avila to illegally purchase the weapons used to kill Brian Terry and negligently failed to interdict the weapons, despite knowing those weapons would be used to commit acts of violence and murder against innocent people like Brian.						
9. <b>PROPERTY DAMAGE</b>						
NAME AND ADDRESS OF OWNER, IF OTHER THAN CLAIMANT (Number, Street, City, State, and Zip Code).  None						
BRIEFLY DESCRIBE THE PROPERTY, NATURE AND EXTENT OF THE DAMAGE AND THE LOCATION OF WHERE THE PROPERTY MAY BE INSPECTED. (See instructions on reverse side).  None						
10. <b>PERSONAL INJURY/WRONGFUL DEATH</b>						
STATE THE NATURE AND EXTENT OF EACH INJURY OR CAUSE OF DEATH, WHICH FORMS THE BASIS OF THE CLAIM. IF OTHER THAN CLAIMANT, STATE THE NAME OF THE INJURED PERSON OR DECEDENT.  During a confrontation with a group of bandits affiliated with Mexican drug cartels, Brian Terry was killed by a shot fired from an AK-47 style assault rifle. ATF had allowed and facilitated the illegal purchase of the weapons used in Brian's murder by a known straw purchaser for the Mexican drug cartels as part of ATF's Operation Fast and Furious. His parents bring claims against ATF for wrongful death under Arizona law.						
11. <b>WITNESSES</b>						
NAME			ADDRESS (Number, Street, City, State, and Zip Code)			
Bill Newell			c/o Department of Justice			
Kenneth Melson			c/o Department of Justice			
other ATF agents and managers			c/o Department of Justice			
12. (See instructions on reverse). <b>AMOUNT OF CLAIM</b> (in dollars)						
12a. PROPERTY DAMAGE		12b. PERSONAL INJURY		12c. WRONGFUL DEATH		12d. TOTAL (Failure to specify may cause forfeiture of your rights).
0.00		0.00		25,000,000		25,000,000
I CERTIFY THAT THE AMOUNT OF CLAIM COVERS ONLY DAMAGES AND INJURIES CAUSED BY THE INCIDENT ABOVE AND AGREE TO ACCEPT SAID AMOUNT IN FULL SATISFACTION AND FINAL SETTLEMENT OF THIS CLAIM.						
13a. SIGNATURE OF CLAIMANT (See instructions on reverse side). 				13b. PHONE NUMBER OF PERSON SIGNING FORM		14. DATE OF SIGNATURE
				602-530-8181		02/01/2012
<b>CIVIL PENALTY FOR PRESENTING FRAUDULENT CLAIM</b>				<b>CRIMINAL PENALTY FOR PRESENTING FRAUDULENT CLAIM OR MAKING FALSE STATEMENTS</b>		
The claimant is liable to the United States Government for a civil penalty of not less than \$5,000 and not more than \$10,000, plus 3 times the amount of damages sustained by the Government. (See 31 U.S.C. 3729).				Fine, imprisonment, or both. (See 18 U.S.C. 287, 1001.)		



**INSURANCE COVERAGE**

In order that subrogation claims may be adjudicated, it is essential that the claimant provide the following information regarding the insurance coverage of the vehicle or property.

15. Do you carry accident insurance?  Yes If yes, give name and address of insurance company (Number, Street, City, State, and Zip Code) and policy number.  No

N/A

16. Have you filed a claim with your insurance carrier in this instance, and if so, is it full coverage or deductible?  Yes  No 17. If deductible, state amount.

N/A

0.00

18. If a claim has been filed with your carrier, what action has your insurer taken or proposed to take with reference to your claim? (It is necessary that you ascertain these facts).

N/A

19. Do you carry public liability and property damage insurance?  Yes If yes, give name and address of insurance carrier (Number, Street, City, State, and Zip Code).  No

N/A

**INSTRUCTIONS**

**Claims presented under the Federal Tort Claims Act should be submitted directly to the "appropriate Federal agency" whose employee(s) was involved in the incident. If the incident involves more than one claimant, each claimant should submit a separate claim form.**

**Complete all items - Insert the word NONE where applicable.**

A CLAIM SHALL BE DEEMED TO HAVE BEEN PRESENTED WHEN A FEDERAL AGENCY RECEIVES FROM A CLAIMANT, HIS DULY AUTHORIZED AGENT, OR LEGAL REPRESENTATIVE, AN EXECUTED STANDARD FORM 95 OR OTHER WRITTEN NOTIFICATION OF AN INCIDENT, ACCOMPANIED BY A CLAIM FOR MONEY

DAMAGES IN A **SUM CERTAIN** FOR INJURY TO OR LOSS OF PROPERTY, PERSONAL INJURY, OR DEATH ALLEGED TO HAVE OCCURRED BY REASON OF THE INCIDENT. THE CLAIM MUST BE PRESENTED TO THE APPROPRIATE FEDERAL AGENCY WITHIN **TWO YEARS** AFTER THE CLAIM ACCRUES.

**Failure to completely execute this form or to supply the requested material within two years from the date the claim accrued may render your claim invalid. A claim is deemed presented when it is received by the appropriate agency, not when it is mailed.**

The amount claimed should be substantiated by competent evidence as follows:

If instruction is needed in completing this form, the agency listed in item #1 on the reverse side may be contacted. Complete regulations pertaining to claims asserted under the Federal Tort Claims Act can be found in Title 28, Code of Federal Regulations, Part 14. Many agencies have published supplementing regulations. If more than one agency is involved, please state each agency.

(a) In support of the claim for personal injury or death, the claimant should submit a written report by the attending physician, showing the nature and extent of the injury, the nature and extent of treatment, the degree of permanent disability, if any, the prognosis, and the period of hospitalization, or incapacitation, attaching itemized bills for medical, hospital, or burial expenses actually incurred.

The claim may be filed by a duly authorized agent or other legal representative, provided evidence satisfactory to the Government is submitted with the claim establishing express authority to act for the claimant. A claim presented by an agent or legal representative must be presented in the name of the claimant. If the claim is signed by the agent or legal representative, it must show the title or legal capacity of the person signing and be accompanied by evidence of his/her authority to present a claim on behalf of the claimant as agent, executor, administrator, parent, guardian or other representative.

(b) In support of claims for damage to property, which has been or can be economically repaired, the claimant should submit at least two itemized signed statements or estimates by reliable, disinterested concerns, or, if payment has been made, the itemized signed receipts evidencing payment.

If claimant intends to file for both personal injury and property damage, the amount for each must be shown in item number 12 of this form.

(c) In support of claims for damage to property which is not economically repairable, or if the property is lost or destroyed, the claimant should submit statements as to the original cost of the property, the date of purchase, and the value of the property, both before and after the accident. Such statements should be by disinterested competent persons, preferably reputable dealers or officials familiar with the type of property damaged, or by two or more competitive bidders, and should be certified as being just and correct.

(d) **Failure to specify a sum certain will render your claim invalid and may result in forfeiture of your rights.**

**PRIVACY ACT NOTICE**

This Notice is provided in accordance with the Privacy Act, 5 U.S.C. 552a(e)(3), and concerns the information requested in the letter to which this Notice is attached.

- B. *Principal Purpose:* The information requested is to be used in evaluating claims.
- C. *Routine Use:* See the Notices of Systems of Records for the agency to whom you are submitting this form for this information.
- D. *Effect of Failure to Respond:* Disclosure is voluntary. However, failure to supply the requested information or to execute the form may render your claim "invalid."

A. *Authority:* The requested information is solicited pursuant to one or more of the following: 5 U.S.C. 301, 28 U.S.C. 501 et seq., 28 U.S.C. 2671 et seq., 28 C.F.R. Part 14.

**PAPERWORK REDUCTION ACT NOTICE**

This notice is solely for the purpose of the Paperwork Reduction Act, 44 U.S.C. 3501. Public reporting burden for this collection of information is estimated to average 6 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to the Director, Torts Branch, Attention: Paperwork Reduction Staff, Civil Division, U.S. Department of Justice, Washington, DC 20530 or to the Office of Management and Budget. Do not mail completed form(s) to these addresses.

**TAB 2**

Law Offices  
GALLAGHER & KENNEDY, P.A.  
Professional Corporation  
2575 East Camelback Road  
Phoenix, Arizona 85016-9225  
Ph: 602-530-8000  
Fax: 602-530-8500

**FEE CONTRACT**

In consideration of the legal services to be rendered by the firm of **GALLAGHER & KENNEDY, P.A.** (hereinafter called "Attorney"), the undersigned (hereinafter called "Client"), does employ said Attorney to commence and prosecute any claims that Client may have for injuries and damages arising from:

*The Wrongful Death of Brian Terry.*

In this connection, Attorney agrees to undertake said employment and representation and use its best efforts for and on Client's behalf.

In retaining Attorney, it is Client's understanding that the fee will be contingent, that is to say, if no recovery is made, no fee will be charged by Attorney for such representation; however, client will still be responsible for costs expended by the Attorney as explained below. If there is a recovery, Attorney's fees will be as follows:

- (a) A sum equal to 25 % of any and all amounts recovered (including, without limitation, any award of sanctions, interest and attorneys' fees), except for property damage, up until the commencement of any actual trial, hearing, arbitration proceeding or any other adversary proceeding or administrative hearing.
- (b) A sum equal to 25 % of any and all amounts recovered (including any award of sanctions, interest and attorneys' fees), after the commencement of any actual trial, hearing, arbitration proceeding or any other adversary proceeding or administrative hearing.
- (c) A sum equal to 25 % of any and all amounts recovered (including any award of sanctions, interest and attorneys' fees) in case an appeal should be filed by any party to the lawsuit.
- (d) In case a second trial is necessitated for any reason, including, but not limited to, any mistrial or appellate order, ~~50%~~ 25% of any and all amounts recovered.

Attorney agrees that he will not charge for his services in recovering property damage reimbursement (unless trial over the property damage is required and is separate from the injury/death claims) for the Client. In addition, the Attorney will not charge for his services in processing group health insurance claims for the client or the Client's motor vehicle insurance medical payments.

If litigation, administrative review, appeals, or more than 20 hours are expended resolving bills, claims or liens asserted by healthcare providers, benefit plans, employers, or governmental agencies, Attorney may, at its discretion, charge a reasonable hourly rate of \$200, not to exceed 50% of the amount recovered or amount saved. For the purposes of this paragraph, "amount saved" is the difference between the amount demanded by the claimant and the amount paid to claimant by the Client. Any and all recovery under this paragraph is contingent upon recovery by the Client and client shall owe nothing if no amounts are recovered or saved.

Client agrees to reimburse Attorney for all costs and expenses incurred in the prosecution of Client's claims including, but not limited to, the following: Filing fees, service of process and all other court costs, costs of computer assisted research, costs of investigation, costs of experts, consultants, including nurse and medical consultants, costs of depositions, witness fees, including expert witnesses fees, travel expenses, including first class airfare and/or chartered aircraft, costs of medical reports, costs of photographs, photocopying, exhibits, or other expenses necessary to a proper prosecution of Client's claim. In the event of recovery, Client agrees that Attorney may pay all unpaid costs and expenses incurred from Client's share of the recovery, and Client agrees that Attorney may reimburse itself from Client's share of the recovery for any funds advanced by Attorney for the payment of costs and expenses. Client also agrees to pay interest to Attorney at the rate of ten percent (10%) per year on any such advanced costs incurred and unpaid in excess of six months.

In the event Client recovers nothing, it is understood that Client still has the responsibility to pay any unpaid costs and expenses incurred by Client or on Client's behalf as the result of this incident and claim. In the event Client recovers nothing, it is also understood that certain costs and expenses incurred by opposing parties may be assessed against Client by the Court in the form of a judgment against Client.

Client agrees to keep Attorney advised of Client's whereabouts at all times and to cooperate in the preparation and trial of the case, to appear on reasonable notice for all depositions and court appearances, and to comply with all reasonable requests made of Client in connection with the preparation and presentation of this case. Failure to so cooperate may result in court-imposed sanctions which may include dismissal of Client's claims.

Client authorizes Attorney to act for and on behalf of Client in all matters relating to the representation and to bind Client, excepting only in the matter of settlement of Client's claims, which Client agrees not to compromise without Attorney's consent. The Attorney

may, at the sole discretion and expense of Attorney, associate any other attorney in the representation of the aforesaid claims of Client.

No guarantees have been made as to what amounts, if any, Client may be entitled to recover in this case.

Client has been advised of Client's rights to terminate the services of Attorney and, in the event of such termination, Client agrees to compensate Attorney for the services rendered by Attorney, at Attorney's normal hourly billing rate, together with any costs or expenses incurred by Attorney.

Client understands that if, during the presentation of this case, Attorney determines that it is not feasible to continue with the case, Attorney may, after due notice to Client, withdraw.

Upon termination of this Contingency Fee Agreement, if there is any disagreement concerning the fee charged hereunder, Attorney agrees, at the request of Client, to submit that disagreement to binding arbitration with the Fee Arbitration Committee of the State Bar of Arizona.

By executing this Agreement, Client acknowledges having read and understood the terms hereof, and receiving a copy of the executed contract.

**WARNING: THIS IS AN IMPORTANT BINDING LEGAL DOCUMENT. IF YOU HAVE ANY QUESTIONS ABOUT WHAT IT MEANS, DO NOT SIGN IT.**

AGREED AND ACCEPTED THIS 15 day of April, 2011.

CLIENT(S):

Kent Terry  
\_\_\_\_\_

ATTORNEY:  
GALLAGHER & KENNEDY, P.A.

By [Signature]  
\_\_\_\_\_

Client authorizes Attorney to act for and on behalf of Client in all matters relating to the representation and to bind Client, excepting only in the matter of settlement of Client's claims, which Client agrees not to compromise without Attorney's consent. The Attorney may, at the sole discretion and expense of Attorney, associate any other attorney in the representation of the aforesaid claims of Client.

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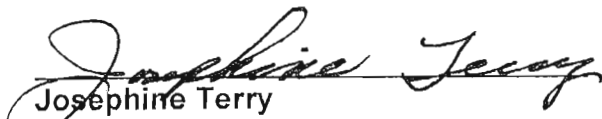
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**WARNING: THIS IS AN IMPORTANT BINDING LEGAL DOCUMENT. IF YOU HAVE ANY QUESTIONS ABOUT WHAT IT MEANS, DO NOT SIGN IT.**

AGREED AND ACCEPTED THIS 2nd day of MAY, 2011.

CLIENT(S):

  
Josephine Terry

ATTORNEY:  
GALLAGHER & KENNEDY, P.A.  
By 

**TAB 3**

**U.S. Department of Labor**

Office of the Solicitor  
Washington, D.C. 20210



JUN - 3 2011

**Suite S-4325  
200 Constitution Avenue, N.W.  
Washington, D.C. 20210**

Gallagher & Kennedy, P.A.  
Law Offices  
2575 East Camelback Road  
Phoenix, AZ 85016-9225

**RECEIVED**

JUN 10 2011

Re: Brian Terry  
OWCP File No.: 13-2243800

GALLAGHER & KENNEDY

Dear Sir/Madam:

The responsibility for administration of the third party liability aspects of the above referenced Federal Employees' Compensation Act (FECA) case has been transferred to this office. All other matters relating to this case will continue to be administered by the Office of Workers' Compensation Programs. The Department of Labor has determined that the circumstances of the FECA covered injury in question indicate that a third party may be liable for the injury; your client is therefore required, pursuant to 5 U.S.C. § 8131, to prosecute an action against any third party in his or her own name.

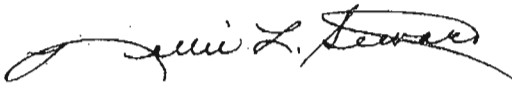
Enclosed with this letter is a copy of the relevant sections of the FECA statute and regulations (5 U.S.C §§ 8131-8132; 20 CFR §§ 10.705-10.719) concerning third party liability. Since this case involves a death, further information about completing a Statement of Recovery in a case involving the death of an employee covered by FECA is also enclosed, as are two copies of the Statement of Recovery that must be filed to report each receipt by your client of any money or property in satisfaction of liability for the injury or injuries at issue in the above referenced FECA case.

Please note that any settlement of a third party liability case for an amount less than necessary to satisfy the statutory right to repayment of the United States under § 8132 requires prior approval of this office to avoid jeopardizing your client's FECA benefits. Please contact this office prior to accepting any settlement in order to obtain current information on the amount of compensation paid by the United States and to obtain our approval of any settlement where such approval is required. In the event that it becomes apparent that prosecution of an action against any potentially liable third party is not reasonable in light of the facts and circumstances of the matter, you can request that this office release your client from any obligation to pursue an action to recover damages.



If you have any questions, please contact me at the above address or call me at (202)693-5351.

Sincerely,

A handwritten signature in cursive script, appearing to read "Nellie L. Seward". The signature is written in black ink and is positioned above the typed name.

Nellie. L. Seward  
Senior Paralegal Specialist

Enclosures

NLS/pw