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*Drug-Linked
Firearms Cases:*
A Primer for Prosecution



Bureau of Justice Assistance



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INTRODUCTION

Illegal drug-linked firearms crime represents some of the most difficult casework a prosecutor can undertake. The prospect of multiple defendants, none of whom claim the drugs or firearms confiscated during the arrest; witnesses who are afraid to come forward or recant their earlier statements for fear of retaliation; unsympathetic witnesses whose own criminal records are lengthier than the defendant's; and creative defense "challenges-du-jour"—all contribute to the maze of difficulties typical of drug-related firearms prosecution. This publication is offered to help state and local prosecutors new to drug and gun prosecution to understand these challenges and to help them assess, prepare and prosecute drug-related firearms cases in state or federal court.

The link between illegal drugs and firearms crime is well recognized. According to the Federal Bureau of Investigation, over two-thirds of the nation's reported murders in 2003 involved a firearm, and approximately six percent of this number also involved illicit drugs.¹ By mid-2004, over 75 percent of federally incarcerated inmates were serving time for illicit drug and/or firearms convictions.² State correctional facilities also report housing significant numbers of inmates on both charges.³ Almost half of state and federal inmates report they had owned or possessed a firearm at some time in their lives.⁴

The nexus between firearms and illicit drugs is of significant concern for prosecutors, both in preparing an effective prosecution strategy for drug-related firearms cases as well as choosing the most effective forum, state or federal, in which to prosecute them. Project Safe Neighborhoods (PSN), a comprehensive national initiative to reduce gun crime, has enabled state and local prosecutors to transfer qualifying drug-related firearms arrests for federal prosecution—often resulting in longer sentences in federal prison than the corresponding conviction may have

¹ Federal Bureau of Investigation, Crime in the United States – 2003, www.fbi.gov/ucr/03cius.htm

² Bureau of Prisons, January, 2004. www.bop.gov; Quick Facts and Statistics.

³ California: www.corr.ca.gov/OffenderInfoServices/Reporta/annual/achar1/achar1d2003.pdf
Tennessee: www.state.tn.us/correction/faq.html.

⁴ *Special Report: Firearm Use by Offenders*, Bureau of Justice Statistics, NCJ 189369, November 2001

received in state court. Federal statute 18 U.S.C. § 922(g)(1) and (3) identifies any person who has been convicted of a crime punishable by imprisonment for a term exceeding one year or any person who is either an unlawful user of or addicted to any controlled substance as a “prohibited person.” These individuals are accordingly prohibited from possessing, shipping or receiving a firearm or ammunition that has traveled in interstate commerce. Correspondingly, federal sentencing guidelines mandate lengthy periods of incarceration for individuals convicted of 18 U.S.C. § 922 “Unlawful Acts” violations, in sharp contrast to many state statutes that typically provide for fines and/or a short period of incarceration.

To illustrate, consider this example: an individual is arrested for driving under the influence of drugs or alcohol, and a review of the individual’s criminal record reveals he or she is a convicted felon. A firearm is found under the driver’s seat together with a small baggie of a controlled substance. Typically, in state court, the maximum allowable sentence for this individual would be five years, and the state judge may suspend a portion of that sentence. In contrast, the federal sentencing guidelines for the same individual on these facts allow a maximum of 10 years in federal prison. Using the multi-agency strategies developed through PSN, state and local prosecutors are able to direct certain drug-related firearms cases to the court—state or federal—with the most appropriate punishment.

This publication will examine the link between illegal drugs and firearms crime, and serve as a guide to some of the fundamental issues a state prosecutor must consider in evaluating the merits of retaining the case for local prosecution or referring it for federal prosecution.

PROJECT SAFE NEIGHBORHOODS

Launched in May 2001, Project Safe Neighborhoods (PSN) is a strategy to integrate existing federal, state and local prosecution, law enforcement and community leaders in an all-out effort to aggressively target gun crime. The program provides a multi-faceted approach to deterring and punishing gun crime through existing state and federal laws. Additionally, PSN promotes developing or enhancing existing partnerships between law enforcement agencies within each federal district, developing intra-agency strategic plans based on shared crime data, creating outreach programs to inform both offenders and the local community regarding the consequences of gun crime involvement, and creating accountability measures to gauge the impact of PSN programs in reducing gun crime. In its first three years, PSN has witnessed a nationwide reduction in gun crime and a 68 percent increase in federal prosecution of qualifying firearms cases, including drug/firearms and domestic violence/firearms-related cases.⁵ The initiative has also benefited immensely from a more effective application of existing state law in prosecuting gun crime. For more information about PSN, consult the official Web site: www.psn.gov.

⁵ <http://usgovinfo.about.com/cs/guncrimes.htm>.

IDENTIFYING THE PROBLEM

“Virtually everyone who deals in drugs or drug money has at least a handgun. Stash houses and laboratories are arsenals.”⁶

One out of every four individuals arrested on illegal drug charges reports having carried a firearm all or most of the time during the course of his or her drug involvement.⁷ Similarly, nearly one-quarter of those individuals arrested on weapons charges report having been under the influence of illicit drugs at the time of their arrest.⁸ Approximately one-half of state inmates incarcerated on firearms charges indicated they carried a firearm to scare others, while two-fifths indicated they used a firearm to defend themselves and approximately one-fifth used a firearm to “get away.”⁹ Drugs and firearms are linked in many identifiable ways:

- The illegal drug trade is traditionally regulated by firearms violence;
- Firearms are used to protect shipments, intimidate competitors, collect or enforce debts, maintain turf, resolve disputes, silence informants and to reward subordinates;
- Illegal drug purchasers use firearms as protection during drug transactions;
- Illegal drug users commit crimes, often facilitated by firearms, to obtain funds to buy drugs;
- Illegal drug users commit crimes facilitated by firearms while under the influence of drugs;
- Illegal drugs and firearms are often exchanged as currency—firearms for drugs and drugs for firearms; and
- Illegal drugs and firearms are frequently trafficked along the same routes and by the same individuals.

⁶ Duke and Gross, *America's Longest War: Rethinking Our Tragic Crusade Against Drugs*, New York: G.P. Putnam's Sons, 1993.

⁷ *Illegal Firearms: Access and Use by Arrestees*, National Institute of Justice, NCJ 163496, January 1997, www.ojp.usdoj.gov/nij/pubs-sum/163496.html.

⁸ *Drug Related Crime*, ONDCP Drug Policy Information Clearing House Fact Sheet, March 2002, www.whitehousedrugpolicy.gov.

⁹ *Survey of Inmates in State and Federal Correctional Facilities: Firearm Use by Offenders*, Bureau of Justice Statistics, NCJ 189369, November 2001.

Protection

“Because drug markets are illegal, the participants must arm themselves for self-protection, and the resulting arms race among young people results in a more frequent resorting to guns as a major escalation of the violence that has often characterized encounters among teenage males.”¹⁰

Defendants, both buyers and sellers, involved in simple possession or small quantity illegal drug transactions frequently justify their need to carry firearms as protection against being robbed by rival dealers, gang members or others. They describe being particularly vulnerable while carrying cash to a purchase location, during the actual drug-money exchange and while leaving the purchase site with illegal drugs. Even if money is not exchanged for drugs, individuals arm themselves against the inherent dangers of drug dealing, including being “jumped” before, during or after the sale.

Many illegal drug transactions are conducted outdoors in poorly lit areas that offer little protection to either seller or purchaser should something go wrong. Moreover, because a small sandwich-sized baggie of crack cocaine can be the equivalent of thousands of dollars,¹¹ the prospect of robbing any party to the transaction becomes attractive. Realistically, neither the buyer nor the dealer will contact law enforcement to report the robbery.

The time of the month contributes to the volume of drug/firearms-related crime. Prosecutors report that drug arrests tend to spike around the first and mid-point of each month corresponding to times when buyers are paid or receive government checks. One urban community reported a marked increase in arrests around tax refund time.¹²

¹⁰ Stewart, R., *Alfred Blumstein: Youth, Guns and the Drug Trade*, The Drug Policy Letter, Summer, 1996.

¹¹ *Toward a Drug and Crime Research Agenda for the 21st Century*, National Institute of Justice, National Institute of Justice, NCJ 194616, September 2003, www.ojp.usdoj.gov/nij/pubsum/194616.html.

¹² *Pulse Check: Trends in Drug Abuse*, November 2002, ONDCP, www.whitehousedrugpolicy.gov.

Unfortunately, as a neighborhood or area develops a reputation for being an illegal drug market area, local residents arm themselves out of fear of being caught in transaction shootings, retaliation violence, turf wars or gang activities.

Retaliation

“The influx of drugs into cities like Louisville and Nashville with their underserved markets is touching off the same cycle of violence that big cities have long been accustomed to: turf wars between dealers, leading to gunplay as the ultimate in conflict resolution.”¹³

Unable to report their grievances to law enforcement or seek relief in court, individuals involved in drug sales gone bad often view violence as the only means of recourse. All too often, firearms are used to settle a score or become an instrument of justice in the “court of last resort.”

Unfortunately, a growing percentage of arrestees justify using a firearm to address their sense of having been disrespected by an unsatisfied customer, rival dealer or rival gang member. Within the drug and gang culture, there is a strong ethic that the proper and acceptable retaliation for disrespect is gun violence.¹⁴

Firearms are increasingly the weapon of convenience in homicides committed by juveniles.¹⁵ Easy access to firearms means that many arguments once settled by simple fist fights may now be settled with firearms.¹⁶ Some juvenile arrestees report that having a reputation for carrying a firearm serves to deter potential acts of retaliation against them. Approximately one-third of state inmates under 25 years of age report having used a firearm at one time.¹⁷

¹³ Stewart, R., *Alfred Blumstein: Youth, Guns and the Drug Trade*, The Drug Policy Letter, Summer 1996.

¹⁴ *Illegal Firearms: Access and Use by Arrestees*, National Institute of Justice, NCJ 163496, January 1997, www.ojp/usdoj.gov/nij/pubs-sum/163496.html.

¹⁵ *Youth Violence, Guns, and Illicit Drug Markets*, National Institute of Justice, NCJ 152235, June 1996, www.ojp/usdoj.gov/nij/pubs-sum/152235.html.

¹⁶ *Id.*

¹⁷ *Survey of Inmates in State and Federal Correctional Facilities: Firearm Use by Offenders*, Bureau of Justice Statistics, NCJ 189369, November 2001.

Preserving and Competing for Turf

Violence is used as a mechanism of control over subordinates and rivals, as a method of resolving disputes, as a means of regulating market share and as an act of retribution.¹⁸

Firearms have become an essential tool in protecting the drug trade and in expanding a dealer's turf or area of control. Unlike legitimate businesses, illegal drug dealers cannot openly bid for sales regions or customers. Turf competition, whether for a street corner or a neighborhood, frequently becomes aggressive and is often regulated by the use or threatened use of firearms.¹⁹ Some sellers report carrying a firearm to discourage rival dealers and to show they will not easily be crowded out of an area.

Dealers routinely use or threaten to use firearms to ensure timely payment by subordinates or individual drug purchasers. Likewise, firearms are used to intimidate subordinates so that, if they are arrested, they are less likely to cooperate with law enforcement or inform prosecutors about the activities of those individuals in control of a particular illegal drug distribution chain. Ultimately, subordinates can be kept "in line" when threatened with firearms.²⁰

¹⁸ Riley, Kevin J., *Snow Job: The War Against International Cocaine Trafficking*, New Brunswick, New Jersey: Transaction Publishers, 1996.

¹⁹ *Drug Related Crime*, ONDCP Drug Policy Information Clearing House Fact Sheet, March 2000, www.whitehousedrugpolicy.gov.

²⁰ *Toward a Drug and Crime Research Agenda for the 21st Century*, National Institute of Justice, NCJ 194616, September 2003, www.ojp.usdoj.gov/nij/pubs-sum/194616.html.

Gang Involvement

Nationwide, gang-related homicides jumped by 50 percent from 1999 to 2002. Small communities are more attractive to gangs because they provide a new market for drugs and less scrutiny from police.²¹

Gangs are frequently funded by drug sales. Many gangs report illegal drug sales as their organization's principal source of income, and an individual's rank or status within the gang is often a reflection of successful drug sales and eliminating competitors. Protecting the gang's funding source often generates firearms violence, as competing gangs jockey for control in various neighborhoods or communities. Gangs become identified with specific types of illegal drug sales and general sales locations and do not tolerate competition. Firearms are frequently the weapon of choice to eliminate this possible competition.

Additionally, juvenile gang members are often given illegal firearms for protection or as rewards for successful gang activity. As younger members are recruited into gangs, stolen firearms move through an increasingly younger population. Gang membership is increasingly associated with firearm possession, and over one-third of gang members arrested report carrying a firearm all or most of the time.²²

Gang-related cases, which often involve drug-related firearms charges, can be some of the most complex and rewarding cases a prosecutor can try. APRI, in its Special Topics Series monograph, *Prosecuting Gang Cases: What Local Prosecutors Need to Know*, provides prosecutors with tools to prosecute gang cases successfully using both criminal and civil court resources. A copy of this publication may be downloaded from APRI's Web site at www.ndaa-apri.org.

²¹ *Fight Crime, Invest in Kids*, 2004, www.fightcrime.org.

²² *Arrestees and Guns: Monitoring the Illegal Firearms Market*, National Institute of Justice NCJ 184250, 1995, www.ojp.usdoj.gov/nij/pubs-sum/184250.html.

Drug Usage and Gun Crime

Almost one-fifth of state prison inmates reported committing their offenses to obtain money to buy drugs.²³

The profile of drug/firearms-related crime is also influenced by individuals who commit violent crime while under the influence of drugs or as a means to obtain money to purchase controlled substances. These related crimes range from purse snatching at gun point to armed home invasions, car jackings, aggravated robberies and homicides. The type of drug may often influence the severity of the criminal behavior. The growth of the crack market has been cited as a key factor in the rise in American violence,²⁴ and the nationwide spread of crystal methamphetamine is also affecting criminal activity. In Hawaii alone, almost 38 percent of arrested males tested positive for “ice” or crystal meth and were responsible for the majority of the state’s violent crime.²⁵

²³ ONDCP Drug Policy Information Clearinghouse Fact Sheet, www.whitehousedrugpolicy.gov.

²⁴ *Toward a Drug and Crime Research Agenda for the 21st Century*, National Institute of Justice, NCJ 194616, September 2003, www.ojp.usdoj.gov/nij/pubs-sum/194616.htm.

²⁵ “In the Throes of an Ice Age: How One Prosecutor Fights Methamphetamine,” Tiapula, Suzanna, *The Prosecutor*, Vol 38, No.5, September/October 2004, National District Attorneys Association.

ADDRESSING THE PROBLEM

It is not uncommon for a suspect to accumulate multiple firearms and drug charges stemming from a single incident. As a result, a prosecutor must evaluate the relative strengths and weaknesses of a case based on the evidence of each charge. At the same time, a prosecutor must consider whether a defendant qualifies for federal prosecution as well as the relative sentences that the defendant may accrue in both forums.

To illustrate, consider an individual who is stopped for erratic driving. Once the individual is stopped, the officer locates a firearm under the driver's seat. After requesting a record check on the driver, the officer learns that he was previously convicted on felony charges but only served three months of his sentence before being released on probation. In many states, the arrestee might face a maximum state sentence of five years; for example, under Utah Code § 76-10-503(3), the defendant would be eligible for an indeterminate sentence of 0-5 years in prison. Conversely, if the same individual were prosecuted federally under 18 U.S.C. § 922(g)(1), as a convicted felon—thus a prohibited person restricted from possessing a firearm—he would be eligible for a federal sentence maximum of 10 years with the actual sentence to be determined by federal guidelines. Under the state system, the defendant may have a portion of his sentence suspended, whereas the defendant would serve the majority of his sentence under the federal system.

On the other hand, if the defendant does not qualify for federal sentencing, the state prosecutor must evaluate the short-term merit or long-term consequences of reducing or dropping any firearms or drug charges in order to negotiate a state guilty plea on other charges. In those states with relatively weak firearms penalties, dropping or reducing the firearms charge and proceeding on charges that elevate the defendant to felon status may hasten a negotiated plea on the primary charge and qualify the defendant for future prosecution under 18 U.S.C. § 922(g)(1) if re-arrested.

Additionally, federal law addresses certain charges for which there may not be a corresponding state violation. In many states, for example, it is

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not illegal for individuals to possess firearms or ammunition while subject to certain categories of protection orders (not *ex parte* orders) or if they have been convicted of a misdemeanor crime of domestic violence within the last 10 years. In both instances, these individuals are prohibited from possessing firearms or ammunition under federal law and would qualify for federal prosecution.

Under Project Safe Neighborhoods, federal, state and local prosecutors and law enforcement work together to determine which forum would yield the most appropriate punishment for an offender who is found in possession of firearms and drugs. In Fiscal Year 2003, over 13,000 individuals, many of whom were arrested on state firearms or drug-related firearms charges, were prosecuted on corresponding federal charges. Careful screening of drug-related firearms cases will enable prosecutors to determine the best forum in which to proceed.²⁶

²⁶ Department of Justice, *Third Annual Project Safe Neighborhoods Conference Held in Kansas City*. Press Release, June 16, 2004.

GUIDELINES FOR CASE SCREENING

Under Project Safe Neighborhoods, many U.S. attorneys' offices and state and local prosecutors' offices have established a protocol or memorandum of understanding articulating elements of arrestees' conduct and whether they qualify for federal prosecution. Typically, before an arrest is reviewed for federal prosecution, the following documents are collected for evaluation by the reviewing team or task force:

- Police report for the arrest incident;
- Defendant's complete criminal record, including juvenile proceedings and any out-of-state convictions;
- Defendant's photo, date of birth, social security number, known aliases and gang membership;
- All incident investigative reports, including drug field tests or toxicology reports;
- List of witness names, contact numbers and addresses, and copies of any statements;
- Copies of any search warrants and supporting affidavits;
- Photographs and diagrams relating to the arrest incident;
- Inventory list of all evidence collected and chain of custody; and
- Approved information regarding any confidential informant.

Controlled Substance Schedules

Each state has adopted statutes listing schedules of prohibited or controlled substances. In an era of rapidly expanding designer drugs, however, it is not uncommon for new drugs to appear in street circulation long before they are adopted by the state legislature and added to the state's schedule of prohibited controlled substance statutes. Federal schedules of controlled substances (found at 21 U.S.C. § 812 (2005)) are routinely updated to reflect new illicit drugs shortly after they are identified and reach circulation. Consequently, it is not unusual for the federal schedule of controlled substances to be more comprehensive than the schedules enacted by state legislatures. If drug evidence confiscated during an arrest does not appear on a state controlled substance schedule, a prosecutor may wish to check this substance against

the federal schedules, especially in the event the suspect might otherwise qualify for federal firearms prosecution.

Controlled Substance Convictions

The federal possession statutes most frequently charged are 21 U.S.C. §§ 841 (manufacture, distribute or dispense) through 844 (simple possession). 21 U.S.C. § 841 (2005) states, in part:

§ 841. Prohibited acts

- (a) Unlawful acts. Except as authorized by this title, it shall be unlawful for any person knowingly or intentionally —
 - (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense a controlled substance; or
 - (2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

Sentencing ranges for this conduct are enumerated in (b) of the same statute and include levels of penalties depending on the type and/or amount of controlled substances involved. Other factors that affect penalties include the defendant's prior convictions and whether death or serious bodily injury was involved. Federal sentences for controlled substance violations range from 10 years to life and a fine of \$4 million, to imprisonment of up to one year and a fine of \$100,000.

State prosecutors are familiar with a defendant's ability to enter a *nolo contendere* plea and, in some jurisdictions, avoid adjudication pending completion of probation. The arrest record may then be sealed and unavailable for sentence enhancing if the defendant picks up subsequent convictions. In contrast, for purposes of enhancing a federal sentence under 21 U.S.C. § 841, a state *nolo* plea constitutes a prior conviction and may render a stiffer sentence for the defendant.²⁷

²⁷ *U.S. v Smith*, 96 F3d 1350 (11th Cir. 1996)

Federal Firearms Statutes

The most frequently charged federal firearms statutes are found under 18 U.S.C. §§ 922 and 924.

18 U.S.C. § 922 (g)(3) prohibits anyone from using a firearm or ammunition during, in relation to, or in furtherance of drug trafficking crime or violent crime when it is established that an individual unlawfully uses or is addicted to any controlled substance:

§ 922 Unlawful Acts:

- (g) It shall be unlawful for any person—
 - (1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;
 - (2) who is a fugitive from justice;
 - (3) who is an unlawful user of or addicted to any controlled substance (as defined in Section 102 of the Controlled Substance Act (21 U.S.C. § 802)).

The firearm must be “in or affecting interstate commerce.” This language has been construed to cover simple in-state possession of a firearm when it can be shown that the firearm was purchased in another state and therefore crossed state lines to be used in the criminal activity in question.²⁸ Establishing that the gun used to rob a convenience store in Texas was purchased in Tennessee, for example, qualifies as “in or affecting interstate commerce.”²⁹

In terms of sentencing, 18 U.S.C. § 922(c) stipulates that anyone who carries a firearm during or in relation to any crime of violence or drug trafficking will be sentenced to a mandatory term of not less than

²⁸ *United States v. Gillies*, 109 S.Ct. 147.

²⁹ An “unlawful user of” a controlled substance includes any use of a scheduled controlled substance beyond an authorized prescription use. 21 U.S.C. § 802 (2005) defines a person “addicted to” a controlled substance as “any individual who habitually uses any narcotic drug so as to endanger the public morals, health, safety, or welfare, or who is so far addicted to the use of narcotic drugs as to have lost the power of self-control with reference to his addiction.” A “controlled substance” is defined in Section 102 of the Controlled Substance Act (21 U.S.C. § 802).

five years. If the person brandishes the firearm during the commission of this crime, the sentence is increased to not less than seven years, and if the firearm is discharged, the sentence will be not less than 10 years. 18 U.S.C. § 924(e)(1) establishes penalties for anyone who is found in violation of 18 U.S.C. § 922(g) when combined with a criminal record showing three previous violent felony convictions or drug offenses, or both.³⁰ Also under federal law, any act of juvenile delinquency that involves the use or carrying of a firearm, knife or destructive device that would have been punishable by imprisonment of more than one year had the act been committed by an adult, also qualifies as a violent crime. A defendant who qualifies for a sentence under this provision is deemed an armed career offender (18 U.S.C. § 4B1.4 (2005)) and receives a mandatory 15-year sentence.

In reviewing a defendant's criminal history, state prosecutors should remember that the three prior violent felony or drug offenses do not qualify a defendant for armed career criminal status until they are no longer subject to examination on appeal (including application for *certiorari* to the Supreme Court). Determining whether a prior state court felony conviction is final is a question of federal law.³¹ Once designated an armed career criminal, a defendant is not eligible for a plea bargain if the case is accepted for federal prosecution. When attempting to negotiate a state guilty plea, the state prosecutor should remind defense counsel of this fact.

Alternatively, each state has an armed career criminal statute, and state prosecutors should become familiar with their respective states' look-back period to use prior drug convictions to enhance a defendant's status for sentencing. Federal prosecution has a limited look-back period of 10 years in most instances, whereas Massachusetts and some other states have no time limit, allowing the prosecutor to use, for example, a 30-year-old drug conviction to enhance a defendant's sentence.

³⁰ For purposes of the statute, a "serious drug offense" is defined, in part, as a drug offense for which a maximum term of imprisonment of 10 years or more is prescribed by law. "Violent felony" is defined, in part, as any crime punishable by imprisonment of more than one year that has as an element of the crime the actual, attempted, or threatened use of physical force.

³¹ *U.S. v Morales*, 854 F2d 65 (5th Cir. 1988).

FEDERAL VS. STATE PROCEDURE

Unlike the concise codification of federal firearms and illegal drug statutes and their corresponding penalties, each state has statutes prohibiting illegal firearms and drugs and a diverse catalogue of penalties for violating these statutes. Through the relationships forged under Project Safe Neighborhoods, state prosecutors can now more readily refer qualifying state firearms cases for federal prosecution—often resulting in more stringent sentences than might have been possible at the state level. The possibility of federal prosecution, therefore, may prompt a defendant to resolve his or her case in state court to avoid harsher federal penalties. Understanding the differences between federal and state procedure enables a state prosecutor to evaluate qualifying firearms cases and select the most appropriate forum for prosecution.

Grand Jury

One of the most notable differences between state and federal criminal procedure is the point at which charges are brought before a grand jury and for what purpose. Unlike many state grand juries that consider charges only after an individual has been arrested, it is not uncommon for federal grand juries to evaluate evidence, statements and reports *before* an arrest is made. Additionally, federal grand juries can be kept active for as long as three years, while a state grand jury is empanelled for shorter periods of time, typically ranging from two weeks to a month or even more.³²

State prosecutors should be familiar with the scope of evidence allowed before their respective state grand jury and federal grand jury. A federal grand jury routinely has access to an individual's prior criminal record in deciding whether to indict, whereas only a few states allow a defendant's prior criminal convictions to be presented for consideration. This difference may be important, for example, when an individual is arrested on a

³² *Fighting Urban Crime: The Evolution of Federal-Local Collaboration*, National Institute of Justice, NCJ 197040, December 2003, www.ojp.usdoj.gov/nij/pubs-sum/197040.html.

relatively small possession charge, but the criminal record indicates a pattern of drug addiction or possession with the intent to sell, thus potentially qualifying the individual for federal prosecution. Knowing these differences may affect where a qualifying drug-related firearms case should be directed for prosecution.

In contrast to the limited power of an individual state subpoena, a federal grand jury has national subpoena power to issue both a *subpoena ad testificandum* to compel an individual's appearance for questioning, and a *subpoena duces tecum* that may require a party to produce documents, fingerprints, DNA samples, voice exemplars, or, if appropriate, to be photographed. For federal grand jury purposes, these subpoenas may be issued without establishing probable cause, specific need or relevance to the matter under consideration. Understanding this broad and powerful federal subpoena ability is especially important if difficulties arise in compelling the testimony of some witnesses at the initial stages of state prosecution.

Bond

After hearing the accumulated evidence, the federal grand jury may make a finding of probable cause. If probable cause is found, the defendant is charged and arrested by any of 66 federal agencies empowered to make arrests under federal law. Federal defendants are then transferred to the custody of the U.S. Marshals Service for processing, transportation and detention. Unlike many state bail statutes, which typically are set solely to assure the defendant's appearance, the federal bail statute (18 U.S.C. § 3142) allows for preventive detention if the prosecutor can establish that no condition or combination of conditions will reasonably assure the defendant's appearance at trial **and** the safety of the community. Individuals arraigned on federal firearms or drug charges often remain in custody until the resolution of their charges if the federal judge makes a finding that the defendant is a danger to the community and/or the defendant poses a flight risk.

Discovery

Some state discovery rules mandate that defendants be provided with a list of witnesses the state intends to call at trial and that defense counsel is entitled to contact and interview, or attempt to interview, these individuals. Some states, such as Florida, rely heavily on pre-trial depositions for discovery while other states do not provide for this discovery procedure. In contrast, federal defendants are not entitled to a pre-trial witness list, nor is defense counsel entitled to interview these parties prior to trial.

Federal vs. State Offers

Typically, after the state defendant is formally arraigned, the state prosecutor evaluates the available evidence and testimony and tenders a plea offer to the defense counsel, either orally or in writing. Depending on the policy of the jurisdiction, a state prosecutor often has some flexibility in negotiating the offer extended to the defendant. The defendant may then accept or reject the offer, and if rejected, a trial date is set. As a result of the collaboration fostered by Project Safe Neighborhoods, many jurisdictions have adopted a case screening or triage procedure whereby state and federal prosecutors and investigators review state arrests to determine the most appropriate forum for prosecution. Once it is determined that a case qualifies for federal court, the defendant is given the opportunity to accept a high-end state offer in lieu of federal prosecution. The defendant is often required to waive the right to apply for a suspended sentence at a later time.

In contrast, all federal plea offers must be in writing and conform to specific sentencing guidelines. The offer is prescribed by the Sentencing Reform Act of 1984, which establishes ranges of recommended sentences using a formula based on the offense and the offender's prior criminal history. In light of the recent Supreme Court rulings in *Blakely v. Washington*, *U.S. v. Booker*, and *U.S. v. Fanfan*, it remains to be seen how federal sentencing guidelines will be affected.³³ In *Booker* and *Fanfan*, the Supreme Court indicated judges should consult the federal guidelines

³³ *Ralph Howard Blakely, Jr. v. Washington*, 124 S.Ct. 2531 (2004), *U.S. v. Booker*, Case No. 04-102; *U.S. v. Fanfan*, Case No. 04-105.

only on an advisory basis in determining reasonable sentences. Further, the Court advised that while federal judges were free to decide for themselves whether a defendant deserved a sentence longer or shorter than that prescribed by the guidelines, sentences that fell outside the prescribed ranges were subject to reversal.³⁴

Federal sentences are imposed in full. For sentences of more than one year, the only possible reduction in actual time served is a maximum of 54 days per year for good conduct. Federally convicted individuals are not eligible for parole but may be released from prison for a period of supervised release. In contrast to state court, federal court does not allow a defendant to request a hearing to have some or all of his sentence probated immediately after being convicted. Instead, the specific terms of federal supervised release are imposed when the defendant is originally sentenced.

Speedy Trial

Each state has adopted a speedy trial statute that requires a defendant's case to be tried within a specific number of days following arraignment, although a defendant may formally waive this right. In federal court, a speedy trial date is set for 70 days after a defendant enters a plea of "not guilty"; continuances are generally not available.

³⁴ <http://www.washingtonpost.com/wp-dyn/articles/A3336-2005Jan12.html>.

PRACTICAL TIPS FOR PROSECUTION

There are several other issues a prosecutor should consider, regardless of whether a drug-related firearms case is accepted for federal prosecution.

Chain of Custody

Unlike firearms, which have a unique and identifiable serial number, most controlled substances are fungible. Consequently, chain of custody issues frequently surface in drug-related firearms cases. These issues are compounded when cases are transferred from state to federal prosecution or, less commonly, when cases are initiated in the federal system and later transferred to state court. When it appears likely that a case will be transferred for federal prosecution, a state prosecutor should include a list of all individuals needed to support the chain of custody and their contact information. This information enables a federal investigator to ensure that any individual who might have retired or transferred from one state office to another is available for all necessary pre-trial hearings. Once a matter has been set for trial, early efforts should be made to determine that all required “links” in the chain of custody will be available to testify.

If any portion of a state case was previously investigated by federal agents—e.g., ATF initiated the case investigation or prepared a report on the firearm in question—a prosecutor should determine whether a certified copy of any applicable federal reports, in lieu of the reporting officer’s live testimony, is admissible in court. In cases of shared evidence, prosecutors should determine what type of documentation or certification is admissible in their particular court to overcome any chain of custody challenges well in advance of the trial date.

Confidential Informants

The use of a confidential informant in drug and drug-related firearms cases requires careful oversight and control. Drug or firearms informants, often by virtue of their own criminal record or associations, move easily within the drug and gun crime community. Although law enforcement

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often uses confidential informants to assist in interrupting or averting drug and firearms activity, prosecutors should be cognizant of informants' intentions with regard to reducing or avoiding charges of their own. Consequently, a prosecutor should avoid relying exclusively on the testimony or representations of an informant.

Many jurisdictions require, typically upon defense counsel's discovery request, that a prosecutor disclose the use of a confidential informant. If defense counsel argues the informant might possess substantial material evidence favorable to his client, a judge may require a prosecutor to provide the informant's name and contact information. Not only does this disclosure "burn" law enforcement's ability to reuse this informant, depending on the nature of the case, it may also place the informant at significant risk. To minimize these problems, prosecutors should work closely with law enforcement and keep them apprised of any relevant changes in statutory or local judicial practice. If an informant's testimony is essential to the case, prosecutors should request that law enforcement identify a point-of-contact officer to maintain communication with the informant.

State prosecutors should also be thoroughly familiar with their office's policy regarding any formal agreement, written or otherwise, with a confidential informant. This process becomes increasingly sensitive for state and local law enforcement and prosecutors when a case shifts to the federal system. Before a case report is prepared for federal court, a prosecutor should consult with law enforcement officers on what identifying information will be included in the case report and discuss the possibility that the confidential informant may be subpoenaed by the federal grand jury. If the informant is on probation or parole or in a drug treatment program, this information should be disclosed to federal prosecutors. Any agreement with the informant should be disclosed to the federal case screening team immediately.

Lay Witnesses: Preventing Witness Intimidation and Keeping Them On Track

“It is true that a witness being out-right killed isn’t going to happen every week, but a witness being intimidated, I believe, happens on a virtually daily basis, to varying degrees.” D.C. Superior Court Judge Noel A. Kramer, commenting after the shooting death of a juvenile who had apparently witnessed a homicide.³⁵

Witness intimidation in drug-related firearms cases can take many forms, including threats of violence or retaliation, property damage, or, in the most egregious instances, murder.

Many drug dealers conduct business on their own local turf or where they live. Unfortunately, witnesses also tend to live in the vicinity of where the illegal conduct is occurring. Consequently, dealers know or can easily track down anyone who might report their activities to law enforcement. All too often, a drug dealer has more opportunity for direct contact and easier access to potential witnesses than law enforcement does.

When it is known that a defendant, or his or her associates, uses or carries firearms, it is not uncommon for witnesses to refuse to talk to investigators for fear of retaliation. When witnesses are unwilling or afraid to interact with law enforcement or testify in court, the ability to prosecute drug-related firearms cases becomes difficult if not impossible.

There are several strategies state prosecutors can employ to reduce the potential for witness intimidation in drug-related firearms cases. To prevent arrested drug dealers from bonding out quickly, for example, some prosecutors ask the judge to set separate bail for each charged violation rather than setting one aggregate bond for the arrest. If the defendant is charged with simple drug possession or possession with the intent to sell and a firearms charge, a prosecutor should request the maximum bond amount be set for each separate charge.

³⁵ *Washington Post*, February 2, 2004

Another measure some prosecutors take in drug-related firearms cases is to immediately assign an investigator or victim/witness advocate to maintain regular phone contact with the witnesses. This strategy quickly alerts prosecutors to potential witness problems so they can take the steps needed to keep the witness on track and available to testify.

In states that have adopted witness intimidation statutes, prosecutors should immediately make both defense counsel and the judge aware of any reported witness intimidation by the defendant directly or by others on behalf of the defendant. This intimidation may warrant additional charges. In extreme cases, critical witnesses may be relocated, given beepers to maintain contact with law enforcement or housed at an undisclosed location pending resolution of the case.

Courtroom witness intimidation is another problem state prosecutors routinely face in drug-related firearms cases. A defendant's relatives or associates will frequently make their presence known to the witness inside the courtroom in a final effort to intimidate the witness. If a prosecutor suspects intimidation, it may be effective to question the witness about the intimidation in front of the jury.

Specialized Voir Dire for Firearms Cases

In firearms cases, it is important to educate prospective jurors regarding the severity of the defendant's criminal conduct. In many communities, especially those with a strong hunting culture, prosecutors must overcome a subtle bias among jurors regarding possession of firearms. The following list is offered to assist prosecutors in understanding the jury's attitude about firearms and refocus the jury on the wrongfulness of the defendant's conduct:

1. To determine a juror's basic attitude about firearms, ask the following questions:
 - a. What do you think of when you hear the word *firearm*?
 - b. What do you think of when you hear the word *weapon*?

- c. What do you think of when you hear the word _____?
(local slang for gun).
 - d. Do you understand the defendant is on trial for his illegal use/
illegal possession of a weapon?
2. To determine a juror's knowledge of firearms, ask the following questions:
- a. Do you own a firearm(s)?
 - If not now, have you ever owned a firearm?
 - If you have previously owned one, what kind?
 - Why did you get rid of it?
 - b. If you own a firearm now, what kind?
 - c. How many?
 - d. Did you buy it or was it a gift?
 - e. If a gift, how old were you?
 - f. If not a gift, did you buy it (depending on what kind of firearm)
for protection?
 - g. If for protection, why?
 - h. Do you own _____ (whatever type of firearm is associated
with the defendant)?
 - i. Have you ever taken any firearms safety courses?
 - j. (If appropriate) How old were you when you got your firearm?
3. To explore a juror's sports/hunter background, consider asking the following questions:
- a. Do you hunt?
 - b. For what?
 - c. What do you use?
 - d. Have you ever taken any hunter safety courses?
4. Finally, the prosecutor may ask the jury the following question: Do you understand there is nothing illegal about the responsible, licensed use of a firearm? Do you understand the defendant is on trial for the illegal use of a weapon?

Using Expert Witnesses—Both Your Own and the Defense’s

Most drug-related firearms trials require a prosecutor to introduce evidence through the use of an expert witness, usually a toxicologist or firearms expert. A prosecutor should take care to ensure that the proffered witness is an expert in the particular area, not merely someone familiar with the subject matter. Ideally, the witness will have been certified as an expert in a previous proceeding and can quantify the number of times he or she has testified as an expert.

When using such witnesses, prosecutors should know the particular standard for admission of each type of expert testimony. The testimony of a law enforcement expert, for example, is typically offered as a result of experience and special knowledge acquired during a career in law enforcement. A toxicologist’s opinions and testimony, on the other hand, will be offered on the basis of both experience and scientific background. A prosecutor should be prepared for defense challenges on the inherent reliability of each type of testimony and be able to show, through judicial notice of general acceptance or acceptance within the scientific community, a sufficient foundation of reliability for admission of the proffered testimony. Depending on the particular court’s practices, certification of a toxicologist’s report may preclude the need for the chemist’s testimony and thus reduce the number of prosecution witnesses needed to carry the state’s burden of proof.

When a defendant alleges that confiscated drugs were for his personal use and that he should at most be charged with simple possession, prosecutors can ask the expert witness to quantify the amount of drugs into individual usage units. Though 10 grams of crack cocaine may not strike a juror as significant, the intent of the defendant’s possession becomes clearer when the amount is described as potentially more than 20 usage units.

Prosecutors are finding that popular television programs dealing with crime scene investigations have prompted jurors to question why DNA or fingerprints were not obtained from the confiscated illegal drugs or firearms. If possible, a prosecutor should include testimony, either from

an experienced, qualified law enforcement witness or other appropriate expert witness, about the difficulties of obtaining either type of evidence. Such a line of questioning can help the jury to avoid futile speculation in the deliberation room.

Prosecutors should routinely file discovery motions (prior to trial) requesting witness disclosure in anticipation that defense counsel will attempt to introduce their own expert witnesses to counter the state's findings. In preparation for trial, prosecutors should interview all known expert witnesses for the defense to determine their methodology and the basis of their opinions and conclusions.

CONCLUSION

The strategies fostered by Project Safe Neighborhoods have created a strong foundation for effective prosecution of drug-related firearms cases. By understanding the procedural tools available in the state and federal systems, prosecutors are able to address the unique challenges of these cases, direct them to the most appropriate forum and effectively prosecute drug-related gun cases.

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APPENDIX

Qualifying Expert Witnesses

Firearms Expert

1. Please state your name.
2. Please state your occupation and where you are employed.
3. With which law enforcement agency do you work?
4. How long have you been employed by that agency?
5. What are your current duties?
6. What specialized training have you had for those duties?
7. What is firearms identification?
8. Have you taken any specialized training in firearms identification?
9. What makes firearms identification possible?
10. Are you a member of any professional organization associated with firearms/firearms identification?
11. Have you testified previously in the field of firearms identification?
12. Have you previously been qualified in court as a firearms expert?
13. How many times?

Ask the court that the witness be certified as an expert witness.

Identifying the Physical Facts

14. I show you what has been marked for purposes of identification as State's Exhibit _____. Please examine them.
15. Have you ever seen these before?
16. Under what circumstances did these items marked as State's Exhibit _____ come into your possession/to your attention?

17. Did you make an examination of any of these items?
18. Describe in detail the examination you made.
19. Following your examination, what did you do with this evidence?

Your Honor, the people offer State's Exhibit _____ for admission as evidence.³⁶

Law Enforcement Officer (non-chemist)

1. Please state your name.
2. Please state your occupation and where you are employed.
3. With which law enforcement agency do you work?
4. How long have you been employed by _____?
5. Have you received any specialized training in a particular field of investigation?
6. In what field are you specialized?
7. How long have you been specialized in that field?
8. Have you attended any specialized schools or had any specialized training regarding illegal drugs?
9. During the past ____ years, in your training, education and experience, on approximately how many occasions have you observed/smelled or come in contact with _____?
10. Have you ever identified a substance as being _____ and had the forensic chemical analysis result in a finding that the substance was not _____?
11. Have you ever testified as an expert witness in any court concerning the visual and/or olfactory identification of _____?
12. In what courts and on how many occasions?

Identifying the Substance

13. I show you what has been marked for purposes of identification as State's Exhibit _____.
14. Based on your past experience and training, do you have an opinion as to what the substance is?³⁷

³⁶ *Trial Technique Predicate Questions*, 2nd edition, National District Attorneys Association (1998)

³⁷ *Id.*

State Chemist As Witness

1. Please state your name.
2. What is your occupation?
3. Who is your employer?
4. How long have you been employed by _____?
5. What position do you hold at _____?
6. How long have you worked in this position?
7. What are your duties?
8. What type of training must you have to qualify for your position at _____?
9. Do you belong to any associations or organizations relating to your occupation?
10. Have you had an occasion to chemically analyze substances to determine whether the substance is or contains a narcotic or narcotic-type drug?
11. How many times?
12. Have you had an occasion to chemically analyze substances to determine whether the substance is or contains _____?
13. How many times?
14. How many _____ analyses do you make in a given week?
15. Do you make analyses as a regular part of your duties?
16. Have you had an occasion to qualify as an expert in this area in court of _____ County?
17. How many times?
18. Did you actually testify?

Your Honor, the people move that _____ be declared as an expert in the field of chemistry and analysis of narcotics.

Identifying the Substance

1. I show you what has been marked for purposes of identification as state's Exhibit _____. Please examine it.
2. Based upon your past experience and training, do you have an opinion as to what this substance is?
3. How can you identify this exhibit?

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4. When did you mark this exhibit?
5. When did you receive this exhibit (date submitted)?
6. Where did you receive this exhibit?
7. How did this exhibit come into your possession (by whom submitted)?
8. Has this exhibit been continuously under your care/custody or control?
9. Is this exhibit in the same condition now as when it was first received?
10. For what purpose did this exhibit come into your possession?

Your Honor, the people offer State's Exhibit _____ for admission as evidence.

11. What is the weight of the _____?
12. On what occasion did you make an analysis?
13. When did you make the analysis?
14. What tests were made by you?
15. What type of examination did you perform?
16. From these tests were you able to form an expert opinion as to what the exhibit is or contains?
17. Please state your opinion.
18. What is the basis for your opinion?

Your Honor, the people offer State's Exhibit _____ for admission as evidence.³⁸

³⁸ Id.

RESOURCES

Gun Crime Prosecution Resources

American Prosecutors Research Institute:	www.ndaa-apri.org
Project Safe Neighborhoods:	www.psn.gov
U.S. Department of Justice:	www.usdoj.gov
Bureau of Alcohol, Tobacco, Firearms and Explosives:	www.atf.gov
International Association of Chiefs of Police:	www.iacp.org
Office of Justice Programs	
Bureau of Justice Assistance:	www.ojp.usdoj.gov/bja
National Institute of Justice:	www.ojp.usdoj.gov/nij
Bureau of Justice Statistics:	www.ojp.usdoj.gov/bjs
Mapping and Analysis for Public Safety:	www.ojp.usdoj.gov/nij/maps
National Criminal Justice Reference Service:	www.ncjrs.org

Firearms and Ballistics Resources

Ballistics Links:	www.firearmsid.com
	http://medstat.med.utah.edu/ WebPath/TUTORIAL/ GUNS/GUNINTRO.html

Drug Resources

APRI Drug Prosecution and Prevention Program:	www.ndaa-apri.org
Arrestee Drug Abuse Monitoring Program:	www.adam-nij.net
Drug Enforcement Administration:	www.usdoj.gov/dea
Office of National Drug Control Policy:	www.whitehousedrugpolicy.gov

APRI's PSN Publication Resources

(available online at www.ndaa-apri.org)

Combating Gun Violence: An In-depth Look at Richmond's Project Exile

Combating Gun Violence: Promising Practices for America's Prosecutors

Cross-Designation & Federal Firearms Laws

Prosecutors' Guide to the ATF

Prosecuting Gang Cases: What Local Prosecutors Need to Know

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