

From Minnesota to Mexicali: Connecting the Dots with Trafficked Firearms

BY DAVID H. PENDLE

STORIES OF MEXICAN drug cartels' bloody and relentless efforts to flood American streets with narcotics have frequented our headlines for well over a decade, but only more recently have the larger dynamics of the trade been widely circulated. While Mexican drug trafficking organizations (DTOs) inject drugs into American communities, American criminals often supply the firepower for Mexico's street violence. DTOs use proceeds from their estimated \$19–29 billion annual profits¹ to arm their operations. And arm them well. Between 2009 and 2010, 34,000 firearms were seized by Mexican authorities from criminal groups.² As a result, Mexico, which has some of the strictest gun control laws in the world, regards trafficked firearms as the number-one threat to its national security.³

This threat originates close to home: the U.S.

Government Accountability Office reported that 87 percent of firearms seized in Mexico and successfully traced led back to the United States,⁴ resulting in what Congress has described as an “unfettered access” to American firearms.⁵ Although estimates vary, the United Nations Office on Drugs and Crime places the number of firearms trafficked across the border at 20,000 annually.⁶ This access has undoubtedly escalated the violence on both sides of the border, which in Mexico has resulted in 50,000 people killed since 2006, including over 12,000 in 2011 alone.⁷

SOURCES OF TRAFFICKED FIREARMS

The calling card for organized firearms trafficking is generally not the clandestine midnight swap of

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nameless foreign freight containers at port. Instead, the firearms are often originally purchased in relatively small quantities from licensed and unlicensed gun vendors in all corners of the country,⁸ but especially within the Southwest Border states.⁹ Of the trafficked firearms recovered in Mexico, 39 percent originated from Texas gun dealers, 20 percent from California, and 10 percent from Arizona.¹⁰

Gun shows are a significant source abused by traffickers to acquire firearms, as unlicensed sellers are not required to perform federal background checks on prospective buyers. A City of New York undercover investigation at seven gun shows in Ohio, Tennessee, and Nevada revealed that 63 percent of unlicensed vendors sold firearms to investigators who even conceded that they “probably couldn’t pass a background check.”¹¹ Perhaps not surprisingly, the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) reported that approximately 30 percent of firearms involved in federal trafficking investigations are connected to gun shows.¹²

Traffickers exploit licensed dealers as well, often by using straw purchasers.¹³ Straw purchasers are intermediaries who acquire one or more firearms from a licensed firearms dealer on behalf of another person, thus concealing the actual recipient’s identity.¹⁴ The ATF has previously reported that “straw purchasing” is the most common method used by traffickers to acquire firearms.¹⁵

Since 2004, straw purchasers have been able to purchase military-style assault rifles from licensed vendors.¹⁶ In fact, purchasing multiple assault and sniper rifles is in some ways less risky than buying ordinary handguns. Since 1975, federally licensed firearm dealers must report the sale of two or more handguns to one individual within a five day period to the ATF.¹⁷ Only on August 14, 2011, did the ATF implement a rule requiring that such vendors report bulk transactions of certain high-powered “long-guns,” and this rule only applies to the states of California, Arizona, New Mexico, and Texas.¹⁸ One would expect that, provided this new rule withstands legal challenges,¹⁹ traffickers will increasingly

look to purchase assault rifles north of these Border States.

INDICATORS OF TRAFFICKED FIREARMS

Regardless of the source, it is abundantly clear that thousands of firearms are regularly trafficked across the country and into Mexico. As such, it is important for law enforcement and prosecutors to keep in

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mind indicators—beyond the sheer number of firearms seized—that may identify potential high impact offenders and trafficking rings. However, none of the circumstances below, especially when viewed in isolation, is sufficient for probable cause, let alone proof beyond a reasonable doubt. Yet these circumstances may serve to elevate suspicion, and they generally warrant further investigation.

The circumstances surrounding the initial purchase can often indicate organized trafficking. The ATF has found that traffickers frequently buy a large number of the same or similar model firearms; may structure their purchases to avoid ATF reporting requirements; will avoid conversations or be evasive when confronted with questions; will not attempt to barter over the cost (money is not an issue); may pay with cash, perhaps with the same denomination; have little knowledge of the specific types of

firearms they are purchasing; or may lack the physical stature to handle the firearms purchased.²⁰

The specific firearms being smuggled can also raise suspicions, as DTOs have expressed a clear preference for certain types of firearms. Among their favorites are 9mm caliber pistols, .38 super caliber pistols, 5.7mm caliber pistols (dubbed by cartels as the “mata policía,” or “cop killer,” because of its ability to pierce certain types of body armor²¹), .45-caliber pistols, AR-15-type rifles, AK-47-type rifles, and .50-caliber rifles.²² Common characteristics include a folding telescopic stock; pistol grip on a rifle; muzzle flash suppressor, or threaded barrel capable of accepting a silencer; obliterated identifying markings;²³ and high-capacity magazines (generally 10 or more rounds). Other items that should naturally sound alarms are bullet-proof vests, armor

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piercing ammunition, grenades, or other military equipment.

Membership in certain gangs can be especially significant when determining DTO involvement. DTOs have long relied on American street, prison, and motorcycle gangs to facilitate mid- and retail-level distribution of their smuggled narcotics.²⁴ Many such gangs use trafficked firearms as currency,

trading them at or near the border for more narcotics. Some of the national-level gangs that have a significant relationship with DTOs include 18th Street, Bandidos, Barrio Azteca, Black Guerilla Family, Bloods, Crips, Florencia 13, Gangster Disciples, Hells Angels, Hermanos de Pistoleros Latinos, Latin Kings, Mara Salvatrucha (MS-13), Mexican Mafia (La Eme), Mexikanemi, Norteños, Sureños, Tango Blast, Texas Syndicate, Tiny Rascal Gangsters, and Vagos.²⁵

Red flags that apply to classic automobile interdiction and stash home searches may apply to firearms trafficking as well. For example, suspicions could be raised if the occupants in a car with suspected trafficked firearms do not know each other, were stopped along major trafficking corridors, or had multiple unexplained cell phones. If the vehicle was a rental car or moving truck, perhaps the person on the rental agreement is not in the car and the occupants claim to not know him or her, or the mileage on the rental agreement compared to the current mileage does not comport with the occupants’ story. Even if the suspects possess few firearms, suspicions should not be dismissed, as DTOs often subscribe to “hormiga” (ant) trafficking, in which a large number of smugglers drive very small batches of firearms to the border.²⁶

Stash homes frequently present common characteristics too. The homes are often rental properties with an attached garage (for covert loading and unloading). They may abut an alleyway or have multiple exits. Neighbors may report unusual amounts of traffic around the home, often with out-of-state plates, or that the occupants rarely interact with others. And the investigation may reveal evidence of packing or shipping materials or that various people stay in the home.

ANOTHER PIECE OF THE PUZZLE

If law enforcement or a prosecutor believes that seized firearms may be connected to trafficking,

there are several resources available to help confirm suspicions. The ATF will trace all recovered firearms through its eTrace (Electronic Tracing System) program, which can reveal the original purchaser's identity and address; the firearm retailer; the time passed from the date of transaction to the crime; patterns in purchase locations, purchasers, and recovery locations; and other law enforcement agencies that have had similar trace results, which may help connect investigations.²⁷ Law enforcement can obtain firearms trace request forms from the ATF website,

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at www.ATF.gov/forms/firearms.²⁸

The El Paso Intelligence Center (EPIC), which is managed by the Drug Enforcement Administration (DEA), is a national tactical intelligence center that can provide immediate access to numerous databases for law enforcement. An EPIC query can provide detailed information on not only the suspect, but also on any associated vehicle, watercraft, aircraft, firearm, and many other items. This information can be vital in connecting a suspect to his or her larger trafficking organization. Prosecutors are also eligible for EPIC access and can request instructions directly from EPIC at 1-888-USE-EPIC, or from the National District Attorneys Association's Gun and Gang Violence Prosecution Program.

Lastly, the Financial Crimes Enforcement Network (FinCEN), maintained by the U.S.

Department of the Treasury, contains a database of more than 140 million reports of large currency and suspicious transactions. If a suspected trafficker is apprehended with a significant amount of currency, FinCEN may assist by determining if transaction data exists on the suspect, identifying and tracing the currency, and assisting with the development of other financial aspects of the investigation or prosecution. For instructions on how to utilize this extensive database, contact your designated FinCEN state coordinator at 1-800-SOS-BUCK or www.fincen.gov.

PROSECUTION OPPORTUNITIES

Once a case is pieced together, a prosecutor will find that many more charging options exist than mere illegal possession or distribution of a firearm. Most states have enacted Racketeer Influenced and Corrupt Organizations Act (RICO) statutes, which may better reflect the extent of the defendant's activities and solve any FRE 404(b) or joinder issues. Prosecutors should also consider adding firearm enhancements, or even charging the defendant as an accessory to any underlying crime involving the firearm. Straw purchasers can likely be charged with forgery or document fraud, based on the declaration during purchase that the defendant is the true buyer. In many jurisdictions, asset forfeiture is a valuable tool for seizing the defendant's vehicle or even stash home and, as a secondary benefit, generating revenue for local law enforcement or other statutorily designated beneficiaries.

If the defendant is a known or suspected gang member, a prosecutor should strongly consider adding any available gang-specific charges or enhancements. In addition to providing for greater punishment, such amendments increase the likelihood of a judge allowing a gang expert to testify at trial to gang involvement in regional trafficking patterns. Even if the defendant lacks clear ties to a gang, prosecutors should explore whether an appropriate

expert could testify to firearms trafficking. Such an expert could preempt numerous defenses by explaining the rules of DTO-involved trafficking and describing that if one gets to play, he or she must know the rules. Since experts are often permitted to testify to the narcotics side of trafficking, there is little reason to believe a knowledgeable expert could not testify to the firearms side.²⁹

In order to understand where a gun case fits into the trafficking network, if at all, investigators and prosecutors must first learn how to connect the dots. Only then can we educate judges and juries on the true impact of illegal possession or distribution of firearms, easily masked as “garden variety” gun cases.

¹ Bureau of International Narcotics and Law, U.S. Department of State, 2011 INCSR: *Country Reports: Mexico*, Mar. 3, 2011, available at www.state.gov/p/inl/rls/nrcrpt/2011/vol1/156359.htm#mexico.

² William Booth, *Drug violence is worse, Calderon admits*, THE WASHINGTON POST, Sept. 3, 2010, available at www.washingtonpost.com/wp-dyn/content/article/2010/09/02/AR2010090205652.html?nav=emailpage.

³ U.S. Government Accountability Office, *Firearms Trafficking: U.S. Efforts to Combat Arms Trafficking to Mexico Face Planning and Coordination Challenges*, GAO-09-709, June 2009, available at www.gao.gov/new.items/d09709.pdf.

⁴ *Id.*

⁵ Report by Senators Dianne Feinstein, Charles Schumer, and Sheldon Whitehouse to the U.S. Senate Caucus on International Narcotics Control, *Halting U.S. Firearms Trafficking to Mexico*, 112th Cong. (2011).

⁶ Office on Drugs and Crime, United Nations, *Firearms: Figure 6.1*, May 2, 2010, available at www.unodc.org/documents/data-and-analysis/tocta/6.Firearms.pdf.

⁷ William Booth, *In Mexico, 12,000 killed in Mexico in 2011*, THE WASHINGTON POST, Jan. 2, 2012, available at http://www.washingtonpost.com/world/in-mexico-12000-killed-in-drug-violence-in-2011/2012/01/02/gIQAAGUdWP_story.html.

⁸ The ATF reports that it has investigated firearms trafficking organizations with connections to Mexican criminal enterprises “in all parts of the country, from Minnesota to Florida to all border states.” Bureau of Alcohol, Tobacco, Firearms, and Explosives, U.S. Department of Justice, *Project Gunrunner*, available at www.atf.gov/firearms/programs/project-gunrunner/.

⁹ National Drug Intelligence Center, U.S. Department of Justice, *National Drug Threat Assessment 2010: U.S. Southwest Border Smuggling and Violence*, Feb. 2010, available at www.justice.gov/ndic/pubs38/38661/swb.htm#Top.

¹⁰ Feinstein *et al.*, *supra* note 6.

¹¹ The City of New York, *Gun Show Undercover: Report on Illegal Sales at Gun Shows*, Oct. 2009, available at www.nyc.gov/html/om/pdf/2009/pr442-09_report.pdf.

¹² Felipe Calderon, President of Mexico, Address to Joint Meeting of Congress, U.S. Congress, May 20, 2010, available at www.c-spanvideo.org/program/293616-2.

¹³ National Drug Intelligence Center, *supra* note 9.

¹⁴ *Id.* at n.11.

¹⁵ Bureau of Alcohol, Tobacco, Firearms, and Explosives, U.S. Department of the Treasury, *Following the Gun: Enforcing Federal Laws Against Firearms Traffickers*, June 2000.

¹⁶ The federal assault weapons ban expired in September 2004. Jill Lawrence,

Federal ban on assault weapons expires, USA TODAY, Sept. 12, 2004, available at www.usatoday.com/news/washington/2004-09-12-weapons-ban_x.htm.

¹⁷ *Reporting multiple sales or other disposition of pistols and revolvers*, 27 C.F.R. § 478.126a (2008); see also 27 C.F.R. § 178 (1975).

¹⁸ The rule only applies to long guns that are rifles greater than .22 caliber, have a semi-automatic action, and have the capability to accept a detachable magazine. Bureau of Alcohol Tobacco, Firearms and Explosives, U.S. Department of Justice, *Q&As for the Report of Multiple Sale or Other Disposition of Certain Rifles*, July 29, 2011, available at www.aft.gov/firearms/industry/07291-qa-multiple-rifles.pdf; see also James Grimaldi and Sari Horwitz, *Gun dealers will have to report multiple sales of semiautomatic rifles*, THE WASHINGTON POST, July 11, 2011, available at www.washingtonpost.com/politics/gun-dealers-will-have-to-report-multiple-semiautomatic-rifle-sales/2011/07/11/gIQAy3S19H_story.html.

¹⁹ On August 3, 2011, the National Rifle Association, through two federally licensed firearms dealers in Arizona, filed an injunction to bar enforcement of the rule. At the time of writing this lawsuit is still pending resolution. Charlie Savage, *N.R.A. sues over bulk gun sales rule*, N.Y. TIMES, Aug. 3, 2011, available at www.nytimes.com/2011/08/04/us/04guns.html.

²⁰ Bureau of Alcohol, Tobacco, Firearms and Explosives, U.S. Department of Justice, *Project Gunrunner: The Southwest Border Initiative*, ATF Publication 3317.6, Mar. 2009, available at www.atf.gov/publications/download/p/atf-p-3317-6.pdf.

²¹ Statement of William Hoover, ATF Assistant Director for Field Operations, Hearing Before the House Committee on Foreign Affairs Subcommittee on the Western Hemisphere, Feb. 7, 2008.

²² U.S. Department of Justice, *Fact sheet: Department of Justice efforts to combat Mexican Drug Cartels*, Apr. 2, 2009, available at www.atf.gov/press/releases/2009/04/040209-doj-factsheet-combatting-mexican-cartels.html; see also Bureau of Alcohol, Tobacco, Firearms, and Explosives, U.S. Department of Justice, *Project Gunrunner Fact Sheet*, Aug. 2008, available at www.atf.gov/publications/factsheets/factsheet-project-gunrunner.html.

²³ The possessor of a firearm with an obliterated serial number is guilty of a felony under federal law, 28 U.S.C. § 5861(g) and (h), as well as under many states’ laws (e.g., Arizona, A.R.S. § 13-3102, and California, Pen. Code §§ 12090, 12094).

²⁴ Drug distribution in the U.S. is “dominated by more than 900,000 criminally active gang members representing approximately 20,000 domestic street gangs in more than 2,500 cities.” National Drug Intelligence Center, U.S. Department of Justice, *National Drug Threat Assessment 2010: Drug Trafficking by Criminal Gangs*, Feb. 2010, available at www.justice.gov/ndic/pubs38/38661/gangs.htm#Top.

²⁵ National Drug Intelligence Center, U.S. Department of Justice, *National Drug Threat Assessment 2010: Gangs with significant influence on U.S. drug markets*, Feb. 2010, available at <http://www.justice.gov/ndic/pubs38/38661/app-b.htm#TableB4>.

²⁶ See Office on Drugs and Crime, *supra* note 7, at p.135.

²⁷ Bureau of Alcohol, Tobacco, Firearms and Explosives, U.S. Department of Justice, *Police Officer’s Guide to Recovered Firearms*, Dec. 2009, available at www.atf.gov/publications/download/p/atf-p-3312-12.pdf.

²⁸ A law enforcement agency must first sign a memorandum of understanding with the ATF prior to using eTrace; contact your local ATF field office for details.

²⁹ For a discussion regarding the proper use of a drug trafficking expert, see *U.S. v. Klimavicius-Viloria*, 144 F.3d 1249, 1259-60 (9th Cir. 1998), cert. denied, 528 U.S. 842, 120 S.Ct. 311 (1999); see also *U.S. v. Kearns*, 61 F.3d 1422, 1427 (9th Cir. 1995).