



CHANGING SYSTEMS
TRANSFORMING LIVES



IMPROVING THE RESPONSE TO
FIREARMS IN THE CRIMINAL LEGAL
SYSTEM

BWJP

Improving the Response to Firearms in the Criminal Legal System

The criminal legal system uses its full authority to take guns away from abusers and ensures abusers surrender their guns and ammunition if the law says they can't have firearms.

This Community Strategy focuses on criminal domestic violence cases, and challenges communities to take every available opportunity during the criminal process to address the threat posed by offenders' access to firearms.

Despite differences in the criminal processes employed by communities around the country and in the legal authority granted to the professionals involved in responding to domestic violence crimes, all communities can develop and implement effective processes to identify cases in which offenders' access to firearms presents safety concerns and to address those concerns by disarming offenders and preventing them from obtaining new firearms.

In addition to enforcing state and Tribal firearm prohibitions, communities should take steps to facilitate enforcement of the federal firearm prohibition imposed upon individuals convicted of certain misdemeanor crimes of domestic violence, found at 18 U.S.C. § 922(g)(9), especially in the absence of an analogous prohibition in their state or Tribal law.

Each of the common steps of criminal domestic violence cases, listed below, provides opportunities for the legal system to learn about and respond to offenders' use of and access to firearms.

1. 911 Call and Initial Response by Law Enforcement

The 911 call and initial response to a domestic violence incident, in addition to being crucial opportunities to protect victims, children, and others, sets the stage for the subsequent response by the legal system to offenders who have access to firearms.

Potentially life-saving information may be obtained at these stages, and victims can be given information about their options for seeking assistance and other services, as well as further relief from the courts.

911 Dispatchers >

When taking a call for service, dispatchers should follow department protocol when obtaining information regarding a family violence incident.

The protocol developed should pay particular attention to the following:

- The caller's name and relationship to the offender
- The victim's name and the offender's name, and their relationship to each other;
- The nature of the abuse, and suspected or sustained injuries;
- Previous complaint history;
- Whether the victim has a current order for protection;
- Whether children are involved;
- Whether there is presence of alcohol, drugs or mental illness;
- Whether there is presence and use of firearms and the parties' access to firearms, including their location.

The dispatcher should cross-reference file incidents by name and address to determine:

- If there had been previous incidents involving the same parties;
- Whether weapons had been used previously; and
- Whether any injuries had been reported in the earlier incidents.

The protocol should also include the following steps for dispatchers:

- Complete a criminal history search, including prior domestic offenses, arrest warrants and firearm offenses;
- Convey all Information gathered regarding firearms to responding officers.

Step Checklist

1. Ask about the presence and location of firearms.
2. Always inform patrol officers of the presence and location of firearms, whether reportedly used in the instant crime or not.
3. Check databases for information on possession or prohibitions against guns.
4. Protect safety of victim and officers.
5. Identify opportunities for early disarming.

Law Enforcement >

When responding to call for service, first responders should follow department protocol for responding to a domestic violence incident.

The protocol developed should pay particular attention to the following:

- An explanation of the full scope of both mandatory and discretionary legal authority to seize weapons.
- Clear directions for officers regarding search and seizure of firearms, including the authority to seize weapons allegedly used or threatened to be used in the incident, when they are in plain view or found pursuant to consent or custodial search or a search incident to arrest or where authorized by State law to do so.
- A requirement that responding officers ask questions about firearms and that they are trained to do so safely.

- A procedure for responding to a person in possession of firearms who is subject to a protection order that disqualifies the person from firearms possession, including, where authorized by law, seizure of the weapons and arrest.
- An explanation of the federal firearm laws related to domestic violence, their relationship to state/Tribal laws, and the process for seeking involvement of federal authorities in a particular case.
- Use of a mandated domestic violence incident report that includes specific information regarding firearms, including firearm types, locations, whether they were used during the incident, who owns the firearms, and the offender's numerical identifiers (date of birth, social security number, or other identifying information).
- Provision of informational materials for victims regarding advocacy/safety planning and other available services, as well as legal relief available, including relief related to offenders' firearms access.

Step Checklist

1. Seize any firearms allegedly used or threatened to be used in the incident, if in plain view or found pursuant to consent or custodial search or search incident to arrest, or where authorized by State law.
2. Determine if there is a current protection order in effect by interviewing the alleged victim.
3. Verify existence of protection order by examining paper copy and through electronic means of protection order database.

Prosecutor >

Involve the prosecutor in the development of protocol for dispatch and first responding officers. Protocol should be informed by all applicable federal and state law.

State laws vary greatly in addressing seizure of firearms at scenes of domestic violence. Some states require seizure at the scene if the firearm was used or threatened in the current instance of domestic violence. Others allow for seizure at the officer's discretion. Some jurisdictions rely on widely accepted exceptions to the warrant requirement, others, however require officers to secure a search warrant to search for or seize firearms.

The law in some jurisdictions allows law enforcement or a prosecutor to get warrants to seize firearms from anyone who poses an imminent risk of injuring himself or herself or someone else.

Prosecutors who work in jurisdictions requiring officers to apply for a search warrant should create a protocol to streamline the warrant process so warrants don't become an impediment to seizing firearms. Law enforcement policies often require warrant review

and approval by prosecuting attorneys. Prosecutors should facilitate an on-call schedule for review of search warrants and use available technology to expedite review and processing of warrants.

Step Checklist

1. Develop warrant process, where needed
2. Include steps for evening, weekend applications
3. Identify players involved in application, serving warrant
4. Develop safety plan for officers as well as family members for serving warrant

Judge >

Some jurisdictions require law enforcement to get a search warrant prior to seizing firearms. In determining grounds and probable cause for issuing a warrant, the judge must consider any recent threat or violent act the person directed at himself or herself, others, or animals. In determining whether the threats or acts constitute probable cause to believe a risk of injury is imminent, the judge may consider, among other things, if the person

- Recklessly used, displayed, or brandished a gun;
- Has a history of using, attempting or threatening to use physical force against people;
- Was ever involuntarily confined to a psychiatric hospital;
- Abused alcohol or illegal controlled substances.

If satisfied that probable cause exists the judge must issue the warrant stating:

- The grounds or probable cause;
- Describing the person, place or thing to be searched;
- Directing the officer to conduct the search in a reasonable time.

Step Checklist

1. Develop process for application, including evening and weekend procedures.
2. Develop guidelines for warrant application in light of jurisdiction
3. Review process with prosecutors and law enforcement
4. Staleness of information may be an issue in these cases

2. Pre-Trial Hearings: Initial Appearance and Preliminary Hearing

The pre-trial stage of a criminal domestic violence case provides an opportunity to investigate the nature of the offense and the offender's criminal history, dangerousness/risk, and other characteristics.

Courts presiding over pre-trial hearings are in a position to use this information to craft pre-trial orders, including bail orders, release conditions, and/or criminal protection orders, that are responsive to the risks posed by the offender and the needs of the victim—including regarding firearms-related safety concerns.

Courts and other professionals involved in pre-trial hearings should collaborate to prevent offenders from having access to firearms where prohibited by law by adopting the following suggested practices noted below.

Prosecutor >

Prosecutors should investigate firearm issues prior to a first appearance. Prosecutors must review police reports, 911 calls and inquire with the victim about the use of a firearm in the present offense. Prosecutors should also review all available federal and state databases to determine historical information relating to the defendant's access to firearms and protective orders. Prosecutors must be present at arraignments to ensure that information about firearms used or possessed by the defendant reaches the court.

One of the most critical aspects of a domestic violence case is the issuance of a no-contact order. A no-contact order may be entered by the court at any time and is common as a part of pre-trial release. In issuing a no-contact order, the court should make a finding regarding the defendant's relationship to the victim. A finding of "intimate partner" will subject the defendant to federal firearm restrictions. "Intimate partner" includes current/former spouses, parents of common child, or current/former cohabitants as intimate partners. Pre-trial no contact orders will expire when the charges are dismissed or the defendant is acquitted.

In preparing criminal complaints, indictments or other charging documents, prosecutors should specify the precise act a defendant is charged with committing. To be a qualified domestic violence related offense for purposes of federal firearms prohibition the crime must have as an element the use or attempted use of physical force or the crime must have as an element the threatened use of a deadly weapon. Even if a domestic relationship between the parties is not an element of the predicate offense, prosecutors should include a description of the relationship in the charging documents.

Step Checklist

1. Investigate firearm issues, current and historical.
2. Investigate access to firearms including firearm registries and conceal carry permit registries.
3. Notify the court at or before arraignment:
4. If the defendant owns or possesses a firearm;
5. If the defendant is required to surrender firearm pursuant to state or federal law.
6. Motion the court for judicial remedy requiring surrender of firearms.
7. Request appropriate bail in order to protect the victim.
8. Ensure that the defendant is advised of firearm prohibition both in writing and verbally by the presiding judge.

9. Prepare criminal complaint to reflect elements required for firearm prohibition, namely use of force and domestic relationship between involved parties.

Judge >

Judicial officers should consider the charged offense, use or threatened use of a firearm and any existing protective orders.

Judicial officers should consider historical information regarding the defendant's use or access to firearms and protective orders.

Judicial officers should review whether there is an extant, qualifying conviction prohibiting firearm possession. Things to consider are whether the offender:

- Has had their conviction vacated
- Has been pardoned or had the conviction expunged or set aside
- Has had their civil rights restored
- Has the convicting jurisdiction placed any lingering firearm restrictions on the misdemeanor, such as restrictions on the ability to obtain a concealed weapons permit, the ability to possess a machine gun, possess a handgun outside the home or business, possess a firearm for other than hunting etc.

Where there is a civil protective order that the court or bail commissioner is aware of, the bail order should duplicate the conditions of the civil protective order to the extent allowable by law, and not simply incorporate conditions of the civil order by reference. Incorporation of a civil protection order by reference will not provide conditions of bail that survive in the event the petition is withdrawn or the civil case is dismissed.

When issuing criminal protective orders and conditions of bail in domestic violence cases, courts should address the issue of victim notification with the prosecutor at the arraignment in order to guarantee that proper notification is made.

Orders should be clear, specific, and include information to support compliance monitoring (See section on Surrender/Third-Party Transfer below).

Orders should comply with federal laws (including the specific requirements of 18 U.S.C. § 922(g)(8) regarding the language in the order, a relationship indicator, compliance with due process requirements).

Courts should provide both written and oral notification of federal firearm prohibitions.

Orders should be entered into state/Tribal and federal databases in a timely manner.

Step Checklist

1. Review record of defendant and current charge
2. Determine existence of firearms
3. Order firearms surrendered, if appropriate
4. Require compliance as condition of bond

Law Enforcement >

Step Checklist

1. Review defendant's record and current charges
2. Review presence or use of firearms in current case
3. Communicate with prosecutor about concerns regarding firearms and regarding charging decision

Probation >

Firearms may be a particular issue in the case based upon the incident itself, victim reports or history of the defendant. Where particular facts indicate increased concern, the court must be informed.

Step Checklist

1. Inquire with the defendant and/or victim about firearm ownership/access.
2. Include all criminal history, especially domestic violence history in bail evaluation.
3. Include all protection order history in bail evaluation.
4. Make bail recommendations that ensure victim safety and require firearm surrender where authorized by law.

3. Pre-trial Negotiations and Plea

Plea agreements and the use of deferred prosecution/sentencing or diversion programs are a universal feature of the criminal justice system across the country, including in domestic violence cases.¹

It is important to understand, however, that pleas to lesser offenses and deferrals/diversion may leave victims at risk of firearms violence because federal (and some state) prohibitions on firearms possession only apply to convictions for certain qualifying misdemeanor crimes of domestic violence. As a result, those firearm prohibitions generally do not apply to convictions that result from plea bargains to lesser misdemeanor crimes such as disorderly conduct, as well as to deferred sentencing and diversion programs—despite the danger the offender may continue to pose.

To protect victims and others from firearms at this stage, consider adopting the following strategies:

- Prosecutors should carefully consider the effects of plea agreements for lesser or non-domestic-violence criminal offenses and deferments/diversion on state/Tribal/federal firearms prohibitions and include safeguards in agreements to prevent firearms access
- Prosecutors should be aware of impact of deferments/diversion on firearm prohibitions and therefore include safeguards to prevent firearms access
- Judicial officers should carefully consider the consequences of accepting pleas and/or deferments/diversion on firearms prohibitions, and they should include provisions that prohibit possession and/or require surrender of firearms (as authorized by law) in any orders they issue

1. Because offering offenders the option of entering pre-trial diversion programs in domestic violence cases may compromise victim safety and/or allow offenders to avoid responsibility for their actions, the Office on Violence Against Women, U.S. Department of Justice forbids grantees from implementing “pre-trial diversion programs not approved by OVW or the placement of offenders in such programs.”

Prosecutor >

Prosecutors will often be asked to make plea bargains to offenses that will not trigger firearm prohibition.

A prosecutor’s office should develop a written policy to provide guidance and structure to the process of plea bargaining. Except in extraordinary circumstances a charge of domestic assault should not be dismissed or reduced to a non-domestic violence related offense.

Victims should be informed concerning plea negotiations and proposed dispositions. The views of the victim concerning plea negotiation and disposition should be considered but should not control the prosecution.

If the case is resolved by a plea agreement, the defendant must be represented by counsel or knowingly and intelligently waive the right to counsel on the record. If the defendant was entitled to a jury trial for the offense he must also make a knowing and intelligent waiver of his right to trial by jury.

The plea colloquy should cover any elements necessary to invoke the provisions of 922(g).

Some prosecutors’ offices develop diversion programs for first-time offenders to participate in counseling and classes rather than proceeding through the court system and establishing a criminal record. Diversion can take a variety of forms but the common characteristic is that charges are either not filed, dismissed or expunged as a result of a accused’s successful completion of diversion requirements. Before utilizing diversion for domestic violence offenders, consideration must be given to the consequences to firearm surrender. Without a conviction, the federal firearms prohibition will not apply. Firearm restrictions should be made a condition of diversion.

Step Checklist

1. Limit pleas in domestic cases to domestic offenses.
2. Advise victims concerning plea negotiations.
3. Victims should have the opportunity to voice concerns regarding plea negotiations to the prosecutor and the judge accepting the plea.
4. Ensure defendant has counsel or has waived right to counsel.
5. Ensure plea colloquy covers offense elements required for firearm prohibition.
6. Diversion programs should restrict firearm access during term of diversion.

Judge >

Acceptance of plea agreements which avoid firearms prohibition consequences should be a matter of considered policy. Courts should be mindful of collateral consequences to defendant prior to accepting charge amendments. The wishes of the victim should also be considered, if that can be accomplished without placing victim in more danger. In court systems where firearms surrender orders are the practice, the court should routinely advise the defendant before taking the plea. Therefore, an advisable practice is for the court to make an analysis on the record of the applicability of firearms prohibitions, federal or state, with an opportunity for the parties to respond. Note that a NICS applicability decision is independent of the court's findings.

Step Checklist

1. Consider adopting a policy on amending charges to avoid firearm prohibitions
2. Address firearm prohibition on record prior to conviction (pre-trial or during plea colloquy)
3. Upon conviction determine number of firearms and identify, location if possible
4. Petitioner should not be involved at this stage unless willing to take part, potentially dangerous
5. Order surrender to predetermined law enforcement personnel, or third party if appropriate in your jurisdiction
6. Give specific timeline for surrender
7. Schedule compliance hearing

4. Trial, Conviction, and Sentencing

Once a defendant has been convicted of a misdemeanor domestic violence crime, the sentencing decision should take into account the defendants' use of firearms in committing the offense and other considerations.

In addition, imposition of state, Tribal, and/or federal firearms prohibitions may be facilitated by taking certain steps to document the information needed to identify the conviction as one that may serve as a predicate conviction and to transmit that information to the relevant databases.

Prosecutor >

The offenses that qualify for a restriction on the possession of firearms by an individual convicted of a misdemeanor crime of violence pursuant to Title 18, United States Code, Section 922(g)(9) includes all misdemeanors that involve the use or attempted use of physical force if the offense was committed by one of the defined parties. Defined parties include current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim. To qualify, the misdemeanor crime does not have to be a violation of statute that is labeled or categorized as domestic violence. Prosecutors must ensure that the elements regarding force and relationship are present in all charging, plea, trial and conviction records.

In all resolutions, plea or trial, the defendant must be represented by counsel or knowingly and intelligently waive the right to counsel.

In the case of a guilty plea, the plea colloquy should cover any elements necessary to invoke the provisions of 922(g).

In the case of a bench trial, the court needs to make findings of the specific elements of the crime that are implicated. If the defendant was entitled to a jury trial for the offense he must make a knowing and intelligent waiver of his right to trial by jury.

In the case of a jury trial, prosecutors must make sure the jury instructions and verdict form accurately reflect the specific elements involved with respect to the act and the mental state or intent constituting the crime and the relationship between the parties. Where allowed by law, special interrogatories specifying the elements the jury has found may be included as part of the verdict form.

Even where the relationship between the defendant and the victim is not an element of the predicate offense, a description of the relationship should be included in the judgment of conviction.

Prosecutors should ensure that firearm prohibitions, where applicable, are addressed at sentencing, both on the record and in sentencing orders.

Step Checklist

1. Ensure charging, trial and conviction documents contain elements of offense, including description of domestic relationship.
2. Ensure proper findings regarding use of force and relationship are made on the record during plea or trial.
3. Ensure that firearm prohibitions are addressed with offender at the time of sentencing, verbally and in writing.

Judge >

Upon entry of conviction the court is able to assess the implications for firearms possession. When prohibition applies, the court should ensure that surrender is ordered if appropriate, and also should ensure that the conviction is appropriately reported to databases used for firearm purchase background checks.

Courts and communities should consider implementing the following strategies:

Courts should seek and receive information about defendant's firearms access and use prior to sentencing from appropriate sources, including prosecutors, arrest records, police reports, etc.

Courts should take firearms use by the defendant into account in sentencing decisions

Official court records (ideally, a standard record of conviction form) should include all information necessary to indicate that the offense of conviction is a predicate offense for application of the federal firearms prohibition at 18 U.S.C. § 922(g)(9), including:

- The actual elements of the applicable criminal statute under which the defendant was convicted
 - This is especially important where the criminal statute is multi-pronged or “disjunctive” and not all alternative elements satisfy the requirements of the federal law (18 U.S.C. § 922(g)(9)); a citation to the general statute will not be sufficient
- The qualifying intimate partner relationship between the parties, if available;
- That the defendant was represented by an attorney or knowingly and intelligently waived representation; and
- That the defendant had a trial by jury or knowingly and intelligently waived that right

Records of conviction should be transmitted to the Interstate Identification Index (III) in a timely fashion (See Community Strategies #3 and #4 for a more detailed description of steps that communities can take to facilitate enforcement of federal firearm laws and to prevent purchases of firearms by prohibited persons.

Step Checklist

1. Designation of charged or amended offense as predicate offense should be addressed on record before trial or at time of plea
2. Upon conviction, court should confirm applicability of firearm prohibition
3. Court should then determine if defendant possesses firearms, and identify
4. Court then orders surrender to law enforcement or third party as appropriate for local protocol
5. Schedule compliance hearing
6. Notify law enforcement of order

5. Post-Conviction/Probation

In crafting post-conviction orders and a plan for post-conviction or post-release supervised probation, courts should ensure that concerns about firearms access by the offender are adequately addressed.

Similar considerations apply in ordering supervised probation/community supervision as part of a diversion program or deferred sentence/prosecution.

Professionals involved in these processes should implement one or more of the following strategies to prevent offenders' access to firearms:

- Judicial officers should issue probation and other post-conviction orders that include clear and enforceable provisions regarding firearms, including, where authorized by law, surrender provisions
- Judicial officers should implement a compliance monitoring program, developed in collaboration with probation/community supervision services, to detect violations of firearms prohibitions and surrender provisions.
- Probation protocols and processes for offender supervision should include monitoring compliance with orders not to possess firearms and firearms-related issues more generally
- Protocols should include guidance regarding investigation of possible firearms possession by offenders, search and seizure of unlawfully possessed firearms, and a process for swiftly and effectively holding offenders accountable for firearm violations and offenses

Prosecutor >

Following a conviction or guilty plea on qualifying offense, prosecutors should ensure that defendants are advised of the federal and/or state prohibitions on the possession of firearms. The court or prosecutor should inquire on the record, at the time of conviction or sentencing, about whether defendant possess any firearms. Defendants who admit to possession should be given surrender instructions and a specific time frame for completion.

Using the probation revocation system to address possession of a firearm requires prosecutors and probation officers to work together to develop a protocol. Forms should be developed to be used during probationers orientation. Those forms need to put the probationer on notice of the federal or state law precluding firearm possession as well as the potential punishment (new charges and/or probation violation). Probationer should sign this document signifying acknowledgment that they can no longer possess firearms. These documents should also detail procedure for surrender should the probationer be in possession of firearms. Probation officers can use failure to surrender or possession as the basis to file a probation violation with the court. Prosecutors should aggressively pursue probation revocation as a consequence for violating probation by possessing a firearm.

Step Checklist

1. At the time of conviction or sentencing:
2. Notify defendant of firearm prohibition verbally and in writing.
3. Inquire on the record regarding defendant's firearm possession
4. Notify defendant of procedure for surrender
5. Develop protocol with corrections officers to address probation violations involving firearm possession by prohibited persons
6. Aggressively pursue probation revocation for firearm possession violations

Probation Officer >

Federal law prohibits all individuals with a felony conviction, any domestic violence conviction (i.e., felony or misdemeanor), and those with an active protection order from possessing firearms or ammunition. Conditions of probation are essential tools for protecting public safety, enforcing offender accountability, addressing offender rehabilitation, and monitoring offender behavior. All offenders under the supervision of community corrections are subject to conditions of probation, parole, and pretrial release. Swift and consistent enforcement of probation conditions and other orders imposed on domestic violence offenders is critical to effective supervision of domestic violence offenders. Community corrections professionals should undertake the following procedures to disarm domestic violence offenders:

- Be fully informed about firearms laws. These laws should be the foundation for all forfeiture and seizure policies and practices with domestic violence offenders.
- Investigate offenders' firearms access during pretrial services, investigations, and ongoing supervision of the offender. Investigation practices should include the following steps:
- Ask the offender if he has access to any firearms (those he owns or others allow him to use) and if he has expertise in the use of firearms, such as military experience, hunting, or as a collector.
- Ask the victim and other collateral sources about the offender's access to firearms (e.g., other family members, neighbors), and inform these individuals of firearms restrictions and that supplying the domestic violence offender with firearms or ammunition is illegal.
- Check arrest and conviction information regarding the present criminal incident to learn whether threats or assaults were made with firearms or other weapons, and if so, what type of weapons.
- Check official records of protective orders to determine whether an active protective order has been issued against the offender.
- Determine whether the person requesting the protective order alleged that any firearms or other weapons were involved in threats or assaults.
- Check criminal history records for previous felony or domestic violence misdemeanor convictions against the offender. Determine whether any firearms or other weapons were used during previous crimes.
- Check state permit registries to determine if the offender has legally purchased firearms in the state.

- Check protective order records periodically to determine whether protective orders have been issued against any offenders on probation or parole, even if the conviction that led to their supervision is not related to domestic violence.

Provide offenders with notice of weapons prohibitions. Both oral and written notice should be provided to domestic violence offenders clearly stating that they may not possess firearms. Usually, this notice will apply only to firearms and ammunition, but if an offender has used another type of weapon in previous assaults (e.g., explosives, knives), local jurisdictions may also allow for the prohibition of these weapons. The notice should be provided at every point the offender comes in contact with the justice system (e.g., pretrial, sentencing, probation intake, parole release) and should be provided by all those having authority over the offender including judges, paroling authorities, and supervising pretrial, probation, and parole personnel. If offenders are prohibited from possessing firearms because of a protective order, they may be able to regain possession of those firearms if or when the protective order is no longer in effect. When an offender is allowed to regain the right to possess a firearm, all affected individuals should be notified.

Work with local, State, and Federal law enforcement entities to develop protocols for the safe removal, storage, and disposition of offenders' firearms.

If later information discloses firearm possession, or if the offender does not cooperate with an initial plan to remove the firearms, further confiscation procedures are needed. Additionally, it is important to monitor domestic violence offenders for firearms they may acquire during the supervision period. These situations may require searches of their residences, vehicles, and other places they may keep personal property to ensure compliance with prohibition requirements.

Respond swiftly and appropriately to any firearm possession prohibition infraction. Agency policy should stipulate procedures to be followed if domestic violence offenders are found in possession of firearms after being notified that they are not allowed to possess them. Even if firearms prohibitions are not a specific condition of their community supervision, all offenders must obey state and federal laws.

Step Checklist

- While preparing a presentence investigation, inquire of the victim about offender's weapon history and current access to firearms.
- Inquire of offender about possession or access to firearms.
- Include prohibition on possession of firearms in conditions of probation/pretrial release.
- Require offender to sign notice to offender of federal and state firearms prohibitions.
- Provide offender information on process for surrender of weapons and ammunition currently possessed.
- Use probation revocation proceedings to address failure to surrender.
- Periodically check firearms registries during term of supervision.

6. Surrender and Seizure Process, Including Compliance Monitoring

Court orders to surrender firearms are potentially powerful tools for preventing offenders' access to firearms in both the criminal and civil protection order contexts.

By mandating surrender of firearms by a time certain and imposing meaningful sanctions for non-compliance, judicial officers can maximize the likelihood that offenders will not access or possess firearms during the period in which they are legally prohibited from doing so.

However, judicial officers cannot accomplish this alone, nor are any court orders self-executing. Instead, a multi-disciplinary, multi-agency approach is necessary to ensure that orders to surrender or seize firearms are supported by a process that is seamless and effective.

Communities around the country have implemented compliance monitoring procedures that help courts and others to detect non-compliance with firearm prohibitions and surrender provisions without requiring a significant outlay of resources and without placing the burden on the victim to notify authorities or the court of respondents' failure to comply with orders.

An initial investment in establishing collaborative relationships among courts, law enforcement, prosecutors, victim advocates, and other professionals in the community can yield large dividends in the form of increased compliance with orders and a clear message that the community and court take such compliance seriously.

Communities should consider several potential approaches to establishing compliance monitoring mechanisms and to adopt those strategies that are best suited to the governing legal standards and to the procedures and other characteristics of their legal systems. For instance, in some settings the use of compliance review hearings may be the best use of the court's time and other resources, whereas in other communities a more form-intensive process with direct communication from relevant non-court agencies may be more appropriate. In designing their own process for surrender/seizure of firearms and for monitoring compliance, communities should consider adopting the following elements:

- Courts should establish the foundation for an effective process by issuing orders to surrender firearms (or use supplemental forms) that use clear and specific terms, including as to the exact firearms involved, the location of the firearms, and where, when, and how to surrender firearms to the receiving agency
- Defendants should be provided with an instruction sheet, developed in collaboration with law enforcement, for the surrender process, including information regarding:
 - Deadline to surrender
 - Where to surrender
 - How to surrender
 - Type of proof required

- Forms should be used to facilitate and monitor compliance with the surrender process, including for example a defendant/respondent's affidavit of firearms possession or non-possession; receipt or affidavit of surrender of firearms; forms returned to court by receiving law enforcement agency indicating compliance or non-compliance, etc.
- Relevant stakeholders (courts, law enforcement, prosecutors, probation, defense attorneys, victim advocates) should work together to create a collaborative mechanism to ensure that defendants comply with orders to surrender firearms
- The compliance review process should include effective means to alert court of non-compliance; some alternatives include:
 - Direct communication between accepting agency and court
 - Court sets hearing, canceled if proof of compliance received
 - Defendant required to provide receipt or other proof of compliance
 - An effective mechanism should be in place to address non-compliance, as authorized by law; some alternatives include:
 - Issuance of search and/or arrest warrant
 - Revocation of probation
 - Violation charged by prosecutor
 - Agencies involved in surrender process should designate dedicated personnel to the task
 - A protocol for alerting victim as to status of surrender process should be in place (including notice of failure to surrender and any subsequent court hearings/steps taken)
 - Where prosecutors charge for violations of orders to surrender, a mechanism should be established for the prosecutor's office to learn about the violations (e.g., from law enforcement, probation, victims/advocates)
 - Where surrender of license/permits has been ordered, the relevant state department should be involved in the development and implementation of a compliance-review process

Prosecutor >

Prosecutors should provide legal advice to their jurisdictions' working group regarding which state and federal laws apply to surrender and seizure process in their state.

Prosecutors should work with stakeholders to develop a mechanism to address non-compliance with surrender orders. Options for addressing non-compliance include:

- Issuance of search/arrest warrant
- Revocation of probation
- Violation charged by prosecutor

If violations are addressed with a search/arrest warrant, the protocol must state whether the prosecutor or law enforcement will take the lead on seeking a search warrant from the court.

If violations are handled through the prosecutor's office, then the protocol must include:

- Mechanism for notifying the prosecutor of the violation/non-compliance
- Short time frame for review and charging of violations

- Process for notifying domestic violence victim that defendant is not in compliance with firearm surrender

Step Checklist

1. Provide legal advice on firearm surrender, seizure and compliance protocol.
2. Address non-compliance in a timely manner.
3. Create notification system to inform victims that defendant is not in compliance with surrender order.

Law Enforcement >

Compliance with surrender orders can be facilitated through identification of the law enforcement entity, as well as the specific personnel responsible for receiving, storing and potentially seizing firearms.

These aspects of law enforcement involvement in the process will be determined by state law, as well as by local policy concerns.

Step Checklist

1. Conduct follow-up investigation whenever the defendant does not surrender firearms in compliance with conditions of release, restraining order or conviction.

Judge >

The court is in a position to determine whether or not the conviction disqualifies the defendant from possessing firearms under federal or state law.

This should be addressed at the time of the plea, with parties weighing in on the court's decision. The court must then determine if defendant possesses firearms and identify them. The court then enters a surrender order with clear instructions to the defendant about when, where and to whom the surrender is to take place. The court should then schedule a compliance hearing to confirm that the defendant has followed the order.

If the compliance mechanism is issuance of search/arrest warrant:

Step Checklist

1. At time of plea, address elements of criminal complaint, determine on record if conviction triggers firearm prohibition
2. At time of conviction, determine if defendant possesses firearms
3. Identify firearms
4. Order specific terms for surrender, where, when, to whom
5. Give defendant contact information for law enforcement

6. Schedule hearing to review compliance
7. Review and issue search warrants for compliance enforcement

7. Storage of Firearms

Ideally, any firearms seized from or surrendered by prohibited individuals should be stored under control of a designated law enforcement agency.

Some communities encounter challenges related to the proper storage and maintenance of seized and surrendered firearms, including a lack of adequate storage space and the need to store what may be very valuable firearms in a climate-controlled environment.

To overcome these obstacles, communities have pursued a range of creative strategies, including:

- Using existing, but under-utilized or capacious storage facilities, including National Guard armories, shooting ranges, etc.
- Entering into contracts with federally licensed firearms dealers to store and maintain firearms, with fees passed on to the prohibited individuals
- Allowing law enforcement agencies themselves to charge a fee for storage
- Granting immunity to law enforcement agencies storing firearms from liability for damage to stored firearms (absent recklessness, gross negligence, or intentional misconduct)

No matter what storage method is employed by a community, the responsible agencies should implement a protocol for release of firearms to the prohibited person or an eligible third-party, including background checks and other safeguards (see Return of Firearms for more details).

Prosecutor >

Prosecutors should provide legal advice to law enforcement agencies about storage of surrendered firearms.

Firearms may be surrendered to law enforcement or to a federally licensed firearms dealer for the storage of firearms, at the defendant's expense or to a third party.

Law enforcement should be encouraged to photograph firearms before taking them into custody. This will document damage present prior to storage.

Law enforcement agencies or other approved storage facilities are permitted to charge a fee for storage of firearms, ammunition and specified deadly weapons. The fee charged by a law enforcement agency should not exceed the actual cost of storage.

Generally law enforcement will be liable to compensate for a firearm that is damaged or lost while in their care. Some jurisdictions have passed laws exempting law enforcement agencies from liability for alleged damage or deterioration due to storage or transportation, so long as due care is used.

No law enforcement agency or federally licensed firearms dealer may release any firearms or ammunition without a court order.

Step Checklist

1. Provide legal advice regarding storage protocols.
2. Ensure that proper care is taken to ensure firearms are undamaged.
3. Address liability for lost or damaged firearms.

Evidence Technician >

Evidence Technicians manage the storage and return of firearms, and must:

- Document firearms from defendant when surrendered
- Documents condition of firearms when surrendered (digital photograph)
- Cares for firearms as appropriate
- Returns firearms or arranges for destruction
- Identify or build structures to store firearms removed from prohibited people

These facilities should control for temperature and humidity, and firearms should be stored in such a manner as to prevent rust, scratches, stains, and other damage. Alternatively, contracting with licensed firearms dealers, or allowing respondents to surrender to a licensed firearms dealer – who is better equipped to store firearms in a manner to prevent damage – may help alleviate the burden on law enforcement to maintain stored firearms in good condition. Respondent may sell or transfer all firearms and ammunition to a third party not residing with the respondent, provided the third party is approved by the court. A notarized copy of an affidavit evidencing such transfer should be filed with the court and any concealed weapon permit should be surrendered to the police.

Law enforcement shall not release firearms, ammunition, or permits without a court order granting the release.

Step Checklist

1. Document firearm condition during surrender.
2. Store firearms in climate controlled facility to prevent damage.
3. Charge for the cost of storage.
4. Do not release firearm without court order.

8. Third-Party Transfer of Firearms

For many offenders, transfer of firearms to a third party who is eligible to receive and possess firearms is preferred over surrendering the firearms to a law enforcement agency or federally licensed dealer.

Such transfers may be safe and achieve the goals of an order to surrender possession of firearms, but they do present the possibility that the prohibited person will retain access to the firearms if the transfer is a sham, or if the third party does receive the firearms but nonetheless permits the prohibited person to access them while the prohibition on possession is in place.

To prevent third-party transfers from enabling prohibited persons to maintain access to firearms, communities should consider implementing the following strategies:

Relevant stakeholders (courts, law enforcement, defense attorneys, victim advocates) should develop and implement a collaborative mechanism to ensure that transfer of firearms to an eligible third party is done safely and in compliance with all governing laws

A protocol for third-party transfer should be developed and implemented by courts and other relevant agencies, including law enforcement

An affidavit/acknowledgement form should be developed, including the following elements:

- Numerical identifiers for third party to facilitate background check
- Signatures by the defendant and the third party required
- Directive not to permit possession of firearms by the prohibited person
- Notice and explanation of criminal liability under applicable state law and federal law for doing so
- Defendant and third party both must be present in court prior to any transfer and oral and written warnings are provided regarding:
 - Directive not to permit possession of firearms by the prohibited person
 - Criminal liability under applicable state law and federal law for doing so
- A full criminal background check is conducted on the third party prior to transfer (facilitated by requiring transfer through law enforcement or a federally licensed dealer)
- Victims are provided with an opportunity to object to the third-party transfer on safety grounds
- Victims are notified of third-party transfers and to whom the firearms have been transferred
- Probation department implements a protocol requiring monitoring of whether defendant gains access to transferred firearms and setting forth a process for addressing violations

Judge >

Surrender to a third party carries inherent potential for fraud. This can lead to extremely tragic outcomes. When done properly, however, third party surrender can have a positive effect in the form of involving one more party in the relationship.

Recommended procedures to reduce the potential for fraud include: ordering the initial surrender of all firearms to law enforcement, holding a hearing at which time the court

addresses the third party personally on the record, requiring the court to place findings on the record, serve order on third party, require law enforcement to conduct a background check on the third party before releasing the firearms.

Step Checklist

1. Order firearms surrendered to law enforcement
2. Schedule hearing for third party, notice to petitioner
3. At hearing place 3rd party under oath, colloquy on record, full name and d.o.b.
4. Opportunity for petitioner to object
5. Prepare and serve order on 3rd party, copy to law enforcement

Evidence Technician >

If the third party is approved by the court, the evidence technician receives a copy of the order to release guns to that party. The third party then contacts the technician to schedule time to pick the guns up. The technician should run a background check prior to arranging for pick up. Third party must show ID before guns are released.

Step Checklist

1. Upon receipt, document firearms surrendered
2. Upon notification from court, run background check
3. When contacted by 3rd party, schedule time to pick up
4. Document guns released
5. Notify court if 3rd party denied

9. Return of Firearms

When a court order or other legal prohibition on possession of firearms expires, the previously prohibited person may have a right to regain possession of his or her firearms that have been held by a law enforcement agency, licensed firearms dealer, or individual third party.

The return of firearms should not be automatic, however: despite the expiration of the particular prohibition, the individual may remain ineligible to possess weapons due to a different existing prohibition (for instance, a civil protection order may have expired but the individual may have been convicted of a disqualifying misdemeanor crime of domestic violence, or he or she may be subject to a different state, Tribal, or federal prohibition).

- In some jurisdictions, a statutory scheme for the return of firearms has been enacted; in others, stakeholders will need to consider how best to handle requests for returns under existing authority.
- To prevent return of firearms to an ineligible individual, and to protect the safety of the victim, communities should consider implementing the following suggested practices:

- Relevant stakeholders (courts, law enforcement, defense attorneys, victim advocates, etc.) should develop and implement a collaborative mechanism to ensure that return of firearms to defendant is done safely and in compliance with all governing laws
- The individual subject to the prohibition should be required to petition court for return of firearms (where authorized by law) and the decision to return firearms should only be made after a hearing to consider the propriety of returning the firearms
- The individual seeking return of firearms should be required to fill out an affidavit (equivalent to the affidavit required to purchase a firearm, ATF Form 4473) prior to return of firearms
- Firearms should not be returned unless a criminal background check indicates no state/Tribal or federal prohibitions
- The victim should receive notice of hearing regarding return of firearms, with participation optional
- The victim should receive notice once any firearms have been returned to the previously prohibited individual

Law Enforcement >

Law enforcement should develop a protocol for those seeking return of surrendered firearms. Ideally, the individual seeking return should have to petition the court. If there isn't a procedure for court review, the individual seeking return should file a written request to the law enforcement agency storing the weapon. Upon receipt of a written request for the return of one or more firearms, law enforcement should conduct a background check using NCIC, the state protection order registry, and any other relevant databases in order to determine whether the person is prohibited from possessing a firearm.

If the person is found to be prohibited from possessing a firearm for any reason whether pursuant to local, State, or Federal law or policy, the agency shall not return the firearm. The agency shall instead provide in writing to the person the reason for the denial of the firearm return request.

Step Checklist

1. Develop protocol for return of firearms to include court review.
2. Request for return of firearms should be made in writing.
3. A complete background check must be conducted before return of firearms.
4. Firearms shall not be returned to an individual found ineligible to possess for any reason.

Judge >

Upon receipt of petition to return previously surrendered firearms, the Court should request a full background check from law enforcement or the prosecutor. That background check should include NCIC, the state protection order registry, and any other relevant databases in order to determine whether the person is prohibited from possessing a firearm.

If the individual petitioning the court for return is no longer prohibited from possession under any state or federal law, the Court should order that the law enforcement agency storing the weapon release it to the petitioner.

If the individual petitioning the court for return is prohibited from possessing by state or federal law, the court should order that the weapon remain in the possession of law enforcement. The written order should include the basis for the denial of the request to return.

Step Checklist

1. Court determines if the protective order has expired
2. Court then sends order to law enforcement to conduct background check on individual
3. Law enforcement determination sent to court
4. Court enters appropriate order, either return or do not return firearms to the individual