Criminal Possession of a Weapon (Gun) Cases in New York

What Gun Cases are all about and Why they are Important

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Criminal Possession of a Weapon

Criminal possession of a weapon in New York is a serious crime. A true criminal possession of a weapon case should not be confused with a case in which a person is charged with criminal possession of a weapon, but the underlying case is really bigger.

For example, a person charged with attempted murder (using a gun) may be charged with criminal possession of a weapon as well as the attempted murder. The attempted murder charge is likely to be far more serious and carry with it a far more serious sentence than the additional charge of criminal possession of a weapon.

A "pure" criminal possession of a weapon case (gun case) in New York will be a situation in which the only (or the most serious) charge against the defendant is criminal possession of a weapon of some degree. In other words, the defendant will be charged with possessing one or more guns and nothing else.

In New York criminal possession of a weapon, for the purposes of "gun cases" is classified into three "degrees" or levels of seriousness. Criminal Possession of a Weapon in the Second Degree, Third Degree, and Fourth Degree.

Criminal Possession of a Weapon in the Second Degree is a class C felony, Third Degree is a class D felony, and Fourth Degree is a class A misdemeanor.

The class C felony is punishable by a maximum of 15 years in prison, the D felony by a maximum of 7 years in prison, and the A misdemeanor by a maximum of 1 year in jail. Also, there is a theoretical 1 year mandatory jail sentence on any felony gun conviction.

Conviction of a criminal possession of a weapon case can also create significant problems for a defendant who is not a citizen, even if the defendant is a legal resident. Weapons (especially guns) convictions can cause a non-citizen to be deported, denied citizenship, or excluded from legal entry to the United States at the border. This can be true even if the conviction is for the A misdemeanor criminal possession of a weapon in the fourth degree. Of course a qualified immigration lawyer needs to be consulted with respect to any individual situation, but a non-citizen who is contemplating pleading guilty even to the misdemeanor form of criminal possession of a weapon needs to be aware of the potential difficulties.

Different Types of Gun Cases

There are a few major types of gun cases recognized by New York City criminal defense practitioners. Most pure gun cases will fall into one of these categories and each category is treated a little differently by the District Attorney's Office. Gun cases are also an extremely important sort of criminal case.

1. Airport Gun Cases

New York City is home to not one but two major international airports (both in Queens County). New York City is also home to some of the strictest and harshest gun control legislation in the nation. Add to this the fact that the major airlines do very little to make prospective carriers of handguns aware that the Federal regulations with respect to transportation of handguns on airplanes do not govern New York and you have a recipe for serious problems.

Here is how it works: Passenger lives in a state where gun control laws are not as strict as New York, like say, Texas. In Texas, it is probably illegal not to carry a weapon. Passenger wants to travel by airplane with his gun as he has done a

million times before to other southern states. He does everything by the book alerting the airline in advance and checking for the appropriate procedures.

This time, however, he is traveling to New York City. So this time he actually contacts the airline and asks for instructions. They give him instructions. He follows the instructions. He has all the paperwork, all the licenses, everything he needs to be in legal possession of that gun in Texas and probably 23 other states, except unfortunately, New York. The airline information people provide him with the Federal rules about which they are primarily concerned but do not provide him the information about New York State specific rules.

Is Passenger careless for not paying closer attention to the rules? Should he have been more careful about making sure that everything would be ok in New York? Absolutely. Unfortunately for Passenger, however, aside from being so careless, he is, the moment the plane lands in New York City, probably guilty of a violent felony offense in New York City (and he probably has NO LEGAL DEFENSE).

This scenario, or a version of it, plays itself out fairly frequently in New York City. At Shalley & Murray alone, we have handled quite a few of these sorts of cases and we are but one New York criminal law firm. Many people, including celebrities have been caught up in versions of this scenario, including Harry Connick Jr. and Axl Rose.

One might expect that the frequency with which this scenario occurs and the sort of clear absurdity of it would suggest that the District Attorney's Office would routinely treat these cases as they seem to deserve to be treated. The reality, however, is that the District Attorney's Office takes these cases extremely seriously. They can often be quite difficult to "negotiate away".

One of the difficulties in cases within this general scenario is that the District Attorney's Office has (legally) a very strong case. There is virtually no legal defense to these cases despite how ridiculous it might seem that someone with a license in 23 states who follows all the directions that the FAA and the airlines told him could be guilty of a violent felony offense.

Therefore, the District Attorney's Office has a great deal of bargaining power when determining how or whether to negotiate. If they choose, they can adopt a hostile "take it or be indicted for a violent felony for which there is a mandatory state prison sentence) approach. This is not to say that they will adopt such a hostile approach. But in negotiating these cases, one must keep in mind that the District Attorney's Office has this over the head of the defendant.

The one bit of room the Passenger in this scenario has is that he may be able to take advantage of the Grand Jury process in a way that most defendants can not. Defendants facing felony gun possession charges in this circumstance are often good candidates for testifying in the Grand Jury if the case gets that far. The Grand Jury is of course normally not a terribly defendant friendly procedure for a variety of reasons. Furthermore, as I mentioned before, the Passenger in this scenario really hasn't much of a LEGAL defense. So why on earth would Passenger want to testify before the Grand Jury and virtually confess to the crime?

…because members of the Grand Jury are human beings who are likely to have little use for indicting Passenger for a felony under these sorts of circumstances. It is not uncommon for Grand Jurors in cases such as this to refuse to indict.

Keep in mind that a decision to testify in the Grand Jury in this sort of situation is a HUGE decision and one that ABSOLUTELY MUST BE MADE ON A CASE BY CASE BASIS WITH AN EXPERIENCED CRIMINAL DEFENSE ATTORNEY. The defendant must understand the risks involved and must understand that his testimony before the Grand Jury under oath is arguably admitting to all of the necessary elements of the crime.

NOT EVERY GUN CASE, EVEN IF IT IS AN AIRPORT GUN CASE, IS A GOOD CANDIDATE FOR GRAND JURY PRESENTATION. UNDER NO

CIRCUMSTANCES SHOULD ANYTHING IN THIS ARTICLE BE TAKEN TO MEAN THAT SHALLEY & MURRAY RECOMMENDS THAT ALL DEFENDANTS IN AIRPORT GUN CASES TESTIFY IN THE GRAND JURY. IN DISCUSSING THE POSSIBILITY OF A GRAND JURY PRESENTATION UNDER THESE CIRCUMSTANCES, I MEAN ONLY TO DESCRIBE THE ONE SMALL AREA OF BARGAINING POWER A DEFENDANT IN SUCH A CIRCUMSTANCE HAS.

The District Attorney's Office is aware of this risk, but is certainly more than willing to take it if the assistant handling the case believes there is sufficient justification to prosecute the case as a felony.

In such cases, the hope is that through concerted negotiation a mutually agreeable resolution of the matter would be possible.

In any event, a person who has been arrested in one of these airport gun cases needs an experienced criminal defense lawyer.

Gun in a Car

Another frequent type of gun case is the "gun in a car" case. The gun in a car case presents a significant opportunity for injustice as the result of a combination of the reality of police-citizen interactions and a number of laws passed just for gun cases that most people would find startlingly unfair.

Here is the problem as the Government saw it:

Guns are small and easily hidden in cars. Cars are very mobile. When inside a car a person is likely to hide the gun somewhere out of sight (although, judging from police testimony and police reports, people in New York seem to be generally oblivious to this strategy).

Furthermore, if the gun is located by a police officer somewhere inside a car, all of the passengers in the car (if there is more than one) are likely to say, "not mine". In such a circumstance it might be very difficult for the Government to convict someone of a crime even though the Government knows that at least one person in the car probably committed the crime of illegal weapon possession.

This distressed the Government a great deal.

The New York State Legislature, just like other state legislatures around the country, came up with an ingenious solution. They developed a series of "presumptions" that would apply whenever a gun is found in a car. These presumptions would relieve the Government of the sticky business of actually having to have direct proof that a person committed a crime.

For example, in New York, when an illegal gun is found in a car (and I mean anywhere in or on or about a car, including secret compartments in the trunk of the car) EVERY SINGLE PERSON IN THAT CAR, whether there are 2 or 202 people in the car is PRESUMED to be in possession of that gun. Every single person in that car can be indicted, brought to trial, and convicted based only on proof of the fact that the person was in the car and that the gun was in the car at the same time.

Now the New York Legislature, as well as other state legislatures realized that this business of PRESUMPTIONS when actual proof is lacking might pose a problem to those who would try to pervert our Constitution into a stumbling block to efficient justice.

The New York State Legislators remembered something from 5th Grade about proof beyond a reasonable doubt and the presumption of innocence. These two lofty, technical principles represented something of an obstacle to the more pressing need to make sure that people who hide guns in cars can't get away with it by relying simply on saying, "not mine" when the gun is found under their seat.

But our legislators were a clever group of lawmakers and discovered a magic word that, as long as they used it, would trick the old fogies in our appeals courts into letting their PRESUMPTIONS stand. This magic word was "PERMISSIVE." You see they

realized that if they simply said that the PRESUMPTION was PERMISSIVE and not MANDATORY, then the presumption did not run afoul of the presumption of innocence or the requirement for proof beyond a reasonable doubt.

They realized that they could create a situation in which at the end of the trial, AFTER all the lawyers spoke, the judge would be allowed to tell the jury that despite everything else they heard, they are allowed (but not required) to find that all of the occupants of a car possessed the gun found in the car as long as they believed that the occupants were in the car at the same time as the gun. This statement from the judge, among the LAST things a jury will hear before it is released to decide the case, would be completely acceptable, just as long as the judge said that they "may" use this presumption.

Now, armed with this presumption, the Government no longer needs to worry about whose gun it was that was found in the center console of the car. Was it the driver's? It doesn't matter - they have the presumption. Was it the front seat passenger's? It doesn't matter - they have the presumption. Was it the rear passenger's? You guessed it. It doesn't matter - they have the presumption.

Every single occupant of the car can now be found guilty simply based on the presumption. What a relief for the government!

Now all the government has to prove is that the gun was in the car (that's easy enough, "Officer where did you find the gun?") and that all the defendants were in the car (easy again, "Officer where were the defendants before you found the gun in the car?") It just doesn't get any easier than that.

Just apply the presumption and presto, everybody's guilty. Efficiency thy name is PRESUMPTION. It's not the Government's problem anymore now that the Government has the presumption.

Whose problem is it? Anyone who happens to be an occupant of the car. This is great news for the Government because it not only resolves the problem of actually proving something specific, but it makes it easy by requiring proof of two things they will have no trouble proving: the gun was in the car and the occupants were in the car.

It is not so great news for those of us foolish enough not to perform detailed inspections (including inspections for exterior secret compartments) of the cars we get into or borrow. Those of us who are foolish enough to enter or borrow a vehicle (even for a very short trip) without first inspecting it for guns are running the risk of being caught up in some major difficulties. If a gun is recovered from the car while we are in it, we are in big trouble.

You see, in practice, the police are not terribly discriminating when they find an illegal gun in a car. Even if one person leaps up and says, "I cannot let my friends be held accountable for my own wrongdoing. It is my gun and mine alone. Tis a far far better thing I do…" the police are not bound to accept this. In fact, they rarely do. In fact there is at least one good reason why they are not bound to accept this.

There can be myriad reasons, unrelated to the truth, why an occupant of a car might leap up and say such a thing. Perhaps another occupant, who is bigger and stronger than he is just whispered, "If you don't say it was your gun I am going to kill you." Perhaps the volunteer is under 18 and expects that if he "takes the heat" he will be treated lightly. The police are not required to accept as truth what might well be the agreed upon plan of multiple people who all may have been a participant in the criminal enterprise of possessing an illegal gun.

Furthermore, even if the police were inclined to believe the person who "confesses" to possession of the weapon, the police have a vested interest in arresting the entire group inside the vehicle: money and prestige. If one felony is great for your stats and overtime, then 3 felony arrests is even better.

Therefore, if you are foolish enough to enter a vehicle in New York without first thoroughly inspecting it for illegal guns, then you are taking a substantial risk if in fact you are unlucky enough to be stopped by the

police and if the car is searched and an illegal gun is found.

You will almost certainly be arrested and prosecuted for a felony as if it were your gun, and, thanks to the PRESUMPTION, if you go to trial, you stand a substantial chance of being convicted. Imagine the power for a moment, if you will, of the judge turning to the jury at the end of the case and saying (essentially), "Despite everything else you have heard during this trial, if you believe the defendant was in the car, AND if you believe the gun was in the car at the same time, you may conclude that the defendant was in possession of the gun." Realize that in most of these cases, there will be two facts that are absolutely NOT in dispute: 1) The defendant was in the car and 2) The gun was in the car at the same time.

Occasionally, the District Attorney's Office will take into account one occupant's position that the gun was his. Occasionally the District Attorney's Office will take this into consideration to the point that they will actually dismiss the charges against any other occupant of the car. The key word here, however, is OCCASIONALLY. Remember, the District Attorney's Office is not bound to accept one occupant's statement that "the gun was his" for the reasons discussed above.

Occasionally, the District Attorney's Office will take into account one occupant's position that the gun was his, but instead of dismissing the case against the others, offer a less serious plea bargain. This can be a particularly distressing concept for the occupant who is being offered the less serious charge. This person is probably someone who is claiming that he had no idea that the gun was in the car and who is also probably aware that another person is claiming responsibility

Often times the insistence by the District Attorney's Office on this resolution will be driven by the defendant's prior criminal history. As a general rule, a person with a prior criminal history is not likely to be given the "benefit of the doubt" in a gun in a car case, even when another person is offering to "take the rap." Often the District Attorney's Office will insist on something, even if it isn't a felony.

In such a situation, the defendant will have to measure his distaste for accepting partial responsibility for the gun against his distaste for going to trial in the face of the Government's PRESUMPTION. In many cases, defendants fear going to trial against the presumption. The Assistant District Attorneys are well aware of the power of the PRESUMPTION and will use it to their advantage in plea negotiations.

Gun in a car cases do not represent difficult cases to try for the Government. Essentially, they must prove that an operable gun was in the car and that the defendants were in the car at the same time. A first year law student could do it. A high school student with a day's training could do it.

On the other hand, gun in car cases represent a means to put people away for substantial periods of prison time.

Most of the time, a criminal possession of a weapon felony in New York will be considered violent. That means there will be a mandatory minimum prison term associated with a conviction, even for a first arrest. More and more, the Government will indict these gun cases under an "intent to use unlawfully against another" theory that makes it a C violent felony for which there is a mandatory minimum even for a person with no criminal history. Furthermore, the range for a first arrest C violent permits sentences all the way up to 15 years.

Therefore, those defendants who choose to go to trial against the Government's Presumption will often be risking at years in state prison. That is a substantial risk to take when one considers the power of the Government's Gun Presumption.

But wait, there's more…

Once our legislators tasted the sweetness of Presumptions, they didn't stop just with the gun in a car presumption.

The world of gun cases is an entire world of presumptions.

For example, it is a crime in New York to possess a defaced weapon. But does the

Government actually have to prove that you knew it was defaced? NO! There's a presumption for that too.

It is also a crime to possess a weapon with the intent to use it unlawfully against another. But does the government actually have to prove that your intent was to use it unlawfully against another? NO! There's a presumption for that too. That presumption, if it applies, is enough to up the ante of your crime from a D to a C violent felony, exposing you to a mandatory minimum.

Our state legislators gave the District Attorneys wonderful tools to convict people of crimes by creating all these gun case presumptions, and our appeals courts have told us that it's all ok as long as they are "permissive" presumptions.

But wait, there's even more…

Often the District Attorney's Offices will use the automobile presumption as the basis to use the other presumptions. This is called bootstrapping presumptions. Here's how it works: Passenger is arrested and charged with possession of a defaced loaded gun found in a secret location in the car. The only evidence against him and in effect the only means of prosecuting him is the automobile presumption that says that if he and the gun are in the car at the same time, then he may be presumed to have possessed the gun.

But now, unsatisfied with the simple possession charge, the District Attorneys then say, well will apply the presumptions to use unlawfully against another and the presumption of knowledge as to the weapon's defaced quality. Sounds reasonable, right?

Let's see…The means by which the Passenger is accused of possession is only by way of a presumption. There is no direct evidence that Passenger touched the weapon or knew it existed. The presumption of intention to use unlawfully against another is based on the underlying fact of possession. The presumption of knowledge of the defaced quality of the gun is based on the underlying fact of possession. But the underlying fact of possession WAS ONLY PRESUMED TO BEGIN WITH.

So…Passenger is being accused of crimes in which the critical proof against him is a presumption of intention to use unlawfully against another founded on a presumption of possession. Presumption based upon presumption.

That doesn't sound very fair does it? The innocent Passenger of a car might well find himself in the Alice in Wonderland world where his lawyer will explain the following to him: You are being accused of intending to use a gun you didn't know against an unspecified "other" person you didn't know and the Government need not ever identify. Not only that, but the Government will be able to tell the jury that they can simply assume these facts against you based simply on your presence in the car.

Well, this is the regular course of business for our prosecutors in the State of New York. The issue of bootstrapped presumptions has not been directly addressed by our Appellate Courts yet.

So ride in cars at your own risk residents of and visitors to New York. Under the circumstances, entering a car makes you presumptively responsible for any and all guns located within that car which means you are presumptively going to state prison for up to 15 years.

SEARCH WARRANT CASES

The final broad category of gun cases would be cases in which guns are recovered as the result of a search warrant. In the "typical" search warrant case, the police obtain a written authorization from a judge to search someone's home.

When there is a search warrant, the issue of "probable cause" or the police's "good reason" to want to explore someone's home is actually determined up front. Therefore, the probable cause issue is not typically something that will ever properly be the subject of any legal motions or hearings on any resulting criminal case. Presumably,

the judge who grants the motion has already determined that "probable cause" exists.

While I have not personally experienced the "execution" of a search warrant, I have had it explained to me frequently enough by people on the receiving end of the "execution" that I feel like I have a pretty good idea of what search warrant executions are all about.

Surprising people who are suspected of being criminals in their homes is certainly a dangerous, risky business. As a result, the police are quite legitimately concerned for their personal physical safety during these "executions." Therefore, the police routinely take a number of precautions that are designed to maximize their safety as they enter someone's home. Most of these precautions are designed to disorient anyone in the house at the time and to allow the police to control the situation quickly.

For example, the police will frequently attempt to obtain permission for what is called a "no-knock" warrant. A "no-knock" warrant, as the name suggests, permits the police to dispense with what is supposedly the presumed manner of executing a warrant by knocking and announcing the presence of the police. It is the difference between ringing the doorbell and saying, "Hello this is the police. We have a search warrant for this house. Let us in or we will huff and puff and blow the house down" and simply breaking down the door and rushing inside.

The police much prefer the breaking down the door and rushing inside approach for two significant reasons. First, it allows them the element of surprise and therefore limits the time a criminal would have to take steps to hurt the police officers. Second, it minimizes the likelihood that any criminals inside would have time to dispose of or destroy evidence before the police found them.

The United States Supreme Court has told us recently that the practice of the police always asking for "no-knock" warrants by simply writing the same boiler plate non-specific reasons for every case is not sufficient. In practice, however, the police continue to use extremely general boiler plate language in the application for "no-knock" warrants and they are frequently granted.

In fairness to the judges who must decide these things, I think they are primarily concerned for the safety of the officers who are executing these warrants. The judges who decide these things are presented with information and are not always in a position to know the full details of the reliability of the information being presented to them. It is hard, if not impossible, for the judges to know which are the "real" cases and which are the less "real" cases based on the barebones information they are provided in search warrant applications.

So, while the United States Supreme Court's mandate not to rely on barebones boilerplate applications for "no-knock" warrants is certainly present, I think it is easy to understand how judges, honestly motivated by a desire to help ensure that people don't get hurt, might give the police a large amount of leeway when requesting "no-knock" warrants. The issue illustrates an interesting issue with respect to the level of government intrusion into the privacy of its citizens that a free society can or should tolerate. I don't think there is a specific right answer here. The way it plays out in Court, I suppose will depend on the sense judges have of the tension between the government's desire to preserve order and its citizens' rights of privacy.

To come back to the world of the practical, the reality is, for the time being, that most search warrants will probably be "no-knocks" for now.

In addition to being "no-knock", warrants will typically be executed as late at night as is permitted in the warrant or as early in the morning. This is in keeping with the idea of trying to have the people inside the house (or apartment) as disoriented as possible. Disoriented people are less likely to be thinking clearly and causing the police trouble.

The actual execution of a warrant is usually a terrifying experience for anyone

who is unfortunate enough to be present. This again is by design. There is no polite discussion. There is no debate. There is no reasoned review of the search warrant documentation with the owner of the house. Doors are kicked in and multiple armed, armored gunman explode into the house shouting and screaming decisive unambiguous commands. The armed gunmen will typically be shouting commands to order the occupants of the house to get down on the ground. The commands will not be polite invitations but clearly very serious orders from people who are making it clear that they are prepared to use deadly force in order to see their orders carried out.

This is not the time to attempt a discussion of any kind with the police. The officers executing search warrants believe quite strongly that they are engaged in a highly dangerous operation. Therefore, they are likely to be extremely "intense". The entire process is designed to be loud, confusing, violent, and disorienting.

Now when the victims of the execution of these warrants are real criminals, perhaps we can all feel that the execution of search warrants is the sort of treatment they deserve.

Unfortunately, the real world isn't often so neat, tidy, and clear.

Search warrants are frequently executed in people's homes where one or more members of the family are involved in something illegal but others are not or have no control over it and are at a loss for what to do. Real life is almost always a little fuzzier than we like to believe.

The police officers executing search warrants, however, pumped up for what they believe (rightly so) is a potentially personally dangerous activity do not make fine distinctions as to how to treat occupants of a house. At least in the beginning, grandma, grandpa, and the ten year old little sister will quite likely find themselves face down on the floor handcuffed and being shouted at. This may or may not be official policy, but it happens.

Most people have little sympathy for the indignities of search warrant execution on the theory that search warrants will only be executed at locations where serious crimes are being committed and that the people at those locations are not terribly deserving of much sympathy. Notice, however, that this lack of sympathy is based on the concept that search warrants will be executed only at locations where serious crimes are being committed.

In the real world, however, search warrants are frequently obtained based on information provided by "confidential informants". Confidential informants are not often civic minded upstanding citizens who are providing information to the police solely for the betterment of society. Confidential informants are usually criminals themselves who have been recently arrested for something serious. Once faced with the prospect of spending the better part of a decade in prison, they will frequently scramble to provide "information" to the police in hopes of gaining a benefit far more valuable than money - freedom. These confidential informants are desperate people. They desperately want to avoid going to prison. They have often led a life of depravity and crime. To imagine that, faced with the prospect of providing "information" or going to prison for a long time, they will always provide reliable information seems overly optimistic.

The number of times I have spoken to people whose homes have been ransacked as the result of a search warrant and the police have found nothing more than a small amount of marijuana or misdemeanor weight cocaine, seems to suggest that the reliability of the information upon which search warrants are frequently obtained, is not always as high as we all might hope.

The informant has an incentive to paint the object of his treachery as a bigger criminal than he or she might really be. For example, if the informant knows someone who smokes marijuana at home from to time, the informant might pitch this person to the police as a "major marijuana dealer". This makes the police interested and makes it more likely that the police will believe that the information is being "helpful". When the

police execute a warrant and find only a small bag of marijuana consistent with personal use, it is only because the dealer had just happened to sell the truckload of marijuana he usually keeps under his bed.

When the police do find illegal things during a search warrant, they often have an easy time of it convincing the people in the house to make all sorts of damaging statements. One favorite ploy by the police is to use grandma and the 10 year old little sister as pawns. The police will explain to the true target of their search (the person they believe truly responsible for the guns, drugs or whatever else) that unless he "cooperates" (translation - makes statements conceding his guilt to serious felony offenses for which there may well be mandatory state prison sentences) they will arrest grandma and ten year old little sister will be placed with professional foster parents caring for twelve "troubled" teens somewhere in New York City.

These are not idle threats either. I have been involved in multiple cases where entire families, including the 80+ year old grandma have been arrested and charged with serious felonies because they all happened to be in the house when the police executed a search warrant.

By the way, the reason the police are able to arrest the 80+ year old grandma when they find something in the house as the result of a search warrant is because of yet another PRESUMPTION (see previous section on gun in car cases). Presumptions seem to follow illegal guns around like little dogs.

This presumption says that if you are in a room in which an illegal gun is found, you can be presumed to be in possession of it, just as if it were found in a car in which you were an occupant.

This runs into all sorts of knotty debates about where people were when the search warrant was executed.

Having listened to a great deal of police testimony on the locations of people and illegal things during search warrant execution and having read countless police reports on the subject, I have come to the inescapable conclusion that New York harbors a strange breed of criminals indeed.

It seems that, as a general rule, when New York City criminals have illegal guns or drugs in their homes, they inexplicably tend to congregate in the room where the illegal guns or drugs are kept. Furthermore, they rarely keep their illegal guns and drugs in secret locations, preferring instead to make sure they are plainly visible to all the multitudes who are congregating in the room (especially the police).

Of course after the fact, 80 year old grandma will have the audacity to claim that she really wasn't in the basement with the bag of cocaine and the 12 other family members at the moment the search warrant was executed.

Search warrant cases tend to be either pretty good or really exceedingly bad from a defense point of view. They are really exceedingly bad when the kilo of cocaine is found underneath the defendant's bed in the defendant's bedroom and the defendant was sleeping in the bed at the time the search warrant is executed.

They can be better for the 80 year old grandma or the person who happened to be visiting the home at the time the search warrant was executed.

With a search warrant there is not likely to be any ability to argue about the probable cause for the warrant since that was decided up front by a judge. There are some substantial legal issues in play in a search warrant case, although being successful on any one of them is probably more of a longshot than being successful at a traditional suppression hearing.

One issue with a search warrant can be the "staleness" of the information that led to the issuance of a warrant. Warrants are often obtained but not acted upon immediately. After a certain time (to be determined on a case by case basis, not a specific number) it is considered inappropriate to execute that warrant.

For example, assume that on January 2, 2003 the police get a search warrant to search a home on the basis of information that a kilo of cocaine was delivered to a location on January 1, 2003. Armed with the warrant, the police go back to the Precinct and forget about it for a while. On December 31, 2003, the police remember the warrant and execute the search warrant (about one year later.)

That year old warrant would probably be considered "stale" and a judge would probably find that its execution one year later was improper.

Another issue with search warrants is the "scope" of a warrant. Search warrants typically will describe a specific location or locations to be searched. Without sufficient reason, it is improper for the police to search beyond what is specifically described in the warrant. For example, if the search warrant says that the house at 1313 Mockingbird Lane may be searched, it might be a "scope" problem if the police search the house and then also search the legal apartment over the garage that is rented to a third party.

There are a number of other issues related to the execution of search warrants, but they are extremely technical, abstract, and unlikely to come to anything favorable for a defendant. While of course they are worth exploring in a real case, they are beyond the scope of this introductory article.

Why Gun Cases are Important

All criminal cases are vitally important of course, to the person accused of a crime, and gun cases are no different from any other type of case in that respect. But gun cases also frequently involve issues that help define the very concept of freedom as we know it in the United States. This is not an exaggeration. At a state level, the day to day relationship between citizens of this country and our Government can be measured by the way gun cases are dealt with in criminal court.

This is not because there is something abstract about guns. It essentially has to do with one quality that many guns share: they are small enough to be easily hidden.

The fact that guns are small enough to be easily hidden creates a sort of tug-of-war between the Government's desire to root out illegal activities and the average American citizen's desire to be able to go about his business free from worry about unpleasant interactions with uniformed government agents, snarling hounds, and requests for "papers".

At this sort of street level where the Government's interests and the interests of its citizens meet is really where freedom is defined. It is here at this level where citizens either are free of unwarranted government intrusion or they are not.

Gun cases help to define the extent of this type of personally felt freedom because there will often be disputes over how the guns in question came to be discovered by the police. Here's why.

The Fourth Amendment to the United States Constitution tells us that we citizens are to be free from warrantless search and seizure, but it really doesn't offer much in the way of practical street to street level advice on what this really means.

One big thing noticeably absent from the Fourth Amendment is what to do when or if the Government violates this right. Pretend for a moment that the police have violated a citizen's right to be free from warrantless search and seizure (whatever that means). So what? Where is the remedy?

As reality played itself out and government agents began acting like agents of the government, it turned out that the courts were being plagued with uncomfortable questions about how to handle alleged violations of this Fourth Amendment. The Constitution didn't say what should be done.

So the United States Supreme Court came up with an answer. The Court said that since the Constitution doesn't provide a remedy, we'll provide a remedy. And that remedy is that the Government will not be allowed to benefit from its own

unconstitutional wrongdoing. At a practical level that meant that if the Government violated a citizen's 4th Amendment rights by say, kicking down his door for no reason and searching his house until they found a gun, the Government would not be allowed to use the gun they found in any prosecution. In legal mumbo jumbo, the gun is "suppressed" or "excluded."

To this day there are those who say that the Supreme Court had no business inventing such a remedy that was not part of the Constitution or that it is an inappropriate remedy. After all, these critics say, the evidence is perfectly reliable and perfectly legitimate. The illegal guns they find when they kick down my door for no reason and search my bedroom closet are still illegal and still guns regardless of the motivations and actions of the government agents. How unfair to society, they say that I should get away with a crime merely because some overzealous police officer was unclear that kicking down a door for no reason and searching a bedroom closet might later be determined to run afoul of the Constitution.

But despite its critics (including Justice Rhenquist of the current United States Supreme Court) the exclusionary rule, as it is called in the legal world says that evidence that is found to have been obtained illegally (that is, against the Constitution) is not generally admissible in court against a defendant.

Realize however, that the remedy is not, never was, and never will be, that the entire case against a defendant must always be dismissed. The exclusionary rule only operates to exclude a specific piece, or pieces, or illegally obtained evidence. The Government is free to continue the case against the defendant as long as it has sufficient evidence that was obtained without violating the principles of freedom upon which our country was founded. In other words, the drooling psychotic murderer's 12 homicide indictments will not be dismissed because the police illegally obtained a single marijuana cigarette from his car's ashtray. Just the marijuana would be excluded from his cases.

And those of you reading this article that might be ready nonetheless to grab your pitchforks and storm the local chapter of the ACLU because judges have to suppress perfectly reliable legitimate evidence, relax, sit back, and take it easy for just a minute. There's more…

If you listen to the press and watch television and movies that depict the criminal justice system, you are probably under the impression that the police are "hamstrung" by abstract, indecipherable, impossibly technical rules that are constantly causing murder weapons and truckloads of drugs to be excluded.

Judges are helpless to do anything but follow the law no matter how absurd they know the law has become in the hands of high priced greasy haired lawyers who could talk the birds out of the trees. And the poor police, well how could you possibly expect the police to be "hip" to the latest technicalities in the law as they try ever so hard to abide by long lists of rules of behavior on the street? What a miserable state of affairs when the founding principles of freedom are twisted into such impractical lists of irrational requirements.

Well the preceding state of affairs certainly is an interesting place to introduce fictional characters like "Dirty Harry" who "bend the rules for justice". But the truth is that the preceding state of affairs is nothing more than a preposterous fantasy.

The truth of the matter is that evidence does not frequently get suppressed at these suppression hearings. In fact, the phrase "does not frequently get suppressed" is something of an understatement. The phrase that is closer to the truth, the phrase that is more statistically accurate would be "evidence never gets suppressed".

One study found that in fewer than 5% of criminal cases was any evidence at all, let alone case-critical evidence, suppressed.

Suppression hearings are conducted by a Judge. There is no jury. By their nature, they will often boil down to a determination of the believability of the witness.

If the police officer witness says, for example, "I happened to observe two bullets on the floor of the passenger side of the car," then the judge must decide whether to believe that. If the judge believes that and decides that it happened that way, then in most circumstances the police officer will have had the right to then search the car.

Now in the rare and unlikely event that the truth is that there were not actually bullets so easily visible on the floor of the car, and the police officer just said that because he knew it would justify his actions in searching the car, then it is up to the defense lawyer to use the great truth-revealing engine of cross examination to ferret out the truth.

But what then does the defense lawyer say? I suppose he could dramatically clear his throat and say to the police officer, "Isn't it true there really weren't two bullets on the ground?" to which the police officer would naturally reply, "That is the truth. I just committed perjury before."

…or maybe not.

Instead, the police officer is likely to say something like, "No counselor, there were two bullets right there in plain view on the floor." But perhaps the shrewd defense lawyer will ask the unbeatable follow-up, "Liar liar your pants are on fire," (see a wonderful scene in the movie A Few Good Men in which the character played by Tom Cruise explains this sort of difficulty to the character played by Demi Moore) to which the police officer will immediately say, "You're right. You got me. I was lying."

…or maybe not.

The police officer has a number of advantages at this point, not the least of which is that as a general rule the only people in a position to dispute his claims will be his partner and the defendant. One partner is not terribly likely to step forward and proclaim his partner a liar.

Certainly the defendant is free to take the stand and explain to the judge how there were not really bullets rolling around the floor of his car just at the moment that the police officer was innocently peering in. Well now that creates a difficult situation for the judge because the judge has two competing versions of the same course of events.

One version (the police officer's) would mean that suppression of evidence would be denied and the case could proceed toward trial. The other version (the defendant's) would mean that suppression of evidence would be granted and the Government's case could be severely impaired if not destroyed. Thus, the suppression hearing can boil down to a determination of believability as between the police officer and the criminal defendant.

Of course if there are independent witnesses or serious discrepancies in the police officer's paperwork, the judge may be put in the difficult bind of being hard-pressed to credit the police officer's testimony. But read on…

That brings us to one final little tidbit that needs to be tossed into the mix. The determination of the believability of a witness is virtually unappealable. The judge will virtually never be reversed because an appeals judge disagrees with his assessment of the believability of a witness. As long as the judge determines the facts based on the believability of a witness, he can decide as he chooses and in only the rarest of circumstances (on the order of comet striking the earth rarity) will any appeals court bother him with a reversal.

So what is a judge to do?

Cynical people might say that a judge who is given the power to make unappealable decisions will tend toward making decisions that favor NOT suppressing evidence. If, by finding that the truth of the matter is that the defendant had a couple of bullets rolling around the floor of his car the judge can avoid suppressing evidence, then these cynical people would say that the judge will tend toward finding that the defendant had a couple of bullets rolling around the floor of his car.

Once this fact is found, the judge, in not suppressing the evidence is legitimately

following the law that sensibly tells us that police are permitted to assume that where there are bullets there are also guns worth trying to find.

The judge can also tell himself that the police officer's testimony was not uncovered to be a bald faced lie. The judge can even point to the witness' unwavering ability to withstand the withering "liar liar pants are on fire" cross-examination.

Furthermore, in most cases, judges are not even faced with having to make the uncomfortable determination as to crediting the police officer's version or the defendant's version. For a variety of reasons, including a sense of pointlessness among the defense bar, defense lawyers will not usually have their clients testify simply to set up an alternative fact pattern to a stop unless there is additional corroboration of the defendant's version.

A number of years ago, there was a scandal in New York City because some police officers claimed that there was a general practice within the Department of fudging the truth a bit in these suppression hearings. They claimed there was even a clever name for the practice, "testilying".

The police justified the practice by telling themselves that the law with respect to how they dealt with ordinary citizens involved too many absurd "technicalities" that did nothing but impose dangerous stumbling blocks to their ability to fight crime. In essence they believed that systematically perjuring themselves was doing society a greater good.

After all, the guns they found were real. The drugs they found were real. Or at least most of the time anyway. They believed the good they did by getting these illegal things off the streets far outweighed the trifling evil of systematic government perjury with respect to violations of the Bill of Rights.

So you see, the police were really convinced they were doing us all a great service by saying that the bullets were on the floor of the car instead of telling the truth which was that the car was stopped because the driver looked "out of place" and upon being stopped he was ordered out of the car, frisked, and his car was thoroughly searched - and ultimately a gun and bullets were recovered in a secret location under the driver's seat.

And it is certainly hard to argue with the officer, who when somehow caught in his lie reminds us that in taking that gun off the street he may well have saved the lives of whoever might have been shot by that gun.

Radical liberals might point out, however, that while it is true that the officer's actions in this one instance uncovered a gun, there are likely other instances in which his actions were not so glorious and heroic.

What about the time before that when he pulled over a 17 year old kid driving his parents' expensive car, ordered him out of the car at gunpoint for no particular reason other than he looked "out of place" to that police officer and he and his partner then turned the car inside out looking for guns or drugs? He didn't find anything, and then sent the kid on his way.

The radical liberal would of course whine that there was something fundamentally horrific about this scenario - something so horrific that if it were repeated frequently enough would have a significant impact on whether or not we really live in a free society.

Perhaps the technicalities that require the police to obey the law, including some of our Constitution's most basic principles, and the general hope that police officers would not systematically perjure themselves (the radical might say), are actually pretty important - maybe even MORE important than an individual gun or any individual case.

There will be a constant tension between a police force's desire to ferret out crime at all costs and a free society's desire not to be plagued by checkpoints, snarling hounds, random intrusive stops by armed paramilitary personnel, and requests for "papers".

Gun cases by their nature will often be at the focal point of this tension. They will go a

long way toward defining the day to day manner in which the police deal with citizens. The more judges are willing to believe that the bullets are rolling around the floor of a car in plain view, the more judges are willing to believe that the center console of the car was open to reveal the gun as the police officer walked up to the car to give a ticket for no seatbelt, the more unfettered the police will feel in how they interact with people on the street on a day to day basis.

So gun cases, while not seemingly as interesting or serious as more familiar types of criminal cases, really are among the most important. The next time a police officer interacts with you, the manner in which he conducts himself and the way that he treats you during your interaction may well be driven in large part by manner in which our criminal justice system handles gun cases.

As a result of the "testilying" scandal mentioned above, a commission was formed to look into it, a number of police officers were scolded quite severely, and the problem has been nearly completely eradicated…

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Don Murray is a founding partner in Shalley & Murray. He graduated from *with honors* from the University of Florida College of Law in 1989 and graduated from Williams College in 1986. After clerking for William DeCarlis, a prominent criminal defense lawyer, Mr. Murray accepted a position as a trial lawyer for the Legal Aid Society in New York City. Mr. Murray wrote a chapter for the Matthew Bender Series of legal reference books, *Criminal Defense Techniques* while with the Legal Aid Society. In, 1996, Mr. Murray co-founded Shalley & Murray. Mr. Murray was retained by a London, England, lawfirm as an expert on New York Criminal Defense and Procedure in the context of an international extradition matter. He has also served as a faculty member for the Cardozo Law School intensive trial training program in the areas of opening statements and basic cross-examination. Mr. Murray is a member of the National Association of Criminal Defense Lawyers, the Nassau County Bar Association, and the Queens County Bar Association. Mr. Murray currently handles a caseload of exclusively criminal cases in New York City and Nassau County.

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