

DOMESTIC VIOLENCE & FIREARMS

Update for Judicial Officers

Judge Anne Levinson (ret.)
Dec., 2017

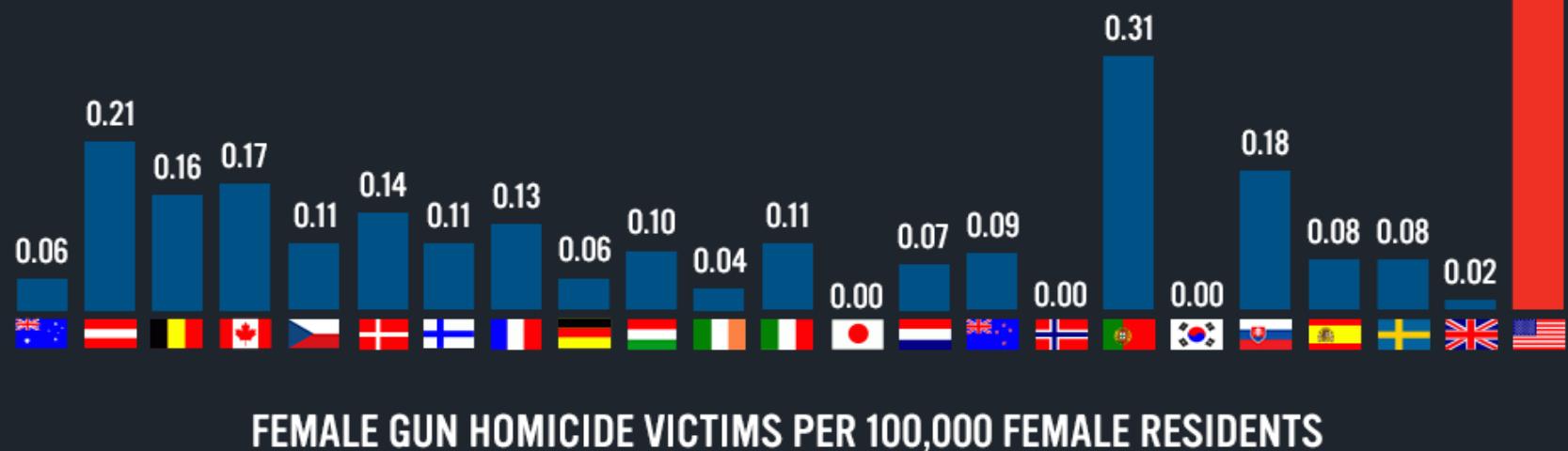
*Note: slides 13-15 & 18, 24,25 are
from J.Berns*



AN AMERICAN WOMAN IS SHOT BY HER PARTNER
EVERY 16 HOURS

SOURCE: Associated Press analysis of FBI and Florida state homicide reports from 2006-2014

AMERICA'S EXTRAORDINARY RATE OF LETHAL GUN VIOLENCE AGAINST WOMEN



Erin Grishteyn and David Hemenway, "Violent Death Rates: The US Compared with Other High-Income OECD Countries, 2010,"
American Journal of Medicine, 2015. Unpublished data on female gun homicide rate courtesy of author.

RISK IS HIGHER WHEN THE ABUSER HAS ACCESS TO FIREARMS

- Domestic assaults involving guns are 12 times more likely to cause death than assaults that don't involve firearms, and the presence of a gun in a domestic violence situation increases the risk of homicide for women by 5 times.
- Every year, more than 1,800 people in the United States are killed by their intimate partners. About half of those homicides are committed with firearms, and 85 percent of the victims are women.
- American women are 11 times more likely to be murdered with guns than women in other high-income countries, and an average of 46 American women are shot to death each month by a current or former husband or boyfriend.

RISK IS HIGHER WHEN THE ABUSER HAS ACCESS TO FIREARMS

- The U.S. Supreme Court said “[w]hen a gun [i]s in the house, an abused woman [i]s 6 times more likely than other abused women to be killed.”
 - *U.S. v. Castleman*, __ U.S. __, 134 S. Ct. 1405, 1408-09 (2014)
- The Ninth Circuit noted that research demonstrates a “*high rate of domestic violence recidivism, the use of firearms in roughly 65% of [domestic violence] murders, and that the use of guns by domestic abusers is more likely to result in the victim’s death.*”
 - *Fortson v. L.A. City Attorney’s Office*, 852 F. 3d 1190, 1193-94 (9th Cir. 2017)

RISK IS HIGHER WHEN A VICTIM IS INITIALLY LEAVING THE ABUSER

- A woman's risk of homicide is highest when she is trying to end the relationship. According to the highly-respected Ontario Domestic Assault Risk Assessment (ODARA), the single most important red flag to predict a lethal response was "recent separation."
- 45% of DV homicides occur within 90 days of separation, most within the first few days.
- A Michigan State University study released in November found a 12 percent reduction in intimate-partner homicides when emergency restraining orders included gun restrictions.

ONE OF THE MOST EFFECTIVE INTERVENTIONS IS REMOVING GUNS FROM DOMESTIC ABUSERS

- The best available research shows that the most important element in preventing fatalities is to remove the firearm from the situation.

-New England Journal of Medicine

- Over 20 years, our state's DV Fatality Review "has consistently recommended removing firearms from abusers as a priority to protect victims from lethal violence."

-The Washington State Domestic Violence Fatality Review

- Research indicates lack of a "substitution effect" – abusers do not use alternative weapons to kill when they do not have access to guns.

FEDERAL LAW

To address the heightened risks of firearms and domestic violence, in 1994 and 1996, Congress added persons subject to a final protective order for domestic abuse and persons convicted of misdemeanor domestic violence to those prohibited from having firearms.

- But it did not require firearms already owned to be turned in or provide a mechanism for law enforcement to remove firearms in the abuser's possession or control.
- And it also did not include two elements addressed in state law: abusers subject to temporary (Ex Parte) DV orders, issued prior to a full hearing, reflecting the immediate danger the victim faces; and persons other than married, cohabitating as spouses, or if they have a child together.

THE LAW IN WASHINGTON STATE

- In 2014, the Washington State Legislature unanimously passed ESHB 1840 – amending RCW 9.41 – making it a felony under state law for anyone subject to a qualifying protection order to possess a firearm, and compelling relinquishment.
- Failure to comply with the requirements of RCW 9.41 is a misdemeanor.

TEMPORARY (INCLUDING EX PARTE) & FINAL ORDERS

- RCW 9.41.800(1) provides that when a court issues many different types of protection orders (including a temporary DVPO pursuant to RCW 26.50.070), the court *shall* order surrender of firearms upon a showing by *clear and convincing evidence* that a party has used, displayed, or threatened to use a firearm or other dangerous weapon in a felony, or previously committed any offense that makes him or her ineligible to possess a firearm under the provisions of RCW 9.41.040.
- If the petitioner makes the same showing by a *preponderance of the evidence*, a trial court also *has discretion* under RCW 9.41.800(2) to order the respondent to surrender firearms when issuing a full or temporary DVPO.

TEMPORARY (INCLUDING EX PARTE) & FINAL ORDERS

- RCW 9.41.800(4): a court “may order temporary surrender of a firearm or other dangerous weapon *without notice to the other party* if it finds, on the basis of the moving affidavit or other evidence, that *irreparable injury* could result if an order is not issued until the time for response has elapsed.” (emphasis added).
- Regardless of the requirements of section (1) (2) and (4), RCW 9.41.800(5) also authorizes the Court to issue the same order to restrict firearm possession if it finds that the possession of a firearm or other dangerous weapon by any party presents a serious and imminent threat to public health or safety, or to the health or safety of any individual.

FINAL ORDERS

- RCW 9.41.800(3): a court *shall* enter an order to surrender firearms if, after a hearing where the respondent received actual notice and had an opportunity to participate, the court issues a DVPO that: (1) restrains the respondent from harassing, stalking, or threatening an intimate partner of the person or child of the intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child; (2) includes a finding that the respondent represents a credible threat to the physical safety of the intimate partner or child; and (3) by its terms, explicitly prohibits the use, attempted use, or threatened use of physical force against the intimate partner or child that would reasonably be expected to cause bodily injury.
- Note that orders are mandatory under 9.41.800(3) whether or not a firearm was used or displayed in any way.

9.41 - Judicial Officers: Mandatory vs. Discretionary

| Relationship type | Mandatory Surrender | Discretionary Surrender |
|---|---------------------|-------------------------|
| Spouse or former spouse/dp | X | |
| Parent of a common child | X | |
| Current or former cohabitant as part of a dating relationship | X | |
| Current or former dating relationship | | X |
| Stepparent or stepchild | | X |
| Current or former cohabitant as roommate | | X |
| In-law | | X |
| Parent or child | | X |
| Blood relation other than parent or child | | X |

9.41 - JUDICIAL OFFICERS: MANDATORY

Prohibit Weapons and Order Surrender

The Respondent must:

- not obtain or possess any firearms, other dangerous weapons, or concealed pistol license; and
- turn in any firearms, other dangerous weapons, and concealed pistol license as stated in the Order to Surrender Weapons filed separately.

Findings – The court (check all that apply):

must issue the above orders and an Order to Surrender Weapons because:

the first restraint provision is ordered above, and the court found on page one that the Respondent had actual notice, represented a credible threat, and was an intimate partner.

AND any of the following that apply

the court finds by clear and convincing evidence that the restrained person has:

used, displayed, or threatened to use a firearm or other dangerous weapon in a felony; or

previously committed an offense making him or her ineligible to possess a firearm under RCW 9.41.040.

may issue the above orders and an Order to Surrender Weapons because the court finds by a preponderance of evidence, the Respondent:

presents a serious and imminent threat to public health or safety, or the health or safety of any individual by possessing a firearm or other dangerous weapon; or

has used, displayed or threatened to use a firearm or other dangerous weapon in a felony; or previously committed an offense making him or her ineligible to possess a firearm under RCW 9.41.040.

9.41 - JUDICIAL OFFICERS: DISCRETIONARY

Prohibit Weapons and Order Surrender

The Respondent must:

- not obtain or possess any firearms, other dangerous weapons, or concealed pistol license; and
- turn in any firearms, other dangerous weapons, and concealed pistol license as stated in the Order to Surrender Weapons filed separately.

Findings – The court (check all that apply):

must issue the above orders and an Order to Surrender Weapons because:

the first restraint provision is ordered above, and the court found on page one that the Respondent had actual notice, represented a credible threat, and was an intimate partner.

the court finds by clear and convincing evidence that the restrained person has:

used, displayed, or threatened to use a firearm or other dangerous weapon in a felony; or
previously committed an offense making him or her ineligible to possess a firearm under RCW 9.41.040.

may issue the above orders and an Order to Surrender Weapons because the court finds by a preponderance of evidence, the Respondent:

AND at least one of, or any of the following that apply

presents a serious and imminent threat to public health or safety, or the health or safety of any individual by possessing a firearm or other dangerous weapon; or

has used, displayed or threatened to use a firearm or other dangerous weapon in a felony; or
previously committed an offense making him or her ineligible to possess a firearm under RCW 9.41.040.

ORDERS TO SURRENDER WEAPONS

- Prohibits the respondent from obtaining or possessing a firearm or CPL.
- Requires the respondent to *immediately* surrender *all* firearms or other dangerous weapons and any concealed pistol license.
- Requires the respondent to submit “Proof of Surrender” of *all* weapons/firearms and CPL or “Declaration of Non-Surrender” back to the court *within 5 days*.
- Surrender is only allowed to either law enforcement, legal counsel or a “court-designated” third party.

ORDERS TO SURRENDER WEAPONS

Civil Orders:

- Anti-Harassment Orders
- Stalking Protection Orders
- Sexual Assault Protection Orders
- Domestic Violence Protection Orders
- Vulnerable Adult Protection Orders
- Restraining Orders
- Extreme Risk Protection Orders (new Dec. 2016)
- Petitions for Initial Involuntary Detention of a Family Member (Joel's Law)

Criminal Orders:

- No Contact Orders
- Court-initiated Sexual Assault Protection Orders
- Court-initiated Stalking Protection Orders
- Harassment NCOs
- Conditions of release NCOs

Orders to Surrender Weapons (OTSW's) are mandatory or discretionary on all of these orders except VAPO's.

9.41 - JUDICIAL OFFICERS: ISSUE AN OTSW?

SCENARIOS

1. Parties are divorced, with or without child in common
2. Parties are separated, with or without child in common
3. Parties are non-intimate partners (parent-child) and there was no threat with, or brandishing of a firearm alleged in the petition but the court finds by a preponderance of evidence “the respondent presents a serious and imminent threat to public health or safety, or the health or public safety of any individual by possessing a firearm or other dangerous weapon”
4. Respondent was not served a Temporary Order to Surrender Weapons Issued Without Notice, re-issue or require the petitioner to go back to Ex Parte to continue that order?

9.41 - Judicial Officers

- At each stage of the process, always inquire whether the respondent/defendant owns or has access to firearms when issues of domestic violence are presented.
- A survivor of violence committed by an intimate partner is likely to have the best knowledge of a partner's access to firearms. But the petitioner may not know of access to all firearms, so the Court should obtain from the respondent/defendant, under oath, a list of all firearms to help ensure that all are relinquished.
- The Court should also evaluate any other indicia of firearms possession or access, such as photos, social media, CPL, Fish & Wildlife registration, third party affidavits or testimony, incident reports, criminal history, insurance records, or prior Protection Orders.

9.41 - Judicial Officers

- The law requires all firearms to be immediately surrendered, so Order To Surrender Weapons should clearly require all weapons (whether listed in the petition or not) to be removed by law enforcement when the order is served, or if the firearms are not on site, surrendered immediately thereafter to a law enforcement agency.
- Make sure all civil and criminal court forms that relate to domestic violence cases have questions regarding the presence and possession of firearms.
 - *Petitions for civil Protection Orders*
 - *Ex Parte and final Protection Order forms*
 - *Requests for extension or renewal of orders & continuances*
 - *Requests to vacate or dismiss orders*
 - *Bail or conditions-of-release information and orders*
 - *Arraignment forms*
 - *Dispositions, deferrals, pleas*

9.41 – Judicial Officers

Be cognizant of risk factors –

- *Prior domestic or non-domestic assault*
- *Threats against children*
- *Prior violence or harm to victim*
- *Threats of harm or to kill*
- *Convictions involving violent acts*
- *Firearms convictions*
- *History of crimes involving alcohol or drug abuse*
- *Violence against animals*

9.41 - Judicial Officers

Be cognizant of risk factors -

- *History of Previous Protection Orders*
- *Breach of Previous Orders (restraining, protection, no contact, parole, probation, etc.)*
- *Individual Order History*
- *Victim Level of Fear*
- *Is Victim Pregnant?*
- *Possession/Access to Firearm, or CPL*
- *In Custody*
- *Warrant History*
- *FTA History*

9.41 - Judicial Officers

According to the Washington Coalition Against Domestic Violence, 54% of perpetrators who committed fatal shootings in Washington in 2013-2014 had previously been prohibited from owning firearms.

- Courts should have a mechanism for law enforcement to alert judicial officers when an order is not served or when all guns are not surrendered.
- Courts should have a process to ensure timely and accurate filing of Declaration of Non-Surrender or Proof of Surrender.
- Where there is apparent non-compliance, show cause or non-compliance review hearings should be immediate and sufficient, as would be done when evidence of possible non-compliance with conditions of release or probation in a criminal proceeding or non-compliance with other court orders.
- Courts, prosecutors and petitioners can initiate or move for contempt proceedings [See RCW 7.21.030-040 & 26.50.120 - a petitioner can seek assistance from the City Attorney or County Prosecutor to initiate a contempt proceeding on behalf of the petitioner.]

9.41 - Judicial Officers

Because of the known risks to DV survivors once a petition is filed and the requirement of immediate surrender of firearms:

- Review hearings should be set for the 6th day after service of the Ex Parte OTSW.
- Respondents must appear. Failure to Appear must be entered by the Court as a finding on the record because the respondent is then in violation of a court order.
- Continuances should not be routinely granted, given risk.
- The Court should not “encourage” a respondent to file a DNS, nor indicate that attending review hearing is optional.
- Respondents should be advised, as well as provided a written warning, that criminal charges may be filed if non-compliance with the statute - access as well as possession.

9.41 - Judicial Officers

- The Court should conduct an initial review of the court file to determine whether the Declaration of Non-Surrender or Proof of Surrender has been filed, and to verify service of the Order to Surrender, and note date of service.
- At the review hearing: If compliance is at issue, the Court should advise on 5th Am rights and inquire of respondent; all statements made must be under oath.
- Findings and Order on Surrender Review should be entered on the record & an order filed, including Failures to Appear.
- If continuing the hearing for good cause, both the Temporary Protection Order and the OTSW (they come as a pair) must be continued through the next hearing date.
- If renewing a Protection Order, the OTSW is also renewed, and compliance must be confirmed at the renewal. Non-compliance or Failure to Appear should result in immediate enforcement.

9.41 - Judicial Officers

- The burden is on the resp./def. to provide, under oath, evidence demonstrating that the respondent/defendant no longer owns, possesses, has access to, or otherwise has control over firearms if indicated.
- Simply filing a Declaration of Non-Surrender when there is evidence presented to the contrary is not sufficient. The Court should advise and inquire.
- As with any other type of proceeding, the Court should take action when a document that the Court has reason to believe may not be truthful has been submitted to the Court.
- If the resp./def's firearms have been seized by law enforcement or given to a relative with approval of the Court, the resp./def. must still file a Proof of Surrender (not a DNS), so there is a clear record detailing what firearms were obtained, in what way and by when.

9.41 - Judicial Officers

- If the Court finds that the resp./def. sold or transferred the weapons, that violates the Court's order if it was done after the order was served. The firearms can only be surrendered to law enforcement, counsel, or a third party *that the court has designated.*
- If the resp./def. states under oath that he sold the firearms *prior* to the order, the Court should require proof of sale by documentation or third party testimony. Frequently abusers will report having “sold” their firearms to a friend or relative. The court must determine whether this is a bona fide sale, and should request proof of the transaction.
- If the resp./def. states under oath that he transferred possession of firearms to friends or family members before the order, that may raise questions of “constructive possession.” If a resp./def. can ask for, or physically retrieve, any of the firearms transferred to a third party, such action means he still has access, which would violate the order.

9.41 - Judicial Officers

- If a resp./def. wishes to surrender firearms to a third party, the law requires that party be designated by the Court. The Court may instead require surrender to law enforcement.
- If the Court wishes to allow surrender to a Court-designated third-party, that party must demonstrate to the Court that he or she is not a prohibited possessor and should attest to the Court that he or she understands it would be a violation of the law to allow the resp./def. access to any firearms.

9.41 - Judicial Officers

- If the Court finds good cause to grant a continuance, the Court should impose date and time-certain conditions to direct immediate compliance with firearm and CPL surrender, as the law requires, even if the hearing will be several days later.
- E.g., “you must turn your firearms and CPL in to _____ police department by 4pm today and file immediate proof to the Court and the other party (and/or city/state). Until that occurs, I am finding you out of compliance. When we return on _____ day, we will review whether you followed these instructions and whether I can find you in compliance.”

9.41 - Judicial Officers

- If the respondent refuses to file Declaration of Non-Surrender or Proof of Surrender due to concerns about self-incrimination, the law still requires the respondent to file one or the other form.
- If the Court wishes to provide the respondent additional time to consult with legal counsel, the Court should:
 - *use the criteria in Olympic Pipeline, 104 Wash.App. at 359, [16 P.3d 45](#).*
 - *keep in mind the risk to the petitioner of continued delay*
 - *ensure the PO & OTSW are renewed*
 - *admonish respondent that they are in violation of the law if they possess or have access to (or under HB 1501 attempt to purchase) any weapon.*
- After every hearing, Findings/Order should be entered noting compliance, non-compliance, or continuance of review hearing, noting any actions ordered to be done and by when. Copies of orders should be mailed to both parties.

9.41 - Judicial Officers

- The CPL and any pistol transfer information in DOL's system do not alone constitute proof of ownership of a pistol, and conversely, the absence of CPL information is not proof of the absence of firearm ownership. However, CPL and transfer information do provide the Court with "indicia" of potential ownership which can then give rise to further inquiry.
- CPLs are good for 5 years.
- CPLs eliminate the 10-day waiting period for records check. If respondents/defendants do not immediately surrender the CPL, that means they are "Brady-exempt" – they can show their CPL to the store, and if they pass the federal check, then they can leave the store *with the firearm*, instead of having to wait for the State background check. The store sends the buyer's information to the local law enforcement agency which *then* conducts the State background check.

9.41 - Judicial Officers

Other types of violations to consider:

- Unlawful Possession of a Firearm based on the order, as a previously prohibited possessor, or as a condition of release or probation if there is also a pending criminal matter
- Prohibited Possessors Attempt to Buy (9.41.113, .115)
- Felony Offenders Firearms Registration (9.41.330, .333, .335)
- Perjury
- Contempt
- Illegal firearm (sawed-off, I.D. info removed, etc.)
- Third parties who knowingly transfer firearm to a prohibited person (9.41.080)

9.41 - Judicial Officers

- Courts have additional statutory implicit legal authority – i.e., the Court can issue any other form of relief deemed necessary to provide for the safety and welfare of the petitioner and any children, to achieve cessation of the abuse or harm.
- The judicial officer can also “initiate a proceeding to impose a remedial sanction on its own motion.” RCW 7.21.030(1).
- A contempt motion can also be made by “a person aggrieved by a contempt of court in the proceeding to which the contempt is related.” 7.21.030(1).
- The judicial officer can ask the prosecuting attorney to commence a criminal contempt proceeding. Under this section, the judge is authorized to “appoint a special counsel to prosecute an action to impose a punitive sanction for contempt of court.” RCW 7.21.040(1)(c)
- A party alleging a violation of a DVPO can ask the prosecutor for assistance and the prosecutor “shall initiate and prosecute a contempt proceeding if there is probable cause to believe that the violation occurred.” RCW 26.50.120

9.41 - Judicial Officers

- Be cognizant that many orders never get served or have delayed service when electronic orders are not used and when law enforcement doesn't have a quick or easy way to get corrections or clarifications.
- Most common technical issues are:
 - *Unsigned*
 - *Incorrect address*
 - *Sent to wrong law enforcement agency*
 - *Illegible*
 - *Wrong form*

9.41 – Judicial Officers

- When an abuser petitions for return of firearms because a protection order expires or is dismissed at the request of the petitioner, or because a qualifying misdemeanor domestic violence conviction has been expunged, the court should take all reasonable steps to ensure it does not inadvertently issue an order instructing a police department to return a gun to an individual who is legally prohibited from possessing one.
- The court should perform a search to determine whether there is any other pending case or cause that would impose a state or federal firearm prohibition on the abuser. It is not enough to address only the pending case.
- The abuser may be subject to a protection order issued by another court in the same state, or in another state, protecting a different victim.
- Or the abuser may have previously been convicted of a misdemeanor crime of domestic violence (not expunged) that triggered a lifetime disqualification from possessing a firearm. The disqualifications flow with the individual abuser, not the case.
- Also, by providing notice to the survivor that the abuser has petitioned for a return of firearms, the court may be able to obtain supplementary information from the survivor that will assist in determining whether the abuser is still prohibited. And, notice to survivors will also enable them to take steps, if necessary, to plan for their own and their children's safety.

9.41 – Judicial Officers

- Make sure the court’s case management system has proper coding to be able to track all Orders to Surrender Weapons across all judicial proceedings.
- Update court forms and bench cards to align with best practices.
- Ensure orders clearly direct removal of firearms at time of service of orders, and use “including but not limited to” language.
- Provide a streamlined way for law enforcement to get technical corrections made to orders.
- Review petition format and instructions to petitioners to ensure critical information regarding firearms is prioritized for judicial officers.

PRIORITIES FOR WORKING WITH LAW ENFORCEMENT AND PROSECUTORS

- Model Policy - adopt a model policy for processing, service and enforcement of protection orders (including ERPOs) & firearm surrender orders.
- Risk Assessment – if law enforcement does not have capacity to serve and enforce all orders, prioritize by risk using evidence-based risk assessment tool.
- Establish mechanisms for immediate notification to the Court of non-compliance.
- Create calendar for timely review hearings.

PRIORITIES FOR WORKING WITH LAW ENFORCEMENT AND PROSECUTORS

- For those cases where there has been a 911 call, Washington state law does not require removal of firearms at the scene, as some states do. Instead it's left to the responding officer's discretion.
- Law enforcement agencies need to have protocols for dispatchers to ask about the presence of firearms, and for responding officers to always ask victims (outside the presence of the abusers) to provide information about firearms to which the abuser has access, and whether the victim would feel safer if the firearms were temporarily removed for safekeeping.
- Law enforcement also needs to include CPL and other information in filing requests and code incident reports to indicate presence of firearms of which Court should be aware.

PRIORITIES FOR WORKING WITH LAW ENFORCEMENT AND PROSECUTORS

- Lack of mandatory removal also means that firearms surrender needs to be addressed at first appearance calendars and bail hearings.
- Personal Recognizance and bail information provided to judicial officers should include firearms access.
- Reduction in charges should not result in elimination of the firearms prohibition.
- Surrender should be completed before pleas are accepted or release occurs.

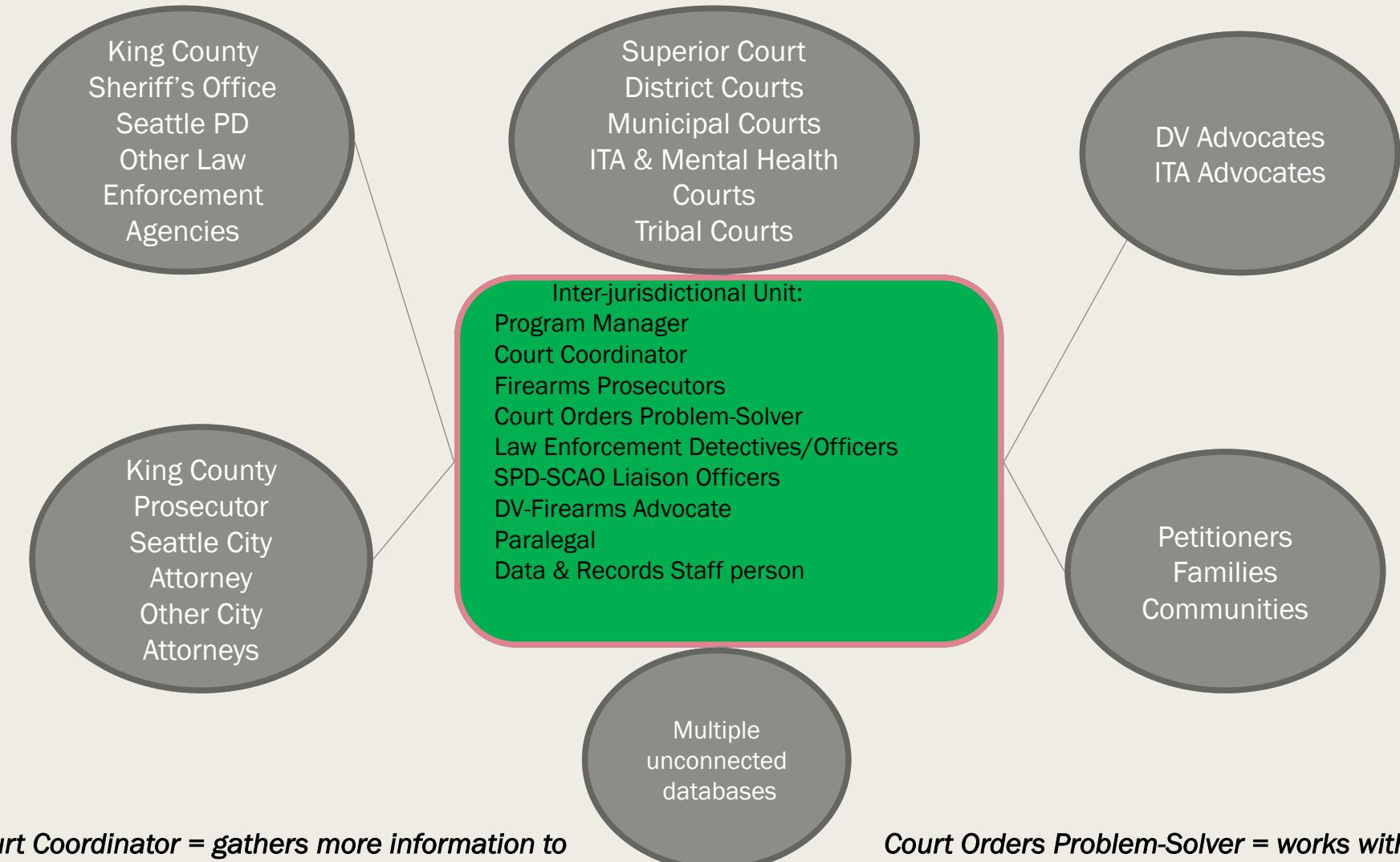
PRIORITIES FOR WORKING WITH LAW ENFORCEMENT AND PROSECUTORS

- Laws require swift and certain enforcement to be effective.
- DV and gun violence are priorities that span jurisdictional, system and agency boundaries.
- Need to have point of responsibility, staff and structure so there is dedicated capacity and expertise to do the work the way it should be done.
- Create a regional unit or team that provides an inter-jurisdictional, inter-agency and multi-disciplinary approach to firearm surrender, service and enforcement of protection orders.
- Effective enforcement also requires updated data systems and adoption of a risk-based approach to reduce risk of harm to survivors, families and law enforcement.

PRIORITIES FOR WORKING WITH LAW ENFORCEMENT AND PROSECUTORS

- In King County we conducted a broad systems review in 2016-2017, making the above recommendations and establishing a dedicated, inter-jurisdictional unit. Also:
- Developed a Model Policy which was adopted by King County Chiefs' & Sheriffs' Assoc. in November, 2017.
- Goal is for all 39 law enforcement agencies in the county to align their policies with the Model Policy and to update Academy and In-Service trainings with Model Policy, and with scenarios involving new laws.
- Requesting that law enforcement agencies track and report out on orders they serve and enforce, as well as firearms obtained, in order to keep improving effectiveness of enforcement.

Regional DV Firearms Enforcement Unit Established in King County, Wa as of Jan 1, 2018



Court Coordinator = gathers more information to present to the Court, works with advocates and law enforcement (modeled after Mental Health Court Monitor)

Court Orders Problem-Solver = works with law enforcement and judicial officers to quickly address technical problems in orders for service