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CONFISCATED WEAPONS PETITIONS

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I. INTRODUCTION.

Law enforcement agencies are **REQUIRED** to confiscate a firearm or deadly weapon in the following two circumstances:

- 1) from a person who has been detained for a mental health evaluation or who is a person described in Welfare & Inst. Code section 8100 or 8103; and
- 2) when the weapon was at the scene of a domestic violence incident involving a threat to human life or a physical assault or the officer was serving a protective order under Family Code section 6218.

If returning the weapon back to the individual would be likely to endanger the individual or others, the law enforcement agency can petition the court for authority to retain and possibly destroy the weapon. This paper is intended to be a practical guide and will outline the petition processes, notice requirements and the hearing processes. This paper will also provide practical suggestions and discuss some important limitations.

II. FIRST TYPE OF PETITION: 8102 PETITION.

Pursuant to Welfare & Institutions Code section 8102(a), “Whenever a person, who has been detained or apprehended for examination of his or her mental condition or who is a person described in Section 8100 or 8103, is found to own, have in his or her possession or under his or her control, any firearm whatsoever, or any other deadly weapon, the firearm or other deadly weapon shall be confiscated by any law enforcement agency or peace officer, who shall retain custody of the firearm or other deadly weapon.”

There are several categories of individuals listed in sections 8100 and 8103 who may not own, possess, control, receive or purchase a firearm. The most common scenario your law enforcement agency will likely encounter, however, is when the officer detains or apprehends an individual for a 72-hour mental health evaluation pursuant to Welfare & Institutions Code section 5150. In that case, the law enforcement officer is **REQUIRED** to confiscate a firearm or other deadly weapon from the

individual. Furthermore, if the individual is evaluated and admitted to a designated facility pursuant to Welfare & Institutions Code sections 5151 and 5152, the individual cannot own, possess, control, receive, purchase or attempt to own, control, receive or purchase a firearm for five years after the individual was released from the facility.¹ Wel. & Inst. Code § 8103(f).

Note that Section 8102 authorizes the officer to confiscate **all** firearms or deadly weapons owned or controlled by the individual. It does not depend whether the weapon was at the scene of the incident or in the immediate physical proximity of the individual. See, *Rupf v. Yan*, 85 Cal.App.4th 411, 424-25 (2000) (“We can posit a safety rationale for this legislative choice. The Legislature has expressly cited the ‘great danger which would result if law enforcement agencies’ lacked authority to confiscate weapons from such individuals.”).

A. WHAT CONSTITUTES A DEADLY WEAPON?

Remember that it is not just firearms that are subject to confiscation. Law enforcement officers are also required to confiscate “any other deadly weapon.” The term “deadly weapon” is defined in Welfare & Institutions Code section 8100(e) to mean, “any weapon, the possession or concealed carrying of which is prohibited by any provision listed in Section 16590 of the Penal Code.” Penal Code section 16590 contains a list of 26 weapons and certain types of ammunition.

B. UPON CONFISCATION, YOU MUST NOTIFY THE INDIVIDUAL OF THE PROCEDURE FOR RETURN.

Pursuant to Section 8102(b), upon confiscation of the firearm or other deadly weapon, the peace officer or the law enforcement agency **SHALL** notify the person of the procedure for the return of the confiscated weapon. Typically, the law enforcement agency will have a form describing the procedure and that has a space for the individual to acknowledge that he or she received a copy of the notice.

¹ Note that the individual may petition the court for relief from this five-year prohibition. Wel. & Inst. Code § 8103(f)(5).

C. THE LAW ENFORCEMENT AGENCY MUST EITHER MAKE THE WEAPON AVAILABLE FOR RETURN OR IT CAN FILE A PETITION PURSUANT TO SECTION 8100.

The law enforcement agency must now decide whether to return the weapon or initiate a petition to retain the weapon. Pursuant to Section 8102(c), upon the release of the individual from the mental health evaluation, the law enforcement agency shall have 30 days to initiate a petition in the superior court for a hearing to determine whether the return of the firearm or other deadly weapon would be likely to result in endangering the person or others, and to send a notice advising the person of his or her right to a hearing on this issue. The law enforcement agency may apply *ex parte* for additional time, but the petition must still be filed within 60 days of the person's release.

One issue that comes up often is, how does the law enforcement agency know when the person has been released from the mental health evaluation? According to Section 8102(b), health facility personnel shall notify the confiscating law enforcement agency that the detained person has been released. However, it is has been our experience that this notification is sometimes not given. The law enforcement agency might need to follow up with the facility. It has been our experience that many health facilities will not give this information to the attorney acting on behalf of the law enforcement agency in the petition process, but that a peace officer is more likely to obtain the release information.

Therefore, we advise calendaring your deadline to file the petition based on the date the individual was detained for the mental health evaluation.

If the law enforcement agency decides within the time limit that it does not want to petition the court to retain and destroy the weapon, it must make the weapon available for return. Note, however, that the individual must still be eligible to own or possess the weapon. See, Wel. & Inst. Code §§ 8100 and 8103. For example, the law enforcement agency should determine whether the five-year prohibition set forth in Section 8103(f) applies. Additionally, the law enforcement agency can insist on receiving a clearance letter from the Department of Justice.

D. NOTICE REQUIREMENT.

Simply serving a service copy of the petition on the individual is not sufficient. Section 8102(e) requires a particular notice to be sent to the individual at the last known address provided to the law enforcement officer by the individual at the time of his or her apprehension. This notice must inform the person that:

- The individual has a right to a hearing on this issue;
- The individual has 30 days to respond to the court clerk to confirm his or her desire for a hearing; and
- The failure to respond will result in a default order forfeiting the confiscated firearm or weapon.

E. PETITION PAPERS.

The petition papers usually consist of the Petition to Retain and Destroy the confiscated weapon², a declaration by the detaining officer that supports the recitation of facts in the Petition and that provides support for the position that returning the weapon would be likely to result in endangering the person or others, and exhibits in support of the Petition. The exhibits will typically include a copy of the police report, a copy of the property receipt indicating the weapon that was confiscated, a copy of the notice required by Section 8102(b) that is provided to the individual at the time of the apprehension notifying him or her of the procedure for the return of the confiscated weapon, and a copy of the notice letter required by Section 8102(e).

As mentioned above, an individual who was detained and admitted into a facility for a 72-hour mental evaluation may not own, possess, control, receive or purchase any firearm for a period of five years after the detention. Wel. & Inst. Code section 8103(f); *see also, People v. Keil*, 161

² Technically speaking, the 8102 Petition is filed to determine whether the law enforcement agency must return the confiscated weapon. We typically ask the court for authorization to destroy the confiscated weapon so that the law enforcement agency is not required to maintain the weapon indefinitely if the court determines that the weapon should not be returned.

Cal.App.4th 34, 38 (2008). Therefore, you will want to include in your petition papers whether the five-year prohibition applies in your case. Unless the individual obtains relief from the five-year prohibition (see Section 8103(f)(5)), the law enforcement agency cannot return the firearm back to the owner for a period of five years after the detention. Note that Section 8103(f) only applies to firearms and does not apply to other deadly weapons.

1. Service and Filing of Petition Papers

Section 8102 is silent on how the petition and notice letter must be served on the individual. As a matter of practice, we serve the petition papers and notice letter by both certified mail and regular U.S. mail. Sometimes, the certified mail will come back as unclaimed, but the regular mail will not be returned.

In most jurisdictions, the petition papers are filed in civil court. Some jurisdictions require 8102 Petitions to be filed in juvenile court. Some jurisdictions require a civil case cover sheet to be filed at the same time as the petition papers. Some jurisdictions require the original proof of service to be filed with the court. Therefore, once you decide to initiate the 8102 Petition process, it is good practice to inquire with your particular jurisdiction as to any particular filing requirements it might have.

III. HEARING ON THE 8102 PETITION.

A. THE BURDEN IS ON THE OWNER OF THE WEAPON TO REQUEST THE HEARING.

Once you have filed the petition papers and have sent notice to the individual, the owner must inform the court clerk within 30 days of the notice of petition that he requests a hearing on whether the weapon should be returned. Wel. & Inst. Code § 8102(e). If the owner desires a hearing, he cannot merely tell the law enforcement agency or the attorney that filed the petition. Rather, the owner must inform the court clerk and this usually entails filing a document with the court, which may require a substantial filing fee. If the owner has requested a hearing, the court clerk must set a hearing no later than 30 days from receipt of the request and the clerk will send out notice of the hearing date and time. Wel. & Inst. Code § 8102(f).

If the owner fails to respond to the court clerk within 30 days of the notice of petition that he requests a hearing, the law enforcement agency

may petition for an order of default. Wel. & Inst. Code § 8102(g). Although the burden is on the owner of the weapon to request a hearing, we have seen several instances where a court has automatically set the matter for hearing. In those circumstances, the law enforcement agency's attorney must prepare to put on evidence at the hearing even though it is unknown whether the owner even wants the weapon returned.

B. HEARING PROCESS.

The purpose of the 8102 Petition hearing is to determine whether “the return of a firearm or other deadly weapon would be likely to result in endangering the person or others.” Wel. & Inst. Code § 8102(c). The law enforcement agency has the burden of proof and although no specific legal standard is mentioned in Section 8102, the superior court judge's decision is reviewed under a substantial evidence standard of review. *People v. Keil*, 161 Cal.App.4th 34, 38 (2008). The proceeding is considered judicial rather than administrative in nature and is subject to the rules of evidence applicable in civil cases. *Rupf v. Yan*, 85 Cal.App.4th 411, 428 (2000). It has been our experience that 8102 Petition hearings tend to be informal in nature. The judge may or may not strictly impose rules of evidence.

Evidence typically introduced at the hearing include:

- The Police Report: the police report is admissible under Evidence Code section 1280 if it is based upon the observations of a public employee who had a duty to observe facts and report them correctly. Statements that constitute a party admission are also similarly admissible. However, there is a split in authority regarding whether hearsay statements contained in the report are admissible when the public employee that made the report is not the source of the information, e.g. a paramedic's statements contained in the police report. Some courts consider the statements inadmissible. See, *Burge v. Department of Motor Vehicles*, 5 Cal. App. 4th 384, 388-389 (1992) and *Imachi v. Department of Motor Vehicles*, 2 Cal. App. 4th 809, 815-817 (1992). However, some courts have held that personal knowledge by the individual that made the report is not necessary so long as the source of the information is trustworthy. See *Gananian v. Zolin*, 33 Cal. App. 4th 634, 640 (1995).

- Live Testimony By Witnesses: you will need to call as witnesses the officers who detained the individual. They will need to offer testimony regarding the danger of returning the weapon. You may also wish to call as a witness the individual who was detained for the mental health evaluation, other witnesses or family members regarding the individual's mental health, and medical personnel who treated the owner, including the mental health professional that treated the individual during the 5150 detention.³
- Subpoenaed Medical Records From the Detaining Facility

IV. IMPORTANT LIMITATIONS REGARDING 8102 PETITIONS.

There are a couple of important limitations on the ability of law enforcement to use Section 8102 to confiscate and retain weapons. First, the law enforcement agency cannot use Section 8102 as the only justification to enter a residence to confiscate the individual's weapons. For example, if an individual is detained outside of his home, police must still obtain a warrant or consent to enter the residence to retrieve the weapons. Law enforcement's entry into a residence to confiscate weapons may be unlawful unless it falls within an exception to the warrant requirement. This issue was addressed in *People v. Sweig*, 167 Cal.App.4th 1145 (2008). Although the case has been depublished, it is helpful for its analysis of a warrantless search in an 8102 context.

Second, law enforcement officers must actually apprehend and detain the individual before they can seek the forfeiture of the weapons pursuant to Section 8102. In *City of San Diego v. Kevin B.*, 118 Cal.App.4th 933 (2004), officers determined that Kevin B. was subject to detention under Section 5150, and they confiscated weapons from his home and car while they were actively searching for him. The officers were never able to locate him and he was never actually detained or evaluated. The officers refused to return the weapons and a trial court granted their petition to

³ Evidence Code section 1024 creates an exception to the patient-psychotherapist privilege and provides, "There is no privilege under this article if the psychotherapist has reasonable cause to believe that the patient is in such mental or emotional condition as to be dangerous to himself or to the person or property of another and that disclosure of the communication is necessary to prevent the threatened danger." See also, *People v. One Ruger .22-Caliber Pistol*, 84 Cal.App.4th 310 (2000).

destroy the weapons. The Court of Appeal reversed and held that a law enforcement agency's power to seek forfeiture of firearms or other deadly weapons is predicated on the performance of the assessment and evaluation required by Welfare & Institutions Code sections 5151 and 5152. The Court reasoned that because Section 8102(c) states, "**upon the release** . . . the confiscated law enforcement agency shall have 30 days to initiate a petition in superior court," that the release of the individual is a pre-requisite to filing a petition to retain and destroy the weapon. *City of San Diego v. Kevin B., supra*, 118 Cal.App.4th at 941 (emphasis added).

V. SECOND TYPE OF PETITION: 18400 PETITION.

The second type of confiscated weapons petition is a petition filed pursuant to Penal Code section 18400. According to Penal Code section 18250, "If any of the following persons is at the scene of a domestic violence incident involving a threat to human life or a physical assault, or is serving a protective order as defined in Section 6218 of the Family Code, that person shall take temporary custody of any firearm or other deadly weapon in plain sight or discovered pursuant to a consensual or other lawful search as necessary for the protection of the peace officer or other persons present:

(a) A sheriff, undersheriff, deputy sheriff, marshal, deputy marshal, or police officer of a city, as defined in subdivision (a) of Section 830.1.

(b) A peace officer of the Department of the California Highway Patrol, as defined in subdivision (a) of Section 830.2.

(c) A member of the University of California Police Department, as defined in subdivision (b) of Section 830.2.

(d) An officer listed in Section 830.6, while acting in the course and scope of the officer's employment as a peace officer.

(e) A member of a California State University Police Department, as defined in subdivision (c) of Section 830.2.

(f) A peace officer of the Department of Parks and Recreation, as defined in subdivision (f) of Section 830.2.

(g) A peace officer, as defined in subdivision (d) of Section 830.31.

(h) A peace officer, as defined in subdivisions (a) and (b) of Section 830.32.

(i) A peace officer, as defined in Section 830.5.”

Therefore, if a law enforcement officer is at the scene of a domestic violence incident that involved a threat to human life or a physical assault, or was serving a protective order as defined by Family Code section 6218, the officer is required to confiscate any firearm or other deadly weapon in plain sight or discovered pursuant to a consensual or other lawful search as necessary for the protection of the officers or others present.

Unlike regarding an 8102 Petition, the term “deadly weapon” is not explicitly defined in Penal Code section 18250. However, a court is likely to apply the same definition, which is “any weapon, the possession or concealed carrying of which is prohibited by any provision listed in Section 16590 of the Penal Code.” Penal Code section 16590 contains a list of 26 weapons and certain types of ammunition.

Note that unlike Welfare & Institutions Code section 8102, Penal Code section 18250 does not authorize the confiscation of just any firearms or deadly weapons owned or controlled by the individual. Rather, the weapon has to either have been in plain sight or discovered pursuant to a consensual or other lawful search necessary for the protection of the officers or other present.

A. UPON CONFISCATION, YOU MUST PROVIDE A RECEIPT.

According to Penal Code section 18255, upon taking custody of a firearm or other deadly weapon, the officer must give the owner or person who possessed the firearm a receipt. The receipt must describe the firearm or other deadly weapon and list the identification or serial number. Additionally, the receipt must indicate where the firearm or other deadly weapon can be recovered, the time limit for recovery (discussed below), and the date after which the owner or possessor can recover the weapon.

B. THE LAW ENFORCEMENT AGENCY MUST EITHER MAKE THE WEAPON AVAILABLE FOR RETURN OR IT CAN FILE A PETITION PURSUANT TO SECTION 18400.

The law enforcement agency must now decide whether to return the weapon in accordance with Penal Code section 18265(b), or initiate a petition to retain the weapon pursuant to Section 18400.

As a preliminary matter, Penal Code section 18265 requires the law enforcement agency to maintain custody of the weapon for at least 48 hours. Thereafter, if the confiscated weapon is not retained for use as evidence regarding criminal charges brought as a result of the domestic violence incident or is not retained because it was illegally possessed, the weapon must be made available to the owner or person who was in lawful possession 48 hours after the seizure, or as soon thereafter as possible, **but no later than five business days** after the individual demonstrates compliance with Penal Code Title 4, Division 11, Chapter 2 (starting with Section 33850). The potential ramification for not returning the weapon to the individual within this timeframe is that the court can award reasonable attorney's fees to the prevailing party in a civil action to recover the weapon. Penal Code § 18265(c).

However, if the law enforcement agency "has reasonable cause to believe that the return of a firearm or other deadly weapon seized . . . would be likely to result in endangering the victim or the person who reported the assault or threat," the agency may petition the court to determine if the firearm or other deadly weapon should be returned. Penal Code § 18400(a).

C. TIME LIMIT TO FILE THE 18400 PETITION.

According to Section 18400, the law enforcement agency must initiate a petition in superior court within 60 days of the date of seizure to determine if the weapon should be returned. As with an 8102 Petition, the law enforcement agency may make an *ex parte* application stating good cause for an order extending the time to file a petition, but the petition must be filed within 90 days of the date of seizure.

D. NOTICE REQUIREMENT.

If the law enforcement agency decides it does not want to return the confiscated weapon, Penal Code section 18405 requires the agency to

inform the individual at that person's last known address, by registered mail, return receipt requested that:

- The person has 30 days from the date of receipt of the notice to respond to the court clerk to confirm his desire for a hearing; and
- Failure to respond to the petition shall result in a default order forfeiting the confiscated weapon.

Note that the notice must be sent by registered mail, return receipt requested, rather than by regular U.S. mail or even certified mail. The person's last known address is presumed to be the address provided to the law enforcement officer by that person at the time of the family violence incident. Penal Code § 18405(b). However, if the person whose weapon was seized does not reside at that address, the agency is required to make a "diligent, good faith effort to learn the whereabouts of the person and to comply with these notification requirements." Penal Code § 18405(c). We also suggest that if the notice sent by registered mail is returned back to the agency, the agency should attempt to learn the whereabouts of the person. A description of the efforts made by the agency to locate the individual may be requested by the judge.

VI. THE 18400 PETITION PAPERS.

The petition papers usually consist of the Petition to Retain the Weapon, a declaration by the law enforcement officer involved in the incident that supports the recitation of facts in the Petition and that provides support for the position that returning the weapon would be likely to result in endangering the victim or person who reported the assault or threat, and exhibits in support of the Petition. The exhibits will typically include a copy of the police report (although certain information might need to be redacted pursuant to Penal Code section 841.5), a copy of the property receipt required by Section 18255 indicating the weapon that was confiscated, and a copy of the notice letter required by Section 18405 that was sent to the individual along with the petition papers.

In your petition papers, you will want to highlight the individual's history of domestic violence, the location of the weapons at issue, and any statements made by the individual that support the position that returning the weapon would result in endangering the victim.

As to the relief sought, we typically request an order from the court permitting the law enforcement agency to retain the confiscated weapons for a period of 12 months, assuming the individual requests a hearing. This is because, unlike the 8102 Petition process, there is an opportunity for the individual to petition the court for a second hearing within 12 months if the court did not order the return of the weapon after the first hearing. If no request for a hearing is made, we file a petition for default order authorizing the destruction of the weapons.

1. Service and Filing of the Petition Papers.

Because the notice letter is required to be served by registered mail, we typically serve the petition papers by registered mail as well to be on the safe side. In most jurisdictions, the petition papers are filed in civil court. However, just as with 8102 Petitions, you should inquire with your particular jurisdiction as to any particular requirements it may have. Some judges require that the original proof of service be filed with the court.

VII. HEARING ON THE 18400 PETITION.

The hearing process for 18400 Petitions is different from the process for 8102 Petitions. As mentioned above, there are potentially two hearings on whether the weapon should be returned to the individual. Additionally, Sections 18410 and 18420 authorize the award of reasonable attorney's fees to the prevailing party. This is an important factor in your decision on whether to initiate petition proceedings.

As with 8102 Petitions, the individual is required to request a hearing within 30 days from the date of receipt of the notice. Again, the individual cannot merely inform the law enforcement agency or the attorney for the agency that he would like a hearing. Rather, the individual must respond to the court clerk to confirm his desire for a hearing. Penal Code § 18405(a). According to Penal Code section 18410, if the person who receives a petition requests a hearing, the court clerk shall set the hearing no later than 30 days from the receipt of that request. Pursuant to Penal Code section 18415, if the individual does not request a hearing within 30 days of the receipt of the notice, the law enforcement agency may file a petition for an order of default and may dispose of the firearm or other deadly weapon as provided in Sections 18000 and 18005.

Assuming the individual does request the hearing, the purpose of the hearing is to determine whether the return of the weapon would result in endangering the victim or the person reporting the assault or threat. According to Penal Code section 18410, the legal standard is preponderance of the evidence and the burden of proof is on the law enforcement agency. It has been our experience that these hearings tend to be informal in nature. The judge may or may not strictly impose rules of evidence.

Evidence typically introduced at the hearing include:

- The Police Report: the police report is admissible under Evidence Code section 1280 if it is based upon the observations of a public employee who had a duty to observe facts and report them correctly. Statements that constitute a party admission are also similarly admissible. As is stated above regarding 8102 Petitions, there is a split in authority regarding whether hearsay statements contained in the report are admissible when the public employee that made the report is not the source of the information. However some courts have held that personal knowledge by the individual that made the report is not necessary so long as the source of the information is trustworthy. See *Gananian v. Zolin*, 33 Cal. App. 4th 634, 640 (1995).
- Live Testimony By Witnesses: you will need to call as witnesses the officers who responded to the domestic violence incident or served the protective order. They will need to offer testimony regarding the location of the weapons (e.g. in plain sight) or, if applicable, the lawful basis for the search and why the search was necessary for the protection of the officer or other persons present. You may also consider calling as a witness the victim or other family members that can testify as to their fear about the weapon that may be returned. You can also call as a witness the individual that is the subject of the petition process to demonstrate to the judge why the weapons should not be returned.

If the court decides that the weapon should not be returned, the individual may petition the court for a second hearing within 12 months from the date of the initial hearing. Penal Code § 18420(a). If the individual does not request the second hearing within 12 months, the weapon may be disposed of in accordance with Penal Code sections 18000 and 18005.

At the second hearing, the legal standard is clear and convincing evidence that the return of the firearm or other deadly weapon would result in endangering the victim or the person reporting the assault or threat. Penal Code § 18420(b). Again, the law enforcement agency has the burden of proof. In addition to the evidence put on at the first hearing, you will want to put on evidence of any domestic violence or other relevant incidents that have occurred since the first hearing. You should also try to determine whether the individual is on probation with weapons restrictions.

As mentioned above, according to Penal Code Sections 18410 and 18420, the prevailing party at either the first hearing stage or the second hearing stage is entitled to an award of reasonable attorney's fees.