

Los Angeles Lawyer

FEBRUARY 2020—PART 1 OF 2 / \$5

EARN MCLE CREDIT

Protecting Influencers' Rights

page 22

BY THE BOOK

The Chief: The Life and Times of Chief Justice John Roberts

page 29

PLUS

Foreign Token Sales

page 12

Flag the Shooter

Los Angeles lawyer Charles G. Bakaly IV discusses the various types of gun violence restraining orders and related procedures involved in requesting and applying these orders under California law

page 16

by CHARLES G. BAKALY IV

FLAG THE SHOOTER

Despite challenges that California's gun violence restraining order laws threaten civil liberties, supporters say they will be a major combative force against the rise of gun violence and mass shootings

Over the past several years, California has experienced several of the nation's most horrific acts of gun violence and mass shootings. In 2014, a former Santa Barbara City College student used semiautomatic handguns and knives to kill six people and injure 14 more in Isla Vista. The following year a government health inspector and his wife used AR-15 style rifles, semiautomatic handguns, and pipe bombs to murder 14 people and injure 24 more at the Inland Regional Center in San Bernardino. Three years later, a U.S. Marine Corps veteran used a semiautomatic handgun and a knife to take 12 lives at the Borderline Bar and Grill in Thousand Oaks. Three individuals were killed in July 2019 when a 19-year-old opened fire at the Gilroy Garlic Festival with a semiautomatic rifle. Most recently, a high school student took the lives of two classmates at Saugus High School in Santa Clarita with a semiautomatic handgun, which has since been characterized as a "ghost gun."¹

California is one of several states to adopt "red flag laws" that allow law en-

forcement agencies and family members to petition the courts for injunctive relief as a means to prevent volatile individuals from controlling, owning, purchasing, possessing, or receiving firearms. In California, this injunctive relief is known as a gun violence restraining order (GVRO).

AB 1014

The California Legislature enacted Assembly Bill 1014, which was signed into law by Governor Jerry Brown on September 30, 2014, in response to the Isla Vista mass shooting. In part, AB 1014 added sections 18100 et seq. to the Penal Code and thereby created the GVRO petition procedure.

A GVRO is a civil order that prohibits a subject individual from controlling, owning, purchasing, possessing, or receiving firearms or ammunition (or attempting the same) for the duration of the order.² GVROs are similar to other types of civil restraining orders available in California, which include domestic violence restraining orders,³ civil harassment restraining

orders,⁴ elder or dependent adult abuse restraining orders,⁵ and workplace violence restraining orders.⁶ All of these restraining orders include provisions that prohibit the subject individual from owning, possessing, purchasing, or receiving a firearm for the duration of the order. They also require the subject individual to relinquish any firearm in his immediate possession or control.⁷

Of course, there are instances in which volatile individuals, who should not have access to firearms, have neither committed an act that would subject them to a "conventional" restraining order nor committed a crime subjecting them to criminal prosecution. Until creation of the GVRO procedure, California had no legal mechanism to promote public safety by temporarily preventing such persons from accessing firearms. For example, when an adult with access to firearms makes comments online that he wants to "shoot up" a school or retaliate against someone who has slighted him, these are significant warning signs that the individual may commit violence

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against himself or others with a firearm. Before AB 1014 was signed into law, if such an individual had not yet committed a crime or an act that would support the issuance of a domestic violence restraining order, civil harassment restraining order, elder or dependent adult abuse restraining order, or workplace violence restraining order, not much could be done to prevent him or her from controlling, owning, purchasing, possessing, or receiving firearms. Therein lies the purpose of the GVRO petition process.

Under AB 1014 three types of GVROs may be granted by the courts: a temporary emergency gun violence restraining order (Emergency GVRO), an ex parte gun violence restraining order (Ex Parte GVRO), and a gun violence restraining order after notice and hearing (GVRO).

Emergency GVRO

A law enforcement officer may request an Emergency GVRO from a judicial officer on an ex parte basis to prohibit the subject individual from controlling, owning, purchasing, possessing, or receiving any firearms or ammunition (or attempting the same).⁸ In practice, a law enforcement officer will request an Emergency GVRO from the field (e.g., in response to a disturbance or request for assistance) by calling the court and speaking with a judge or commissioner.

To obtain an Emergency GVRO, a law enforcement officer must make two assertions. The first is that the subject individual poses an immediate and present danger of causing personal injury to himself or to someone else, by controlling, owning, purchasing, possessing, or receiving a firearm or ammunition. The second is that an Emergency GVRO is necessary to prevent personal injury to the subject individual or someone else “because less restrictive alternatives either have been tried and found to be ineffective or have been determined to be inadequate or inappropriate” under the circumstances.⁹

If the judicial officer finds reasonable cause to believe that both assertions are true, the issued Emergency GVRO will remain in effect for 21 days.¹⁰ If an Emergency GVRO is issued pursuant to an oral request (e.g., made via a call from the field to the court), the law enforcement officer must sign a declaration under penalty of perjury reciting the oral statements provided and must memorialize the court’s order on the approved Judicial Council form (EPO-002).¹¹ The law enforcement officer must then serve the subject individual (if he or she can be reasonably located), file a copy of the Emergency GVRO with the court

as soon as practicable, and have the Emergency GVRO entered into the California Department of Justice’s computer database system for protective and restraining orders maintained.¹²

Once the subject individual is served with an Emergency GVRO, he is prohibited from controlling, owning, purchasing, possessing, or receiving any firearms or ammunition (or attempting the same) for the duration of the order.¹³ The law enforcement officer who serves the subject individual with the Emergency GVRO must ask whether he has any firearm, ammunition, or magazine in his possession or under



his custody or control.¹⁴

In 2018, the legislature enacted Penal Code Section 18148, which requires that a hearing on issuance of a GVRO must be held within 21 days after issuance of an Emergency GVRO. In theory, Section 18148 should streamline the GVRO petition process so that the hearing is automatically scheduled once the Emergency GVRO is filed with the court. In practice, it should not be assumed that a hearing will be scheduled once the Emergency GVRO is filed. Even if an Emergency GVRO is issued, the law enforcement officer (or, practically speaking, the legal counsel for the law enforcement agency) should also request an Ex Parte GVRO.

Ex Parte GVRO

A law enforcement officer or an immediate family member of the subject individual may petition the court for an Ex Parte GVRO to prohibit the subject individual from controlling, owning, purchasing, possessing, or receiving any firearms or ammunition (or attempting the same).¹⁵ The term “immediate family” includes any spouse, domestic partner, parent, child, or person related by consanguinity or affinity within the second degree to the subject individ-

ual.¹⁶ The term also includes any person who regularly resides in the same household as the subject individual, or who did so within the prior six months.¹⁷

California Assembly Bills 12 and 61, which were signed into law by Governor Gavin Newsom on October 11, 2019, will soon amend Penal Code Section 18150 to expand the pool of individuals who may petition a court for an Ex Parte GVRO. In addition to law enforcement officers and immediate family members, the list of potential petitioners will include: an employer of the subject individual, a coworker of the subject individual (if the

coworker has had substantial and regular interactions with the subject individual for at least one year and has obtained the approval of the employer), and an employee or teacher of a secondary or post-secondary school that the subject individual has attended in the last six months (if the employee or teacher has obtained the approval of a school administrator or a school administration staff member with a supervisory role). These new laws go into effect on September 1, 2020.

To obtain an Ex Parte GVRO, the petitioner must establish that there is a substantial likelihood of two grounds. The first is that the subject individual poses a significant danger, in the near future, of causing personal injury to himself or herself, or to someone else, by controlling, owning, purchasing, possessing, or receiving a firearm. The second is that an Ex Parte GVRO is necessary to prevent personal injury to the subject individual or someone else “because less restrictive alternatives either have been tried and found to be ineffective, or are inadequate or inappropriate” under the circumstances.¹⁸ These two grounds must be supported by an affidavit, made in writing and signed by the petitioner under oath, which sets

forth the facts tending to establish the grounds of the petition or the reason for believing that they exist.¹⁹

Whether the subject individual poses a “significant danger” of causing personal injury is determined by evaluating several evidentiary factors.²⁰ In determining whether to issue an Ex Parte GVRO, the court must consider all evidence of the following: a recent threat of violence or act of violence by the subject individual directed toward someone else or toward himself; a violation of an emergency protective order issued for either stalking or domestic violence that is presently in effect; a recent violation of an unexpired protective order; a conviction for any offense listed in Penal Code Section 29805; and a pattern of violent acts or violent threats within the past 12 months, including threats of violence or acts of violence by the subject individual directed toward himself, or toward someone else.²¹

In determining whether to issue an Ex Parte GVRO, the court may also consider any other evidence of an “increased risk for violence.” This includes evidence of the following: the subject individual’s unlawful and reckless use, display, or brandishing of a firearm; the history of the subject individual’s use, attempted use, or threatened use of physical force against another person; the subject individual’s prior arrest for a felony offense; the subject individual’s history of violating an emergency protective order issued for either stalking or domestic violence; the subject individual’s history of violating an unexpired protective order; documentary evidence of either the subject individual’s recent criminal offenses that involve controlled substances or alcohol, or ongoing abuse of controlled substances or alcohol; and evidence of the subject individual’s recent acquisition of firearms, ammunition, or other deadly weapons.²²

Immediate Action

The court generally must act on a request for an Ex Parte GVRO on the same day that the petition is submitted.²³ However, if the petition is filed too late in the day, the request may be granted or denied on the next court day.²⁴

If the court determines that both grounds to issue an Ex Parte GVRO exist, then the order will be issued and will remain in effect for 21 days.²⁵ An issued Ex Parte GVRO must provide, in part, a statement of the grounds supporting the issuance of the order, the date and time the order expires, the address of the superior court in which any responsive pleading should be filed, and the date and time of

the scheduled hearing.²⁶

A law enforcement officer or a person who is at least 18 years of age and not a party to the action must then serve the subject individual (if he can be reasonably located).²⁷ If a law enforcement officer serves the subject individual with the Ex Parte GVRO, the officer must ask whether he has any firearm, ammunition, or magazine in his possession or under his custody or control.²⁸

Upon being served with an Ex Parte GVRO, the subject individual is prohibited from controlling, owning, purchasing, possessing, or receiving any firearms or ammunition (or attempting the same) for the duration of the order.²⁹ Then, within 21 days after the petitioner’s request for an Ex Parte GVRO has been either granted or denied, the court will conduct a hearing to determine whether a GVRO should be issued.³⁰

Petitioning a GVRO

The petitioner of a GVRO (a law enforcement officer or immediate family member, or, beginning September 1, 2020, an employer, coworker, or employee or teacher of a secondary or postsecondary school) may petition the court for a GVRO, after notice and a hearing, to prohibit the subject individual from controlling, owning, purchasing, possessing, or receiving any firearms or ammunition (or attempting the same) for a period of one year.³¹

Once AB 12 and AB 61 go into effect, Penal Code Section 18170 will be amended to allow the courts to issue a GVRO for a period of one to five years. One of the stronger criticisms of the GVRO petition procedure has been that issued orders possess a lifespan of only one year (unless a request to renew is made). Comparatively, longer lifespans are available in other conventional restraining orders such as domestic violence restraining orders (up to five years),³² civil harassment restraining orders (up to five years),³³ elder or dependent adult abuse restraining orders (up to five years),³⁴ and workplace violence restraining orders (up to three years).³⁵ The forthcoming amendments to Penal Code Section 18170 will address this criticism.

The petitioner of a GVRO must prove two elements by clear and convincing evidence: 1) the subject individual poses a significant danger of causing personal injury to himself or herself, or to someone else, by controlling, owning, purchasing, possessing, or receiving a firearm or ammunition; and 2) a GVRO is necessary to prevent personal injury to the subject individual or someone else “because less restrictive alternatives either have been

tried and found to be ineffective, or are inadequate or inappropriate” under the circumstances.³⁶ The evidentiary factors considered for this evaluation are the same as the factors considered for an Ex Parte GVRO petition.³⁷

If the court finds there is clear and convincing evidence for a GVRO, the order will be issued and will prohibit the subject individual from controlling, owning, purchasing, possessing, or receiving any firearms or ammunition (or attempting the same) for a period of one year (or, after September 1, 2020, for a period of one to five years).³⁸ If the court does not find by clear and convincing evidence that a GVRO should be issued, the court must dissolve any previously issued Emergency GVRO or Ex Parte GVRO.³⁹

An issued GVRO must provide, in part, a statement of the grounds supporting the issuance of the order, the date and time the order expires, and the address of the superior court of the jurisdiction in which the subject individual resides.⁴⁰

A subject individual may submit one written request for a hearing before the court to terminate the GVRO during the effective period.⁴¹ The court must terminate the GVRO if, after the hearing, it finds that the grounds for issuance of the order are no longer supported by clear and convincing evidence.⁴²

A petitioner may request a hearing before the court to renew the GVRO at any time within three months before the GVRO expires.⁴³ The court may renew the GVRO if, after the hearing, it finds that the grounds for issuance of the order continue to be supported by clear and convincing evidence.⁴⁴ A renewed GVRO will prohibit the subject individual from controlling, owning, purchasing, possessing, or receiving any firearms or ammunition (or attempting the same) for a period of one year (or, after September 1, 2020, for a period of one to five years).⁴⁵ Once AB 12 and AB 61 go into effect on September 1, 2020, Penal Code Section 18190 will be amended to allow any law enforcement officer, immediate family member, employer, coworker, or employee or teacher of a secondary or postsecondary school to request a renewal of a GVRO, even if that individual did not petition the court for the original GVRO.

Misdemeanor Offenses

A petitioner who files a petition for an Emergency GVRO, Ex Parte GVRO, or GVRO knowing the information in the petition is false, or who files the petition with the intent to harass the subject individual, is guilty of a misdemeanor.⁴⁶

Similarly, a person who owns or possesses a firearm or ammunition with knowledge that he or she is prohibited from doing so pursuant to an Emergency GVRO, Ex Parte GVRO, or GVRO is guilty of a misdemeanor.⁴⁷ Further, such a person shall be prohibited from controlling, owning, purchasing, possessing, or receiving any firearms or ammunition (or attempting the same) for a five-year period, which begins on the date the existing Emergency GVRO, Ex Parte GVRO, or GVRO expires.⁴⁸

Rarely Used Mechanism

Although the GVRO petition procedure has been law for several years, it remains a rarely utilized mechanism to temporarily prohibit volatile individuals from controlling, owning, purchasing, possessing, or receiving firearms. According to data from the California Department of Justice,⁴⁹ only 86 GVROs were issued in 2016. In 2017 and 2018, the number of issued GVROs increased slightly to 104 and 424, respectively. From 2016 to 2018, the counties of San Diego (203), Los Angeles (63), and San Bernardino (55) experienced the highest numbers of GVROs. More than a dozen counties have yet to issue a GVRO.

The GVRO procedure is not without

significant criticism. The National Rifle Association's Institute for Legislative Action, for example, criticized the signing of AB 12 and AB 61 as the legislature's "continuing the assault on our Second Amendment rights in the Golden State."⁵⁰ The American Civil Liberties Union also criticized the enactment, stating the laws pose "a significant threat to civil liberties."⁵¹

No law is perfect, and few legislative actions enjoy a position of universal consensus. Legal challenges to the GVRO procedure will continue (and will likely increase), especially after AB 12 and AB 61 become effective next fall. While, at present, no appeals have been filed in court, it is only a matter of time before constitutional and/or due process claims are alleged as to an issued GVRO as a case of first impression.

Time will tell whether the GVRO petition procedure will assist in combating the ever increasing instances of gun violence and mass shootings that plague our communities. Like many proactive measures, it is difficult to calculate how many tragedies will be avoided through effective law enforcement. However, a single instance of preventing a volatile individual from harming himself, herself, or others

through the issuance of a GVRO is worth the effort. ■

¹ The term "ghost gun" usually refers to a firearm that is made by the owner using separately acquired parts. Because such a firearm has no serial number, the owner can effectively bypass registration requirements and background checks. See, e.g., Ben Christopher, *How California got tough on guns*, CalMatters (Nov. 14, 2019), <https://calmatters.org/explainers/california-gun-laws-policy-explained> and Brain Shatz, *People Are Making Completely Untraceable Guns in Their Homes—Driving a New Kind of Crime*, MOTHER JONES, Dec. 13, 2017, available at <https://www.motherjones.com>.

² PEN. CODE §18100.

³ FAM. CODE §6200 *et seq.*

⁴ CIV. PROC. CODE §527.6.

⁵ WELF. & INST. CODE §15657.03.

⁶ CIV. PROC. CODE §527.8.

⁷ CIV. PROC. CODE §527.9; FAM. CODE §6389.

⁸ PEN. CODE §18125.

⁹ *Id.*

¹⁰ *Id.*

¹¹ PEN. CODE §18140.

¹² *Id.*

¹³ PEN. CODE §18125.

¹⁴ PEN. CODE §18135.

¹⁵ PEN. CODE §18150.

¹⁶ PEN. CODE §§18150, 422.4.

¹⁷ *Id.*

¹⁸ PEN. CODE §18150.

¹⁹ *Id.*

²⁰ *Id.*

²¹ PEN. CODE §18155.

²² *Id.*

²³ PEN. CODE §18150.

²⁴ *Id.*

²⁵ PEN. CODE §18155.

²⁶ PEN. CODE §18160.

²⁷ *Id.*

²⁸ *Id.*

²⁹ PEN. CODE §18155.

³⁰ PEN. CODE §18165.

³¹ PEN. CODE §18170.

³² FAM. CODE §§6200 *et seq.*

³³ CIV. PROC. CODE §527.6.

³⁴ WELF. & INST. CODE §15657.03.

³⁵ CIV. PROC. CODE §527.8.

³⁶ PEN. CODE §18175.

³⁷ PEN. CODE §18150.

³⁸ PEN. CODE §18175.

³⁹ *Id.*

⁴⁰ PEN. CODE §18180.

⁴¹ PEN. CODE §18185.

⁴² PEN. CODE §§18185, 18175.

⁴³ PEN. CODE §18190.

⁴⁴ PEN. CODE §§18190, 18155.

⁴⁵ PEN. CODE §18190.

⁴⁶ PEN. CODE §18200.

⁴⁷ PEN. CODE §18205.

⁴⁸ PEN. CODE §18205.

⁴⁹ Bryan Anderson, *California Employers, Schools Can Now Seek Gun Restraining Orders on "dangerous" Individuals*, SACRAMENTO BEE, Oct. 11, 2019, available at <https://www.sacbee.com/news/politics-government/capitol-alert/article235959727.html>.

⁵⁰ NRA-ILA, *California: Governor Newsom Signs Anti-gun Bills Into Law* (Oct. 11, 2019), <https://www.nraila.org/articles/20191011/california-governor-newsom-signs-anti-gun-bills-into-law>.

⁵¹ Assoc. Press, *Gov. Newsom Signs Law Giving California Broadest Rules For Seizing Guns in the U.S.*, KTLA 5 NEWS, Oct. 11, 2019, available at <https://ktla.com>.