

*WEBINAR*

## Responding to Realignment Impacts and Deadly Weapons in the Community

Wednesday, February 13, 2013

10:00 to 11:30 a.m.

Speakers:

**Matthew R. Silver**

Attorney, Best Best & Krieger, LLP

Matthew.Silver@bbklaw.com

**Jennifer Petrusis**

Attorney, Richards Watson & Gershon

JPetrusis@rwglaw.com

## What is Realignment?





## California Public Safety Realignment Law

- Requires the State to reduce number of inmates in State's 33 prisons to 137.5% of designed (intended) capacity. (*Assembly Bills 109, 117 (2011).*)
- Implementation began October 1, 2011.

## How Realignment Reduces State Prisoners

- Shifts responsibility over certain would-be State prisoners to local jurisdictions.
  - i.e. counties and cities
  - includes incarceration AND monitoring probationers
- To county and city jails
  - do they have adequate capacity and personnel?
  - counties can pay the State to take them back

## Which Prisoners?

- “Low-level” offenders
  - Crime was non-serious, non-violent or not sex related

## Funding

- Realignment provides funding to *counties* to help offset new costs to counties and cities
  - Funding from portions of VLF fees and State sales tax
- No express funding to cities
- Funds may/may not trickle down to cities

## Effects of Realignment

- State prisons carry 24,000 fewer prisoners since October 1, 2011
- 36,000 fewer criminals since 2008
- 42,000 criminals since 2006

## Effects of Realignment Continued...

- Recidivism rate among criminals from State prisons: 63.7%
- 74.5% of felons who recidivate end up in prison within a year of release
- Re-released felons recidivate 20.3% *more* than felons released for the first time

(CA Dept. of Corrections and Rehabilitation, *2012 Outcome Evaluation Report* (Office of Research, 2012).)

## Effects of Realignment in Local Communities

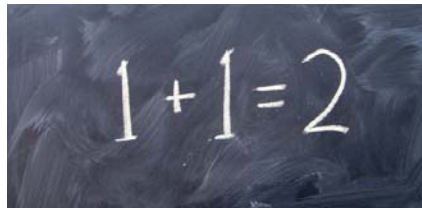
- On average: 15,288 more criminals in local jurisdictions since October 1, 2011
  - (63.7% recidivist rate for 24,000 former State prisoners)

## Particular Effect on Cities

- Realignment funding limited
- Funds may not trickle to cities
- Stretched personnel and reduced city budgets
- Limited city jail capacity, not expanding
- Criminals not incarcerated or “rehabilitated”
- Early release
- Probation violations
- Reduced parolee monitoring
- Lack of information sharing between State and local criminal data

## And the Result Is...

- More criminals in communities
- Increased crime in communities



## What Can Cities Do?

- Lobby State for Direct Funding
  - State budget constraints
  - Recent legislation vs. local control
- Challenge Realignment Law
  - Affirmed by U.S. Supreme Court
- Maximize and Implement Existing Powers
  - And Make the Criminals Pay For It



Presentation Name and Title

## Basis = Local Police Powers

- California Constitution Article XI, § 7: “A county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws.”

## Police Powers

- Very broad powers.
- Enables cities to adopt and enforce local ordinances that define and regulate many activities, including nuisances, aesthetics and criminal behaviors.

## Basis 2 = State Law

- Specific State statutes authorize cities to deal with certain criminal and nuisance problems in manner set by statute.

## Primary Tool: Community Policing

- Aka: comprehensive code enforcement
  - Focuses on nuisance-based approach to crime
  - Broken windows theory
  - Utilizes police, planning and code enforcement resources to comprehensively address criminal activity
  - Eliminates criminal activity by focusing on location of activity and source of crime (target safe havens and crime dens)

## Common Problems/Solutions

- Problem: Drug use, manufacture, distribution
- Solution: Drug Abatement Act (Health & Safety Code §§ 11570 – 11587)
  - Brought by City Attorney
  - Remove occupants from building or place where illegal drug activity occurs
  - Order to vacate and boarded up to 1 year
  - Fines up to \$25,000 per person (1/2 to prosecuting city)
  - Confiscation and sale of fixtures (stove, fridge, etc.) used for drugs
  - Order property owner to contribute to drug prevention programs
  - Attorneys' fees and investigation costs to city
  - Lien

## Common Problems/Solutions

- Problem: Prostitution and Sexual Crimes
- Solution: Red Light Abatement Act (Penal Code § 11225-11235)
  - Brought by City Attorney
  - Remove occupants from building or place where prostitution, lewd conduct, other criminal sexual activity occurs
  - Order to vacate and boarded up to 1 year
  - Fines up to \$25,000 per person (1/2 to prosecuting city)
  - Confiscation and sale of fixtures (stove, fridge, etc.) used for drugs
  - Order property owner to contribute to drug prevention programs
  - Attorneys' fees and investigation costs to city
  - Lien

## Common Problems/Solutions

- Problem: Financial and intellectual crimes
- Solution: Business & Professions Code §§ 17800-17802
  - Targets counterfeiting, manufacturing/possessing/selling fake currency or goods
  - Location of crimes may be shut down and boarded up to 1 year
  - May be brought by City Attorney
  - Requires conviction of specified crime (Penal Code §§ 350(a)(2) or 653w)
  - Nuisance abatement lawsuit
  - Must design and adopt ordinance for cost recovery
  - Reporting use and stats to State

## Common Problems/Solutions

- Problem: Gangs/gang activity
- Solution: Street Terrorism Enforcement and Prevention Act (Penal Code §§ 186.20-186.33)
  - Targets location of gang activity
  - Brought by City Attorney
  - Building/place used for certain offenses, including robbery, murder, unlawful drug sales, rape, intimidation, theft or burglary = nuisance that may be abated
  - Court order to abate nuisance as appropriate under the circumstances (except eviction or closure)
  - Any orders necessary to protect the health and safety of the residents or the public or those necessary to prevent further criminal activity (i.e. gang injunction)
  - Fines against gang members and property owner
  - City may recover damages against gang members on behalf of community to improve neighborhood
  - Need to design and adopt ordinance to recover attorneys' fees and costs

## Common Problems/Solutions

- Problem: Graffiti
- Solution: Government Code § 38772/Local Ordinance
  - Requires adoption of ordinance
  - Criminal prosecution for graffiti violation
  - Civil damages lawsuit against tagger and parents/guardians, if minor
    - Liability up to \$37,000 (adjusted)
  - Civil penalties up to \$1,000 per incident per person
  - Joint and several liability
  - Recover clean up costs
  - Attorneys' fees and investigation costs
  - Recovery by lien or special assessment, plus traditional recovery methods (wage garnishment, attachments, etc.)

## Common Problems/Solutions

- Problem: Dilapidated buildings and blighted properties (broken windows theory)
- Solution: Receivership/Nuisance Abatement (Health & Safety Code § 17980, et seq.; Government Code § 38772, et seq.; Ordinance)
  - Need ordinance(s)
  - Focuses on eliminating crime via blighted and dilapidated properties/neighborhoods (aka: crime havens/sources)
  - Receiver to take over property and rehabilitate or demolish
  - Criminal and/or civil enforcement against property owners and occupants
  - Civil penalties up to \$1,000 per violation per day
  - Administrative fines per violation per day per person
  - Inspection and Abatement warrants
  - Injunctions requiring compliance
  - Criminal probation
  - Attorneys' fees and staff costs
  - Recovery via lien or special assessment

## Common Problems/Solutions

- Problem: Sex Offenders
- Solution: Local Ordinance
  - Requires adoption of ordinance
  - Restrict registered sex offenders from engaging in conduct leading to contact with minors
    - Ex: answering door to Halloween trick-or-treaters
  - Punishment as misdemeanor and/or civil fines

## Common Problems/Solutions

- Problem: Miscellaneous
- Solution: Local Ordinance
  - Attacks bigger offenders based on smaller violations
  - Quality of life issues:
    - Open container
    - Park after hours
    - Solicitations
    - Peddling
    - Selling close to school
    - Public camping
    - Public urination (etc.)
    - ...and more
  - Misdemeanor punishment, fines, probation, 4<sup>th</sup> Amendment waiver, stay away orders, drinking bans
  - City attorney can/must prosecute criminal actions for violations of ordinances

## Cost Recovery

- Problem: Enforcement Costs \$\$\$
- Solution: Local Ordinances & Recovery Programs (Government Code §§ 38773-38773.7; 53069.4)
  - Design and implement ordinances and cost recovery program
  - Designate all violations of any federal, state, or local law as nuisance
  - Set civil fines (\$1,000 per violation if otherwise a misdemeanor)
  - Recovery of attorneys' fees & staff costs
    - Attorneys' fees must be reciprocal
    - Can cap at city's cost
    - Election at initiation of action
    - Broaden to include criminal, civil, administrative and any proceeding to abate a nuisance and appeal therefrom

## Cost Recovery Cont'd...

- Recovery of physical abatement costs
- Administrative fines
  - Up to \$1,000 per violation, per “responsible person”, per day
  - All fines go to city
  - Appealable
- Hold landlords and lessees, etc. equally liable
- Due process considerations:
  - Imposition of fines/fees/lien/assessment requires due process (notice + opportunity to be heard)
  - Provide as requested by violator (unless emergency abatement)
  - Exception: cost confirmation hearing?
  - *Haas* considerations
  - *Nightlife/Quintero* considerations
- Allow for simultaneous use of remedies



REPRESENTING CALIFORNIA CITIES AND PUBLIC AND PRIVATE ENTITIES SINCE

## CONFISCATED WEAPONS PETITIONS

*Presented By:*  
Jennifer Petrusis

## Tragically Familiar Headlines



## We Have Tools in California



<http://www.flickr.com/photos/erix>

## Confiscated Weapons Petitions

Legal tool for law enforcement to keep weapons out of the hands of potentially dangerous individuals by retaining or destroying them.



## Two Types of Confiscated Weapons Petitions

## Mental Health Detention

Weapon confiscated from individual detained for mental health evaluation.

W&I § 8102.



## Domestic Violence

Weapon confiscated from the scene of a domestic violence incident or the officer was serving a protective order pursuant to Family Code § 6218. PC § 18250, *et seq.*



## Confiscation is Required:

- W&I § 8102 requires that a firearm or other deadly weapon **SHALL** be confiscated from:
  - Person who has been detained for a mental health examination. W&I § 8102(a).
  - Person described in W&I § 8100.
  - Person described in W&I § 8103.

## 8102 Petition

Practically speaking, the most common scenario that your law enforcement agency will encounter is when they detain or apprehend an individual for a 72-hour mental health evaluation aka 5150 hold.

## 8102 Petition: Timing

- Upon the individual's release, you have **30 days** to either make the weapon available or initiate a petition to retain the weapon.
  - You can request more time, but not more than 60 days after the release.



W&I § 8102(c)

## Clock Starts on Release

Facility is required to notify law enforcement agency upon release per W&I § 8102(b).



But will they?

## Deciding Whether to Initiate the 8102 Petition

- What's your evidence that returning the weapon would be likely to result in endangering the person or others? W&I § 8102(c).
- Does the confiscated weapon qualify?
  - Must be a firearm or other "deadly" weapon.

## Deadly Weapon?



W&I § 8100(c) and PC § 16590 define "deadly weapon."

## 8102 Petition: Notice Requirement

- Simply serving a service copy of the Petition on the individual is not sufficient notice.
- You must send a notice that:
  - Advises the person of his right to a hearing.
  - Advises that he has 30 days to respond to the clerk to request a hearing.
  - Failure to respond will result in a default order.



## 8102 Petition: Hearing Request

- Once you file the petition, the ball is in the owner's court.
- Owner must request a hearing within 30 days.
  - If a request is made, court clerk SHALL set the hearing no later than 30 days after the request. W&I § 8102(f).
  - If no request is made, law enforcement agency may file a petition for order of default. W&I § 8102(g).

## 8102 Petition: The Hearing

- Standard
- Typically informal hearings.
- Evidence considered:
  - Circumstances leading to the 5150 detention and whether they might occur again. *Rupf v. Van*, 85 Cal.App.4<sup>th</sup> 411 (2000).
  - Psychiatrist's testimony and medical records.
  - Subsequent contacts with police?

## 4<sup>th</sup> Amendment Still Applies



If the individual is detained outside his home, police still need a warrant or consent to enter the home to confiscate the weapons.

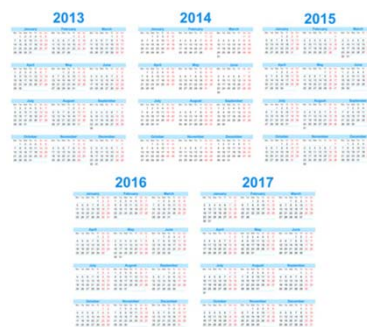
## Detention is Required



Not sufficient that person is just subject to a 5150 detention. Person has to have been located and detained.

*City of San Diego v. Kevin B.*, 118 Cal.App.4<sup>th</sup> 933 (2004).

## W&I § 8103(f)



W&I § 8103(f): a person evaluated and admitted to a mental facility cannot own, possess, control, receive or purchase firearms for a period of five years after the person is released.

## 8103(f) Continued

- The individual can request relief from the five-year prohibition. That matter is handled by the District Attorney's Office.
- Therefore, always check in with the District Attorney's Office if you have an 8103(f) matter.
  - Your 8102 matter and the DA's 8103(f) matter might be set for hearing at the same time by the court.

## Practice Pointers

- Calendaring the 30-day deadline.
- Particular requirements by your jurisdiction?
  - Civil case cover sheet?
  - File proof of service?
  - Civil versus juvenile court to hear the matter?
- Contacting DA's office to coordinate.
- Understand the destruction process.

## Second Type: 18400 Petition (Domestic Violence)

- PC § 18250 requires a law enforcement officer to take temporary custody of a firearm or other deadly weapon **in plain sight or discovered pursuant to a consensual or lawful search** when:
  - At the scene of a domestic violence incident involving a threat to human life or a physical assault; or
  - Serving a protective order pursuant to Family Code § 6218.

## 18400 Petition: Timing

- Must initiate the petition within **60 days** of the date of seizure.
  - Must also advise the owner.
- Agency may request more time, but the petition must be filed within 90 days.



## Considerations on Whether to File 18400 Petition

- What type of incident?
  - DV incident must involve a threat to human life or a physical assault.
- Where was the weapon?
  - At the scene?
  - Found during a consensual or other lawful search?

## 18400 Petition: Notice Requirements

- PC § 18405: You must send a notice that:
  - Advises that he has 30 days from receipt of the notice to request a hearing from the court clerk.
  - Failure to respond shall result in a default order.
- **You must send this notice by registered mail, return receipt requested.**



## 18400 Petition: Hearing

- If requested, court clerk shall set the hearing no later than 30 days after the request.
- First Hearing Standard: Preponderance of the evidence that return of the weapon would result in endangering the victim or person reporting the assault or threat.

## 18400 Petition: Second Hearing

- If the court does not order return of the weapon after the first hearing, the individual may petition the court for a second hearing within 12 months. PC § 18420(a).
- Second Hearing Standard: Clear and convincing evidence.

## Attorney's Fees



The court **SHALL** award reasonable attorneys fees to the prevailing party. PC §§ 18410 & 18420.