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CLIENT ALERT MEMORANDUM

To: All Sheriffs & Chiefs of Police

From: James R. Touchstone, Esq.

A TRIAL COURT MAY CONSIDER HEARSAY EVIDENCE WHEN RULING ON A GUN VIOLENCE RESTRAINING ORDER PETITION

In *San Diego Police Dept. v. Geoffrey S.*,[1] the Fourth District held that hearsay evidence is admissible at a hearing on a gun violence restraining order ("GVRO") under Penal Code section 18175. The Court applied its analysis from a previous case[2] in which the Fourth District had held that hearsay evidence is admissible at a hearing on a workplace violence restraining order ("WVRO").[3]

Background

In April 2020, the San Diego Police Department ("Department") filed a GVRO petition against Geoffrey S. with an attached declaration and four redacted police reports. The attached declaration of Detective Justin Garlow stated: "Based on the content of the attached reports, I hold the opinion that a GVRO is necessary to protect the public and prevent harm to the respondent or others. There are no less restrictive means to ensure public safety." The redacted police reports described several police contacts with Geoffrey over five days in April 2020.

In one incident, police responded to a disturbance call just before midnight at Geoffrey's residence. Geoffrey admitted to the police that he had been posting on social media about Bill Gates killing millions of people and told the police that "Bill Gates is a murderer." Geoffrey also admitted that he possessed shotguns.

Two or three days later, several officers and a psychiatric clinician were dispatched to Geoffrey's house in response to calls about him "posting bizarre threatening statements on social media and attempting to purchase firearm ammunition." Before arriving at Geoffrey's house, the police tried to contact the reporting parties and reviewed his

[1] 2022 Cal. App. LEXIS 1032 (4th Dist. Dec. 16, 2022).

[2] *Kaiser Foundation Hospitals v. Wilson*, 201 Cal.App.4th 550 (4th Dist. 2011).

[3] Code Civ. Proc., Section 527.8.

Facebook posts. The names of the reporting parties were redacted from the police reports attached to the GVRO petition. Police learned that in multiple Facebook posts, Geoffrey described his eccentric beliefs about Bill Gates and the COVID-19 vaccine, attempted to gather followers to defend themselves against a government takeover, discussed his attempts to stock up on ammunition, and encouraged others to do the same. However, none of these Facebooks posts were attached to the GVRO petition or submitted to the court. Geoffrey admitted that he had unsuccessfully attempted to purchase shotgun ammunition at Walmart on the morning of his psychiatric detention. Geoffrey later called an acquaintance in a "rage, ranting about Walmart refusing to sell him firearm ammunition due to him coming up in their system as 'denied.'" Geoffrey told this person it was part of the "'government[']s plan'" and claimed that "'[p]eople are going to try to get me and I need to defend myself.'" Geoffrey's father submitted a declaration confirming that Geoffrey had called him about purchasing ammunition to defend himself. Geoffrey also told another acquaintance, "'I guess I'm just going to have to take things into my own hands.'"

After police arrived at Geoffrey's house, they informed him that "his friends and family asked the police to check on him due to comments he had posted on social media regarding the purchase of ammunition." According to the police reports, "Geoffrey was very animated, agitated and was rambling about a government takeover." He "was exhibiting psychotic and delusional behavior." "When asked specifically about his quest for ammunitions and his intentions, Geoffrey replied that it was none of our business and quoted his 1st and 2nd amendment rights." The police and clinician believed that Geoffrey was a potential danger to others and decided to place him on a 72-hour psychiatric hold.

The trial court issued a temporary GVRO and in July 2020 held a GVRO hearing. No witnesses testified at the hearing, and the Department submitted no additional evidence beyond the previously submitted declaration of Detective Garlow and police reports attached to the GVRO petition. After reviewing the documentary evidence and body-camera video footage, the trial court granted a GVRO prohibiting Geoffrey from owning or possessing firearms or ammunition for one year. The trial court issued the GVRO, finding "by clear and convincing evidence" that Geoffrey posed "a significant danger of causing personal injury" by gun violence and that a GVRO was "necessary to prevent personal injury …." Geoffrey appealed from the one-year GVRO.

Discussion

The Fourth District Court of Appeal noted that the only evidence the Department submitted in support of the GVRO petition was the attached declaration of Detective Garlow and the hearsay police reports. On appeal, Geoffrey argued that hearsay evidence was inadmissible in a GVRO hearing under Penal Code section 18175.

The Court stated that the GVRO statute provides for three types of protective orders prohibiting a person from owning or possessing a firearm, ammunition, or magazine: (1) a 21-day temporary

emergency GVRO issued ex parte on request of a law enforcement officer if the court finds "reasonable cause to believe" the subject "poses an immediate and present danger" of gun violence (Penal Code section 18125); (2) a 21-day ex parte GVRO issued on request of a family member, employer, coworker, teacher, or law enforcement officer if the court finds a "substantial likelihood" that the respondent "poses a significant danger, in the near future" of gun violence (Sections 18150, 18155); and (3) a one to five year GVRO issued after notice and hearing if the court finds "by clear and convincing evidence" that there is a "significant danger" of gun violence (Section 18175). For a GVRO after notice and hearing, the hearing must be held within 21 days of issuance of the temporary emergency GVRO or ex parte GVRO.

The Fourth District observed that the statute for an ex parte GVRO provides that the court "shall consider all evidence" of six factors listed in Section 18155(b)(1),[4] and "may consider any other evidence of an increased risk for violence, including, but not limited to" seven additional factors listed in Section 18155(b)(2).[5] The Court noted that the statutory provision for a GVRO after hearing refers back to the factors listed for an ex parte GVRO. Section 18175 provides: "In determining whether to issue a gun violence restraining order [after notice and hearing], the court *shall consider evidence* of the facts identified in paragraph (1) of subdivision (b) of Section 18155 *and may consider any other evidence of an increased risk for violence*, including, but not limited to, evidence of the facts identified in paragraph (2) of subdivision (b) of Section 18155." (Section 18175(a), italics added.)

In *Kaiser Foundation Hospitals v. Wilson* (4th Dist. 2011) 201 Cal.App.4th 550, the Fourth District held that hearsay evidence is admissible at a hearing on a workplace violence restraining order ("WVRO"). (Code Civ. Proc., Section 527.8.). *Kaiser* noted that Code of Civil Procedure section 527.8 provisions specifically stated that the court "shall receive *any testimony that is relevant*" at the hearing. (Section 527.8(j), italics added.) The *Kaiser* court explained: "The plain language of this provision suggests that the Legislature intended to permit a trial court to consider *all* relevant evidence, including hearsay evidence, when deciding whether to issue an injunction to prevent workplace violence pursuant to

[4] The subdivision (b)(1) factors are: "(A) A recent threat of violence or act of violence by the subject of the petition directed toward another. [¶] (B) A recent threat of violence or act of violence by the subject of the petition directed toward himself or herself. [¶] (C) A violation of an emergency protective order issued pursuant to [other specified provisions of law]. [¶] (D) A recent violation of an unexpired protective order issued pursuant to [other specified provisions of law]. [¶] (E) A conviction for any offense listed in Section 29805 [illegal firearm possession]. [¶] (F) A pattern of violent acts or violent threats within the past 12 months, including, but not limited to, threats of violence or acts of violence by the subject of the petition directed toward himself, herself, or another." (Section 18155(b)(1)(A)–(F).) "Recent" is defined to mean within the six months prior to the date the petition was filed.

[5] The subdivision (b)(2) factors are: "(A) The unlawful and reckless use, display, or brandishing of a firearm by the subject of the petition. [¶] (B) The history of use, attempted use, or threatened use of physical force by the subject of the petition against another person. [¶] (C) A prior arrest of the subject of the petition for a felony offense. [¶] (D) A history of a violation by the subject of the petition of an emergency protective order issued pursuant to [specified provisions] of the Family Code. [¶] (E) A history of a violation of the petition of a protective order issued pursuant to [other specified provisions of law]. [¶] (F) Documentary evidence, including, but not limited to, police reports and records of convictions, of either recent criminal offenses by the subject of the petition that involve controlled substances or alcohol or ongoing abuse of controlled substances or alcohol … . [¶] (G) Evidence of recent acquisition of firearms, ammunition, or other deadly weapons." (Section 18155(b)(2)(A)–(G).)

[S]ection 527.8." (*Kaiser, supra*, at p. 557.) Although Evidence Code section 1200(b) provides that hearsay evidence is generally inadmissible, except as provided by law, the *Kaiser* court stated that "Subdivision (f) [now subdivision (j)] of [Code of Civil Procedure] section 527.8 appears to be one of the exceptions to Evidence Code section 1200, subdivision (b), in that it mandates the court consider, without limitation, 'any testimony that is relevant.'" (*Ibid.*)

The *Kaiser* court noted that certain provisions of the WVRO statute are similar to provisions of the statute governing civil harassment restraining orders ("CHRO"). (Code Civ. Proc., Section 527.6.) "[I]njunctive proceedings under [S]ection 527.8 are intended to parallel those under [S]ection 527.6, which are procedurally truncated, expedited, and intended to provide quick relief to victims of civil harassment." (*Kaiser, supra*, at p. 557.) "[A] petition for an injunction under [S]ection 527.8 is heard by the court, not a jury, and is decided by the clear and convincing standard of proof. Trial judges are particularly aware of the potential unreliability of hearsay evidence and are likely to keep this in mind when weighing all of the evidence presented." (*Id.*) The Fourth District also noted that, after *Kaiser*, other courts had held that hearsay evidence is admissible at a CHRO hearing.[6]

Here, the Fourth District concluded that *Kaiser*'s rationale also applied to a GVRO hearing under Section 18175. Based on the language, purpose, and legislative history of the GVRO statute, and its similarity to the WVRO and CHRO statutes, the Court held that hearsay evidence is admissible at a GVRO hearing. The Court explained that Penal Code section 18175(a) states that the court "shall consider *evidence*" of the factors listed in Section 18155(b)(1), and "may consider *any other evidence* of an increased risk for violence," including the factors listed in Section 18155(b)(2). (Section 18175(a), italics added.) The Court noted that the Evidence Code defines hearsay as a form of evidence.[7] The Court thus determined that the statutory terms "evidence" and "any other evidence" as used in Section 18175(a) logically include the form of "evidence" defined as "hearsay evidence."[8] For purposes of resolving the hearsay issue, the Court did not find any meaningful distinction between the WVRO phrase "any testimony that is relevant" (Code Civ. Proc., Section 527.8(j)) and the GVRO phrase "any other evidence of an increased risk for violence." (Penal Code section 18175(a).)

Moreover, the Court noted that Section 18175(a) allows the court to consider "any other evidence of an increased risk for violence, *including, but not limited to, evidence of the facts identified in paragraph (2) of subdivision (b) of Section 18155*." (Section 18175(a), italics added.) Section 18155(b)(2)(F) allows the court to consider "*[d]ocumentary evidence*, including, but not limited to, *police reports* and records of convictions, of either recent criminal

[6] See *Duronslet v. Kamps*, 203 Cal.App.4th 717, 728–729 (1st Dist. 2012); *Yost v. Forestiere*, 51 Cal.App.5th 509, 521 (1st Dist. 2020).

[7] Evid. Code section 1200(a) ["'Hearsay evidence' is *evidence* of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated."], italics added.

[8] *Id.*

offenses by the subject of the petition that involve controlled substances or alcohol or ongoing abuse of controlled substances or alcohol." (*Id.*, italics added.)[9] The Court explained that documentary evidence and police reports offered for the truth of the matter asserted are classic forms of hearsay. (See Evid. Code section 1200.) Thus, the inclusion of documentary evidence and police reports in Section 18155(b)(2)(F)—and its incorporation by reference in Section 18175(a)—signaled that the Legislature intended the terms "evidence" and "any other evidence" as used in Section 18175(a) to include hearsay evidence.

The Court observed that the statutory scheme for a GVRO proceeding is similar in structure, purpose, and subject matter to those for WVRO or CHRO proceedings, as discussed in *Kaiser*. The Court stated that its conclusion that hearsay evidence is admissible in a GVRO hearing was reinforced by the other factors the Fourth District had relied on in *Kaiser*, where the Fourth District had discussed WVRO and CHRO statutes and respective proceedings. Paraphrasing its holding in *Kaiser*, the Court summarized: "'Considering the fact that the purpose of the [GVRO] statute is to prevent [gun] violence … , the expedited nature of the proceeding contemplated by the statute, and the Legislature's directive that the trial court shall receive [any evidence of an increased risk for violence] without qualification, we conclude that the [evidence] that a trial court may consider in making a ruling on a petition pursuant to [the GVRO statute] is not limited to nonhearsay [evidence].'" (*Kaiser, supra*, 201 Cal.App.4th at p. 558.) Accordingly, the Fourth District held that hearsay evidence was admissible in a GVRO hearing under Section 18175. However, the Court cautioned that courts must bear in mind "the potential unreliability of hearsay evidence, … when weighing all of the evidence presented." (*Id.* at p. 557.)

The Fourth District acknowledged that a GVRO proceeding implicates the Second Amendment right to bear arms. However, the Court observed that the Second Amendment has nothing to say about the admissibility of hearsay evidence, and that the Legislature had accounted for the importance of the right at stake by mandating a clear and convincing standard of proof. (Section 18175(b).) The Court explained that the clear and convincing evidence standard reduces the risk of error when particularly important individual interests are at stake

The Fourth District also concluded that the totality of the evidence was sufficient to support the trial court's finding by clear and convincing evidence that Geoffrey posed a "significant danger" of gun violence. (Section 18175(b)(1).) The Court explained that because the Department's hearsay evidence came from multiple independent

[9] The Court stated that "it would make little sense to treat [S]ection 18155, subdivision (b)(2)(F) as a narrow exception *only* allowing hearsay evidence of alcohol or substance abuse or related convictions. In the first place, the statutory language does not frame it as an exception. Sections 18155 and 18175 both treat the documentary evidence described in this subdivision as being 'includ[ed]' within the broader category of 'any other evidence of an increased risk for violence.' ([Sections 18155(b)(2), 18175(a)].) This affirmatively suggests that the Legislature intended the phrase "any other evidence" to *include* documentary evidence such as police reports. Moreover, we cannot conceive of any rational reason why the Legislature would create a narrow hearsay exception just for evidence of alcohol or substance abuse used to prove an increased risk for violence, but not for actual threats of harm or other evidence used to prove an increased risk for violence."

sources that were consistent with one another, including Geoffrey's pastor, his friend, his own Facebook posts, and Geoffrey himself, and it was corroborated by other evidence Geoffrey submitted at the hearing, and not otherwise refuted, the Court concluded that the hearsay evidence was sufficiently reliable to support the GVRO. As the Fourth District was not persuaded by Geoffrey's other arguments, the Court of Appeal accordingly affirmed the one-year GVRO.

A dissenting judge observed that Evidence Code section 1200(b) states the generally applicable rule, "Except as provided by law, hearsay evidence is inadmissible." The dissent found the evidence of the Legislature's intent in the GVRO statutes insufficient to have otherwise "provided by law" for an exception for hearsay evidence under Evidence Code section 1200 (b). Moreover, the dissent maintained that the *Kaiser* decision – which in the dissent's view interpreted "a different statute addressing a different issue using different language" – did not "supply what the Legislature has failed to provide."

HOW THIS AFFECTS YOUR AGENCY

The Court of Appeal held here that hearsay evidence is admissible at a GVRO hearing. The Court noted that documentary evidence and police reports offered for the truth of the matter asserted are classic forms of hearsay. Agencies are advised to include the names of relevant reporting parties and social media posts in police reports that are attached to a GVRO petition or submitted to the court in a GVRO proceeding.

As always, if you want to discuss any of this in greater detail, do not hesitate to contact James Touchstone at jrt@jones-mayer.com or by telephone at (714) 446-1400.