SENIOR COUNSEL
C. D. Michel*

SPECIAL COUNSEL
Joshua R. Dale
Eric M. Nakasu
W. Lee Smith

ASSOCIATES
Anna M. Barvir
Michelle biglarian
Sean A. Brady
Matthew D. Cubiero
Scott M. Franklin
Margaret E. Leidy
Ben a. machida
Clint B. Monfort
Joseph A. Silvoso, III
Los Angeles, CA

* Also admitted in Texas and the District of Columbia

MICHEL & ASSOCIATES, P.C.
Attorneys at Law

OF COUNSEL
Don B. Kates
Battleground, WA

Ruth P. Haring
Matthew M. Horeczko
Los Angeles, CA

Writer's Direct Contact:
562-216-4444
SBrady@michellawyers.com

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INTRODUCTION

The proposed Safety for All Act initiative would impose ***mandatory*** processes on courts for handling persons convicted of offenses resulting in a firearm prohibition, for the purpose of documenting removal of all firearms from the person's possession. What steps specifically will be required of the court will depend on whether the defendant is believed to possess firearms at the time of conviction and the size and nature of the person's firearm collection.

Our office compiled and submitted to the Legislative Analysts' Office, a report describing what we believe the costs that courts would incur were the initiative to pass. We shared this report with the Judicial Council's office. Representatives of the Council opined that we may have overstated the amount of additional hearings that would be required were the initiative to pass, since we asserted every single person convicted of a prohibiting offense would require at least one additional hearing. In response, we have reassessed the initiative and our previous claim and have adjusted our position accordingly herein.

While we now believe it is feasible that a hearing may not be required for every such case, it is not clear what will happen in practice. A hearing may very well be required in every case or, possibly (although very unlikely) in none of them. In any event, our revised analysis shows what the initiative definitely means and potentially means for courts.

ANALYSIS

In sum, for ***every*** case where the defendant is convicted of a firearm prohibiting offense, the measure would require a judge to, ***at a minimum***: (1) provide the defendant a Prohibited Persons Relinquishment Form; (2) assign the case to a Probation Officer to investigate whether defendant has any firearms and to confirm whether any firearms defendant possessed were relinquished; (3) review each report issued by the Probation Officer; (4) make a finding that the court received a completed Prohibited Persons Relinquishment Form; and (5) include that finding in the abstract of judgment.

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(Proposed Cal. Penal Code § 29810(c)(1),(2),(3)). Judges are not currently required to do any of these, so this is all additional work.[1]

According to the Judicial Council's 2015 Court Statistics Report (CSR), in the fiscal year 2013-2014 alone, 272,610 people were charged with felonies and 915,568 with misdemeanors.[2] Assuming that is a normal year, with a conviction rate of around 90%, it is likely that tens of thousands (if not hundreds of thousands) of people receive prohibiting convictions annually. All felony convictions result in such a firearm restriction and there are several common misdemeanors that do as well[3]. A judge will ***have to*** perform all of the above steps for each of those cases, regardless of whether there is evidence that the defendant possesses firearms. While it is conceivable that judges could meet these obligations without an additional hearing (but only for those cases where they find everything is in order), whether they will practically be able to do so remains to be seen.

What is clear, however, is that judges will not be able to dispose of ***any*** of these cases the same day that a plea or conviction is entered, as they currently are able to do and as is common practice. They will have to keep each case on their docket at least another 5 days, during which they will be spending time performing the required tasks discussed above. How much time those tasks will take will depend on each case.

Processing the Firearm Relinquishment

If there is evidence that the defendant possesses firearms, then the Court will need to perform at least one additional task: make a finding on whether "the defendant has relinquished all firearms." (Proposed Cal. Penal Code § 29810(c)(3)). Of course, doing so will require the Court to review the Probation Officer's report, as well as Defendant's "*Relinquishment Form*" and receipts attached thereto showing disposal of each firearm. *Id*. Given the disparate size of peoples' collections, the length of the reports and amount of receipts that judges will have to review will vary and may in some cases take significant time, even if there is no hearing required to resolve the matter. This will be required for a substantial number of individuals annually.

According to DOJ, between July 1, 2013 and December 31, 2015, 20,351 people were added to the APPS database.[4] In other words, assuming that reflects the standard for such a period, around 8,000

[1] Currently, Penal Code section 29810 only requires that the Court "provide on a form supplied by the Department of Justice, a notice to the defendant . . . inform[ing] the defendant of the prohibition regarding firearms and include a form to facilitate the transfer of firearms."

[2] JUDICIAL COUNCIL OF CALIFORNIA, *Statewide Caseload Trends, 2004-2005 Through 2013-2014*, http://www.courts.ca.gov/documents/2015-Court-Statistics-Report.pdf.

[3] *See* Cal. Penal Code §§ 29800-29875, 29900-29905.

[4] *SB 140 Supplemental Report of the 2015-2016 Budget Package: Armed Prohibited Persons System*, Office of the Attorney General, California Department of Justice at 4, http://oag.ca.gov/sites/all/files/agweb/pdfs/publications/sb-140-supp-budget-report.pdf (Jan. 1, 2016).

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people who have registered firearms are added to APPS annually. The latest DOJ report shows that a little over half of the people added to APPS were for criminal convictions of the type "that renders a person subject to Section 29800 or Section 29805."[5] So, the court will be required to make this additional finding for at least 4,000 of all the people added to the APPS database annually. But, countless people who receive prohibiting convictions are not subject to APPS because they have never registered a firearm but nevertheless possess one, as APPS only accounts for individuals who have registered a firearm.[6] It is crucial to note that there is generally no legal requirement that firearms be registered to possess them and registration of firearm transfers are of a relatively recent vintage.[7] The measure would "[r]equire the defendant to declare ***any*** firearms that he or she owned, possessed, or had under his or her custody or control at the time of his or her conviction," not just ***registered*** ones. (Proposed Cal. Penal Code § 29810(b)(3)). So the number of people for whom the court will need to make an additional finding about firearm possession will exceed 4,000 annually. By how many we cannot say. But, what is certain is that there will be tens of thousands, if not hundreds of thousands, of additional candidates annually.

Like their other would be obligations, it is conceivable that judges could make a finding on the Probation Officer's report and whether defendant submitted the proper form without an additional hearing, but it is less likely. The report may raise questions about whether defendant has complied. Due Process would require that before a finding is made that the defendant did not comply or may not have complied, defendant have the opportunity to present his position at a hearing. Additionally, the accuracy of the Probation Officer's report that judges consult in making the finding will, in many cases, rely on information provided from the DOJ that it must update in the AFS and may also rely on information provided by local law enforcement, if they are involved in the seizing of the defendant's firearms.[8] Coordinating the efforts of probation officers, local law enforcement agents, and the DOJ could not only be time consuming but result in confusion in the status of Defendant's firearms.

Accordingly, disposition of this issue by the Court could often result in requests for continuances and additional hearings to get to the bottom of what is going on, which in turn will require the Court to devote additional time and resources to these cases. The measure allows the court to shorten or enlarge

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[5] *See SB 140 Supplemental Report of the 2015-16 Budget Package: Armed Prohibited Persons System*, California Department of Justice, Office of the Attorney General (Jan. 1, 2016).

[6] Penal Code section 30005(a) or (b)

[7] The only firearms required to be registered with the AFS in order to lawfully possess them are "assault weapons" and ".50 BMG rifles." *See* Cal. Penal Code § 31000 (requiring special permit for possession). Handgun registration goes back to 1910s but only those transfers from 1996 forward were entered electronically into the automated system. ***Transfers*** of rifle and shotguns were not required to be registered until after January 1, 2014. Prior to that, California law prohibited the DOJ from recording the serial numbers of long-guns. *See* Cal. Penal Code § 11106 (2013). People can voluntarily register firearms, but they are not required to, and there is no way to know how prevalent this practice is. *See BOF 4542A (Rev. 01/2015): Firearm Ownership Report*, California Department of Justice, Bureau of Firearms, https://oag.ca.gov/sites/all/files/agweb/pdfs/firearms/forms/volreg.pdf (Jan. 2015).

[8] *See* The Safety for All Act of 2016, Sec. 10 (adding Penal Code section 29810(c)(1)).

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deadlines or provide for another method to the defendant for relinquishing the firearms based on a showing of good cause.[9] But, any of these requests would likely require a separate hearing.

Problems with Firearm Records Relied On

There is potential for still more hearings if the defendant declares firearm ownership. The information in the AFS is often inaccurate. The AFS is an unreliable system going back 20 years. Often people are unaware of California's requirements relating to the acquisition and transfer of firearms, registration at the time of importation, and other aspects of California's regulatory regime so firearm ownership records are often never logged into AFS. Also, often firearms presumed to be in possession of individuals were long since transferred because the owner was either not required to notify DOJ or failed to. Model numbers are often incorrectly listed at the time of transfer as the firearm's caliber, calibers are listed as serial numbers, vice versa, and etc. Moreover, AFS is often not properly updated, so many firearms remain unregistered or registered to a previous owner. Lastly, local law enforcement agencies have a bad track record of entering firearms they seize into AFS (as discussed by DOJ Bureau of Firearms Chief Stephen Lindley last year during his testimony to Senate Subcommittee #5 on APPS). Consequently, DOJ agents attempting to seize firearms from prohibited persons, often discover that the firearms they looking for were seized at the time of the prohibited person's arrest but not entered into the system. Because the Probation Officer's accuracy of reports will depend, in part, on DOJ's efficient and timely updating of the AFS,[10] the Probation Officer might not be able to complete the required reports for court review in a timely fashion, or the reports might be inaccurate. Giving inaccurate information in turn will lead the courts to either delay the progress of the proceedings, which could mean additional hearings as explained above, or to issue unnecessary warrants against the Defendant that waste the Court's time.

This is because if the Court determines there is probable cause to believe that defendant failed to relinquish any firearms, the Court is ***required*** to issue an order for and removal of any firearms where there is probable cause to believe they may be found.[11] And, under Section 29810, the judge would only be required to consider the reports issued by the Probation Officer when determining whether there is probable cause to believe that the defendant has failed to relinquish his firearms.[12] This will almost certainly require a hearing for the defendant to explain what is going on with the firearms before such an order is issued. Due Process would require as much.

And, even if no hearing is held, because of the AFS issues, to the extent the Court relies on that information in finding such probable cause, this may result in unnecessary warrants being issued, which will take court time, i.e., AFS may not reflect the reality that defendant did relinquish all firearms.

[9] The Safety for All Act of 2016, Sec. 10 (adding Penal Code section 29810(f)).

[10] *See* The Safety for All Act of 2016, Sec. 10 (adding Penal Code section 29810(c)(1)).

[11] The Safety for All Act of 2016, Sec. 10 (adding Penal Code section 29810(c)(4)).

[12] The Safety for All Act of 2016, Sec. 10 (adding Penal Code section 29810(c)(3)).

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Further, because of the unreliability of AFS and the "staleness" of the information contained therein, court time will be expended in any subsequent criminal filing when defense counsel brings a Fourth Amendment challenge to any such search ordered by the Court, which would require another round of briefing and hearings.

Additionally, defendant may assert his or her Fifth Amendment right to refuse "to declare any firearms that he or she owned, possessed, or had under his or her custody or control at the time of his or her conviction and require the defendant to describe the firearms and provide all reasonably available information about the location of the firearms to enable a designee or law enforcement officials to locate the firearms." (Proposed Cal. Penal Code § 29810(b)(3)). The measure does not provide any immunity from prosecution if those declared firearms are illegally stolen, have obliterated serial numbers, or were used in a crime. This could trigger even another round of briefing and hearings.

Court and Probation Costs Cannot Generally Be Offset by Fees

Under proposed Penal Code section 29810(j) of the measure, "a city, county, or city and county, or a state agency may adopt a regulation, ordinance, or resolution imposing a charge equal to its administrative costs relating to the seizure, impounding, storage, or release of a firearm **pursuant to Section 33880**." Section 33880 provides that "any charges imposed for administrative costs pursuant to [it]" are subject to certain restrictions, including, that:

> No [such] charge may be imposed for ***any hearing*** or appeal ***relating to the removal***, impound, storage, or release ***of a firearm***, unless that hearing or appeal was requested in writing by the legal owner of the firearm. In addition, the charge may be imposed only upon the person requesting that hearing or appeal.[13]

The measure requires such a hearing so there is no need for a defendant requests it. A fee to recover the Court's costs for any of the above described hearings is therefore expressly prohibited; unless Courts will have to absorb all the costs of the likely tens of thousands of additional hearings that will be required to satisfy the mandates of the measure requiring courts to make findings that the defendant relinquished his or her firearms.

CONCLUSION

In sum, there is no way to definitively determine how much Court time the proposed measure will demand, but there is enough potential for a very significant increase in Court review of matters that do not currently demand such for Courts to be concerned. And, the measure does not provide any mechanism to recoup those costs. Because of such potential, the Judicial Council would be justified in opposing the Safety for All Act or at least expressing its concerns about the potential costs to the Legislative Analysts' Office so that its analysis reflects the true potential for increased court costs.

[13] Cal. Penal Code § 33880(d)(4).

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