
SENATE COMMITTEE ON PUBLIC SAFETY

Senator Nancy Skinner, Chair

2017 - 2018 Regular

Bill No: AB 1968 **Hearing Date:** June 19, 2018
Author: Low
Version: April 9, 2018
Urgency: No **Fiscal:** Yes
Consultant: GC

Subject: *Mental Health: Firearms*

HISTORY

Source: California District Attorneys Association

Prior Legislation: SB 755 (Wolk), 2014, vetoed
AB 1014 (Skinner), Ch. 872, Stats of 2014
AB 1131 (Skinner), Ch. 747, Stats. of 2013
AB 1084 (Melendez), 2013, failed Assembly Public Safety

Support: Bay Area Student Activists; California Association of Marriage and Family Therapists; California Association of Psychiatric Technicians; California Federation of Teachers; California Police Chiefs Association; California Psychological Association; California State Sheriffs' Association; City of Santa Monica; Coalition Against Gun Violence; Peace Officers Research Association of California

Opposition: American Civil Liberties Union of California; California Civil Liberties Advocacy; Disability Rights of California

Assembly Floor Vote: 64 - 1

PURPOSE

The purpose of this bill is to require that a person who has been taken into custody, assessed, and admitted to a designated facility because he or she is a danger to himself, herself, or others, as a result of a mental health disorder more than once within a one-year period be prohibited from owning a firearm for the remainder of his or her life, subject to the right to challenge the prohibition at periodic hearings.

Existing law prohibits firearm possession for an individual who has been adjudicated as a mental defective or who has been committed to a mental institution. (18 USC 922, subd. (g)(4).)

Existing law states that no person who has been found, not guilty by reason of insanity of any crime other than those specified, shall purchase or receive, or attempt to purchase or receive, or shall have in his or her possession, custody, or control any firearm or any other deadly weapon unless the court of commitment has found the person to have recovered sanity, as specified. (Welf. and Inst. Code, 8103, subd (c)(1).)

Existing law specifies that no person found by a court to be mentally incompetent to stand trial, shall purchase or receive, or attempt to purchase or receive, or shall have in his or her possession, custody, or control, any firearm or any other deadly weapon, unless there has been a finding with respect to the person of restoration to competence to stand trial by the committing court. (Welf. and Inst. Code, 8103, subd (d)(1).)

Existing law states that no person who has been placed under conservatorship by a court, as specified, because the person is gravely disabled as a result of a mental disorder or impairment by chronic alcoholism, shall purchase or receive, or attempt to purchase or receive, or shall have in his or her possession, custody, or control, any firearm or any other deadly weapon while under the conservatorship if, at the time the conservatorship was ordered or thereafter, the court that imposed the conservatorship found that possession of a firearm or any other deadly weapon by the person would present a danger to the safety of the person or to others. (Welf. and Inst. Code, 8103, subd (e)(1).)

Existing law specifies that a person who has been taken into custody on a 72 hour hold because that person is a danger to himself, herself, or to others, assessed as specified, and admitted to a designated facility because that person is a danger to himself, herself, or others, shall not own or possess any firearm for a period of five years after the person is released from the facility. (Welf. and Inst. Code, 8103, subd (f)(1).)

Existing law states that a person taken into custody on a 72 hour hold may possess a firearm if the superior court has found that the people of the State of California have not met their burden of showing by a preponderance of the evidence that the person would not be likely to use firearms in a safe and lawful manner. (Welf. and Inst. Code, 8103, subd (f).)

Existing law states that prior to, or concurrent with, the discharge, the facility shall inform a person that he or she is prohibited from owning, possessing, controlling, receiving, or purchasing any firearm for a period of five years. Simultaneously, the facility shall inform the person that he or she may request a hearing from a court, as provided in this subdivision, for an order permitting the person to own, possess, control, receive, or purchase a firearm. The facility shall provide the person with a form for a request for a hearing. Where the person requests a hearing at the time of discharge, the facility shall forward the form to the superior court unless the person states that he or she will submit the form to the superior court.

Existing law provides that a person subject to a 72 hour hold may make a single request for a hearing at any time during the five-year period. (Welf. and Inst. Code, 8103, subd (f)(4).)

Existing law specifies that within seven days after the request for a hearing, the Department of Justice shall file copies of the reports described in this section with the superior court. (Welf. and Inst. Code, 8103, subd (f)(5).)

Existing law states that the court shall set the hearing within 30 days of receipt of the request for a hearing. (Welf. and Inst. Code, 8103, subd (f)(5).)

Existing law provides that upon showing good cause, the district attorney shall be entitled to a continuance not to exceed 14 days after the district attorney was notified of the hearing date by the clerk of the court. If additional continuances are granted, the total length of time for continuances shall not exceed 60 days. (Welf. and Inst. Code, 8103, subd (f)(5).)

Existing law specifies that the prosecution has the burden of showing by a preponderance of the evidence that the person would not be likely to use firearms in a safe and lawful manner. (Welf. and Inst. Code, 8103, subd (f)(6).)

Existing law states that if the court finds that the people have not met their burden, the court shall order that the person shall not be subject to the five-year prohibition on the possession of firearms. (Welf. and Inst. Code, 8103, subd (f)(7).)

Existing law provides that no person who has been certified for intensive treatment as specified shall own, possess, control, receive, or purchase, or attempt to own, possess, control, receive, or purchase, any firearm for a period of five years. (Welf. and Inst. Code, 8103, subd (g).)

Existing law provides that prior to, or concurrent with, the discharge of each person certified for intensive treatment the facility shall inform the person of their right to a hearing on right to possess firearms. (Welf. and Inst. Code, 8103, subd (g)(3).)

Existing law specifies that every person who owns or possesses or has under his or her custody or control, or purchases or receives, or attempts to purchase or receive, any firearm or any other deadly weapon in violation of this section shall be punished by imprisonment for up to three years in the county jail as, a realignment felony, or in a county jail for not more than one year, as a misdemeanor. (Welf. and Inst. Code, 8103, subd (i).)

Existing law states whenever a person, who has been detained or apprehended for examination of his or her mental condition or who is otherwise prohibited from possessing a firearm as specified, 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. (Welf. and Inst. Code, § 8102, subd. (a).)

Existing law requires that firearms dealers obtain certain identifying information from firearms purchasers and forward that information, via electronic transfer to the Department of Justice (DOJ) to perform a background check on the purchaser to determine whether he or she is prohibited from possessing a firearm. (Pen. Code, § 28160-28220.)

Existing law specifies that the Attorney General maintains an online database known as the Armed Prohibited Persons File (APPS). The purpose of APPS is to cross-reference persons who have ownership or possession of a firearm on or after January 1, 1991, as indicated by a record in the Consolidated Firearms Information System, and who, subsequent to the date of that ownership or possession of a firearm, fall within a class of persons who are prohibited from owning or possessing a firearm. (Pen. Code, § 30000.)

This bill specifies that a person who has been taken into custody, assessed, and admitted because he or she is a danger to himself, herself, or others, as a result of a mental health disorder more than once within a one-year period shall not own, possess, control, receive, or purchase, or attempt to own, possess, control, receive, or purchase, any firearm for the remainder of his or her life.

This bill allows a person admitted more than once within a one-year period because they were a danger to themselves or others, to request a court hearing on whether they would be likely to use firearms in a safe and lawful manner.

This bill requires the District Attorney to bear the burden of showing by a preponderance of the evidence that the person would not be likely to use firearms in a safe and lawful manner, if a hearing has been requested.

This bill specifies that if court finds that the people have met their burden to show by a preponderance of the evidence that a person is subject to a lifetime firearm prohibition because that person had been admitted to mental health facility, as specified, more than once within the previous one year period, the court shall inform the person of their right to file a subsequent petition no sooner than five years from the date of the hearing.

This bill states that a person subject to a lifetime ban is entitled to bring subsequent petitions under this section. A person cannot file a subsequent petition, and is not entitled to a subsequent hearing, until five years have passed since the determination on the person's last petition.

This bill provides that a hearing on subsequent petitions will be conducted as described in this subdivision, with the exception that the burden of proof is on the petitioner to establish by a preponderance of the evidence that the petitioner can use firearms in a safe and lawful manner and subsequent petitions must be filed in the same court of jurisdiction as the initial petition regarding the lifetime prohibition.

This bill requires that the form to request a hearing on the right to possess firearms include an authorization for the release of the person's medical and mental health records, upon request, to the appropriate court, solely for use in the hearing.

This bill prohibits the mental health facility from submitting the hearing petition form on behalf of the individual.

This bill extends the time for the court to set the hearing on restoration of right to possess firearms from within 30 days, to within 60 days of the filing of a petition.

This bill authorizes a continuance of the hearing for 30 days on the restoration of right to possess firearms, upon a showing of good cause by the district attorney, an extension from the current continuance of 14 days.

COMMENTS

1. Need for This Bill

According to the author:

AB 1968 would remove the firearms of someone who has been placed on a 5150 hold twice in one year and prohibits the admitting facility from filling out the petition form on the individual's behalf. The individual could still petition the court for a hearing to have his or her guns returned.

People at risk of harming themselves or others should not have easy access to firearms. AB 1968 tightens our laws to keep firearms out of the hands of people who may be suicidal or violent. Restricting their access to firearms will save lives.

A 5150 hold is named after the section of the California Welfare and Institutions code that authorizes people who are deemed to be a danger to themselves or others to be placed on an involuntary psychiatric hold for 72 hours.

Under current law, people who are admitted under one 5150 hold have their firearms taken away for five years but the law allows for them to petition the court for a hearing to have their guns returned. Anecdotal evidence indicates that some mental health institutions fill out the petition on behalf of the individual upon release. Under current law, hearings must take place within 30 days of the petition's submission, which is often not enough time to obtain the necessary medical and psychiatric records and prepare for the hearing.

Assembly Bill 1968 indefinitely removes the firearms of an individual who has been placed on a 5150 hold twice in one year, with the option to petition the court every five years for a hearing to have them returned. The admitting facility would be prohibited from filling out the petition form on the individual's behalf, and the petition would include an authorization for the release of the person's mental health records to the appropriate district attorney. The hearing would take place within 60 days of receipt.

The bill is supported by the California District Attorneys Association, the California Association of Psychiatric Technicians, the California Federation of Teachers, the California Psychological Association, the California State Sheriffs Association, the Santa Barbara Chapter of the Coalition Against Gun Violence, and the Police Officers Research Association of California (PORAC).

2. The Lanterman-Petris-Short Act (LPS Act)

The LPS Act governs the involuntary treatment of the mentally ill in California. Enacted by the Legislature in 1967, the act includes among its goals ending the inappropriate and indefinite commitment of the mentally ill, providing prompt evaluation and treatment of persons with serious mental disorders, guaranteeing and protecting public safety, safeguarding the rights of the involuntarily committed through judicial review, and providing individualized treatment, supervision and placement services for the gravely disabled by means of a conservatorship program.¹ (*Conservatorship of Susan T.* (1994) 8 Cal.4th 1005, 1008-1009.)

The LPS Act limits involuntary commitment to successive periods of increasingly longer duration, beginning with a 72-hour detention for evaluation and treatment (Welf. & Inst. Code, § 5150), which may be extended by certification for 14 days of intensive treatment (Welf. & Inst. Code, § 5250); that initial period may be extended for an additional 14 days if the person detained is suicidal. (Welf. & Inst. Code, § 5260.) In those counties that have elected to do so, the 14-day certification may be extended for an additional 30-day period for further intensive treatment. (Welf. & Inst. Code, § 5270.15.) Persons found to be imminently dangerous may be

¹ www.sdap.org/downloads/research/criminal/mh.doc

involuntarily committed for up to 180 days beyond the 14-day period. (Welf. & Inst. Code, § 5300.) After the initial 72-hour detention, the 14-day and 30-day commitments each require a certification hearing before an appointed hearing officer to determine probable cause for confinement unless the detainee has filed a petition for the writ of habeas corpus. (Welf. & Inst. Code, §§ 5256, 5256.1, 5262, 5270.15, 5275, 5276.) A 180-day commitment requires a superior court order. (Welf. & Inst. Code, § 5301.) (*Id.*)

The LPS Act also authorizes the appointment of a conservator for up to one year for a person determined to be gravely disabled as a result of a mental disorder and unable or unwilling to accept voluntary treatment. (Welf. & Inst. Code, § 5350.) The proposed conservatee is entitled to demand a jury trial on the issue of his or her grave disability, and has a right to counsel at trial, appointed if necessary. (Welf. & Inst. Code, §§ 5350, 5365.) (*Id.*)

3. Existing Law on Welfare & Institutions (W&I) Code 5150 (72-hour hold) and Firearm Prohibition

Current law states that a person who has been taken into custody on a 72-hour hold because that person is a danger to himself, herself, or to others, assessed as specified, and admitted to a designated facility because that person is a danger to himself, herself, or others, shall not own or possess any firearm for a period of five years after the person is released from the facility. (Welfare and Inst. Code, 8103, subd (f)(1).)

The facility shall inform the person that he or she may request a hearing from a court, as provided in this subdivision, for an order permitting the person to own, possess, control, receive, or purchase a firearm. The facility shall provide the person with a form for a request for a hearing. Upon filing of the petition, the court is required to set the hearing within 30 days of receipt of the request for a hearing. (Welf. and Inst. Code, 8103, subd (f)(5).)

Current law provides that a person subject to a 72-hour hold may make a single request for a hearing regarding their right to possess a firearm at any time during the five-year period. (Welf. and Inst. Code, § 8103, subd (f)(4).) Current law allows a person subject to a 72-hour hold to restore their right to possess a firearm if the superior court has found that the prosecution has not met their burden of showing by a preponderance of the evidence that the person would not be likely to use firearms in a safe and lawful manner. (Welf. and Inst. Code, § 8103, subd (f).)

This bill would mandate a lifetime firearm prohibition for individuals that have more than one W&I 5150s (72-hour hold) within a one year time period. An individual subject to a lifetime firearm prohibition because of the provisions in this bill would be entitled to a hearing. The prosecution would bear the burden to demonstrate that the individual showing by a preponderance of the evidence that the person would not be likely to use firearms in a safe and lawful manner. If a court upholds the lifetime firearm prohibition, the person would be entitled to subsequent petitions, but no sooner than five years from the date of the last petition. At any subsequent petition the person would bear the burden to establish that they were likely to use firearms in a safe and lawful manner. This bill would extend the time frame to set the hearing from 30 days to 60 days, and describes the time frame and limits for any continuances of the hearing.

4. Constitutional Right to Possess Firearms

In June of 2008, the United States Supreme Court, in *District of Columbia v. Heller* (2008), 554 U.S. 570, 128 S. Ct. 2783, held that the Second Amendment of the United States Constitution, U.S. Const. Amend. II, confers an individual right to keep and bear arms, and guarantees the individual right to possess and carry weapons in case of confrontation, rejecting prior case law that had treated this right as a collective right of the people, assertable only in connection with the maintenance of a militia.

However, the Supreme Court stated that its opinion should not be taken to cast doubt on long-standing prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.

Subsequent to the *Heller* decision, the Fourth District Appellate Court upheld California's current law regarding a 5 year prohibition on firearm possession for a person subject to a 72 hour hold. In *People v. Jason K.* (4th Dist. 2010), 188 Cal. App. 4th 1545.), the court upheld a court order precluding a defendant from possessing firearms pursuant to California state law barring possession of firearms by a person detained for a mental disorder, as it applied to an individual who had been detained for 72-hour psychiatric evaluation and then discharged, rejecting the detainee's argument that the state law was unconstitutional insofar as it permitted him to be deprived of his right to bear arms based on a showing by a preponderance of the evidence that he would not be likely to use firearms in a safe and lawful manner. The court noted that, as the *Heller* case indicated, this right is subject to the state's traditional authority to regulate firearm use by individuals who have a mental illness. The court also noted that the *Heller* decision had further explicitly recognized the problem of handgun violence and confirmed that the constitution leaves a variety of tools for combating that problem. The court concluded that although the preponderance of the evidence standard required the individual to share equally in the risk of an erroneous adjudication, this risk sharing was justified under circumstances where an individual exhibited a mental disorder sufficient to warrant hospitalization because of facts showing the individual might endanger himself or others.

In reaching its holding the court took note of the temporary nature (five years) of the deprivation of gun rights. The court stated, "When the gravity of the potential consequences of allowing possession of guns by an individual with a history of a manifested mental disturbance is balanced against the temporary deprivation of access to these weapons, the balance weighs in favor of permitting proof by a preponderance of the evidence. (Id. at 1557.)

This bill would provide for a permanent ban on firearm possession for an individual that has been held twice, or more, under a 72 hour hold, within a one year period. A lifetime ban raises due process questions as to whether or not a restriction to one opportunity to have a hearing is appropriate given that mental condition/status is something that can change over time. As amended in the Assembly, this bill allows an individual to bring subsequent petitions to restore their right to possess firearms, but no sooner than five years from the date of the last petition.

5. Amendments Taken in Assembly Public Safety Improved the Bill Significantly from a Constitutionality Perspective

The amendments taken in Assembly Public Safety did the following:

- 1) Allow a person subject to a lifetime prohibition on firearm possession because of the provisions to bring subsequent petitions under this section to challenge the lifetime prohibition;
- 2) Specify that a person cannot file a subsequent petition, and is not entitled to a subsequent hearing, until five years have passed since the determination on the person's last petition;
- 3) State a hearing on subsequent petitions must be filed in the same court of jurisdiction as the initial petition regarding the lifetime prohibition and the burden of proof is on the petitioner to establish by a preponderance of the evidence that the petitioner can use firearms in a safe and lawful manner;
- 4) Strike the requirement that the individual must wait six months after discharge from the facility to file the petition; and,
- 5) Limit the authorization for release of information to mental health records.

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