

EXTREME RISK PROTECTION ORDERS

The Colorado "Red Flag" Law

C.R.S. 13-14.5-101, *et seq.*

- House Bill 19-1177 codified into law on April 12, 2019
- Creates two types of Extreme Risk Protection Orders (ERPOs)
 - Temporary
 - Long-term
- Requires local law enforcement to remove firearms and take possession of concealed carry permit

WHAT IS AN ERPO?

- A court order, either temporary or long term, requiring the removal of all firearms and any concealed carry permit from the possession of the subject (i.e. Respondent)
- Orders are civil in nature and issued by the Court after a hearing
- Requires local L.E. entity to go and serve the order and retrieve the firearms/permit
- (May include a search warrant)

WHERE IS A PETITION FILED?

- Only district and county courts have jurisdiction to hear and issue an ERPO, temporary or otherwise
- No jurisdiction in municipal courts

ERPO TYPES

- Two types of ERPO
 - Temporary ERPO
 - ERPO (long term)
- Each requires:
 - Petition
 - Hearing
 - Order
 - Service
- Each has a different standard and different duration

WHO CAN APPLY FOR AN ERPO?

- Temporary or long-term ERPO, the Petitioner may be:
 - Family Member
 - Household Member
 - L.E. Officer
 - (Probable Cause issue)

TEMPORARY ERPO

- Statutory process
- Process - the Petition:
 - File petition and affidavit to court
 - Affidavit must include facts tending to establish the grounds for the petition
 - If petitioner is a L.E. entity, then it must be accompanied by a sworn affidavit for a search warrant* for any weapons in custody/control of the subject
- Notice to Respondent: Not required
- Hearing
 - Must be held the day petition is filed or the day immediately following (in person or by phone)
- Standard
 - If the Court finds by a preponderance of the evidence that the Respondent poses a significant risk of causing personal injury to self or others by having a firearm

SEARCH WARRANT STANDARDS (GENERALLY)

- For the police to obtain a search warrant, they must have probable cause
- Colo. Const. Art. 2, § 7
 - *The people shall be secure in their persons, papers, homes and effects, from unreasonable searches and seizures; and no warrant to search any place or seize any person or things shall issue without describing the place to be searched, or the person or thing to be seized, as near as may be, nor without probable cause, supported by oath or affirmation reduced to writing.*
- Probable Cause
 - "A law enforcement official has probable cause to conduct a search "when the facts available to the officer would warrant a person of reasonable caution in the belief that contraband or evidence of a crime is present."" *People v. Cox*, 2017 CO 8 (2017) (internal citations omitted).

SEARCH WARRANT STANDARDS FOR ERPO

- C.R.S. § 16-3-301.5 has been created that allows a search warrant to issue authorizing the search and seizure of firearms in the possession of a Respondent in an ERPO (temp or long-term).
 - Requirement:
 - Must comply with 16-3-303; search warrant application requirements
 - (requires grounds for the warrant or probable cause to believe such grounds exist
 - "and also provides facts sufficient to establish probable cause..."
- Lacks any criminal element – this is civil in nature
 - Civil court, civil judge

SEARCH WARRANT CONCERNS

- Concealability...
 - ...of firearms
 - ...of CCW card
- Gun safe?
- Execution
 - When do you walk away from an escalating situation where the failure to comply with the order is a class 2 misdemeanor?

TEMPORARY ERPO

- If the temporary ERPO is issued, then:
 - A law enforcement officer is required to serve the temporary ERPO with notice of an upcoming hearing and petition, and must include a referral to appropriate resources and counseling
 - Within 14 days of issuance, the Court must hold a hearing to consider whether the temporary ERPO should be extended to a long-term ERPP of 364 days
 - The temporary order expires on the date of the subsequent hearing

TEMPORARY ERPO CONTENT

- Temporary ERPO must include:
 - Statement of the grounds asserted for the order
 - Date and time order was issued
 - Date and time order expires
 - Address of court in which any responsive pleading should be filed
 - Date and time of the upcoming hearing
 - Requirements for the surrender of firearms
 - Statement specified at C.R.S. Sec. 13-14.5.103(6)(g)

LAW ENFORCEMENT RESPONSIBILITIES

- If ERPO is issued
 - Service of the Order on the Respondent by LE agency where Respondent resides
 - "Hello, I'm here to take your guns!"
 - Service takes precedence over the service of other documents unless a similar emergency arises
 - Service to occur within 5 days – if not, LE Agency must notify petitioner
 - Petitioner is required add 'l information of Respondent's whereabouts
 - LE Agency may ask court for additional time to serve
- What is the appropriate L.E. response for service?

LAW ENFORCEMENT RESPONSE

- How do you determine the appropriate level of police officer involvement for service?
 - Options:
 - SWAT
 - Advanced notice
 - Surveillance
 - Diversionary Tactics
- What show of force is appropriate?

ERPO (LONG TERM)

- No requirement that a temporary ERPO first issue
- Petitioner:
 - Family member, household member, L.E. officer or agency
- Petition
 - To be filed in county where the Respondent resides
- If L.E., agency is petitioner, then the county of city attorney is required to represent the LE officer or agency
- If not, Petitioner is required, to best of their ability, to notify local LE agency in which respondent resides so the agency may participate in the hearing

ERPO PETITION CONTENT

- The ERPO must
 - Allege Respondent poses a significant risk of causing personal injury to self or others by having custody or control of a firearm, or by purchasing, possessing, or receiving a firearm
 - Must be accompanied by an affidavit "stating the specific statements, actions, or facts that give rise to a reasonable fear of future dangerous acts by Respondent"
 - Identify the number, types, locations of firearms believed to be in Respondent's ownership, possession, custody, or control
 - Identify whether respondent is required to carry a firearm for employment
 - Identify whether a domestic abuse protection order or emergency protection order is in effect with regard to the Respondent

ERPO PETITION CONTENT (CON'T)

- Identify whether there is a pending legal action between the parties
- Identify whether local law enforcement has been informed "regarding the Respondent"
- Petitioner may ask that their address not be disclosed if the petition states it would risk harm to the petitioner or petitioner's family/household

ERPO (LONG TERM)

- Upon filing of the petition, the Court must
 - Appoint an attorney to represent the Respondent
 - Attorney fees are to be paid for by the Court
- The Respondent may replace that attorney at their own expense

ERPO PRE-HEARING

- Upon filing if petition, court shall order a hearing
 - Notice issues to Respondent
 - Court must forward a copy of the hearing notice and petition to the "law enforcement agency in the jurisdiction where the respondent resides"
 - Service must be proper (CRCP apply) / Service takes precedence

ERPO HEARING

- Standard: clear and convincing evidence that:
 - Respondent poses a significant risk of causing personal injury to self or others by having in their custody or control a firearm or by purchasing, possessing, or receiving a firearm
 - Then the court shall issue an ERPO for 364 days
- Statute outlines 12 examples of permissible evidence (13-14.5-105(3)(a)-(l)) but court is not limited to these
 - (The evidentiary examples would be mostly inadmissible in criminal court cases)

ERPO HEARING

- Court may:
 - Examine parties and witnesses, consider sworn affidavits from same
 - Request CBI criminal history check
- Court shall:
 - Allow cross examination
 - Consider available mental health or chemical dependency evaluations
 - Consider whether Respondent meets standard for court-ordered mental health evaluation (and may order the same)
 - Consider whether Respondent meets standard for court-ordered emergency commitment (and may order the same)

CONTENT OF ERPO

- Court must require Respondent to:
 1. Statement of grounds supporting the issuance to the order
 2. Date and time order was issued
 3. Date and time order expires
 4. Address of court for responsive pleadings
 5. Require the relinquishment of firearms and concealed carry permit
 6. Include mandated statements
 7. Advise of ability to request termination of the order and how

HEARING DISPOSITION

- If an ERPO is denied, then:
 - If a temp ERPO was in place, then the Sheriff who issued the concealed carry permit must reissue the permit within three days at no cost to Respondent
- If an ERPO is granted, then:
 - Petitioner must make a good faith effort to provide notice to family or household of the Respondent and third parties who may be at risk

SERVICE OF ERPO

- If ERPO is issued, must be personally served
 - Waived if respondent was appeared in Court for the hearing
- Law enforcement agency in jurisdiction where the Respondent resides must serve the Respondent
 - Court is to forward the ERPO to that L.E. agency within a day of issuance
 - Service takes precedence over other service of docs
- Service to occur within 5 days. If not, then must
 - Notify Petitioner
 - L.E. agency may request add'l time from the court

TERMINATION AND RENEWAL

- These additional processes are provided for in the statute
 - Termination, see C.R.S. 13-14.5-107(1)
 - Renewal, see C.R.S. 13-14.5-107(2)

SURRENDER OF FIREARMS

- Court orders the surrender of firearms by:
 - Ordering Respondent to sell or transfer possession to a federally licensed firearms dealer
 - Arrange for storage by a L.E. agency
 - L.E. agency required to preserve the firearms
 - This option is required if the Respondent does not choose to sell or transfer to a dealer
 - Exceptions for antique firearms and relics (curios)
- Court also orders surrender of any concealed carry permit to the L.E. serving the ERPO

OBLIGATIONS OF L.E. AGENCY

- Per C.R.S. 13-14.5-108(2):
 - Request immediate surrender of all firearms and permit from Respondent
 - Conduct any search permitted by law for the firearms
 - Take possession of the firearms and permit in plain sight or surrendered or discovered pursuant to a lawful search
 - Thereafter, the Respondent may inform the L.E. agency of their preference for sale, transfer, or storage of the firearms
 - If a sale or transfer, L.E. maintains custody until that occurs
- Where personal service is not possible, or not required b/c Respondent was present at the hearing, then Respondent must surrender the same within 24 hours

OBLIGATIONS OF L.E. AGENCY

- Issue a receipt to Respondent at time of surrender for all firearms and any permit
- Within 72 hours of service of ERPO, must file original of the receipt with the court
- Must retain a copy of the receipt
- If no firearms were taken, then the L.E. officer serving the ERPO must file a statement with the court advising of this fact

RESPONDENT'S LACK OF COMPLIANCE

- If a sworn statement, or testimony of petitioner or L.E. agency, indicates probable cause to believe the Respondent did not comply with surrender of firearms or permit, then court shall determine whether PC exists to believe Respondent failed to comply and shall issue a search warrant

CLAIMS OF OWNERSHIP

- L.E. shall return firearms to a person other than Respondent if it determines that other person is the lawful owner of the firearm and if:
 - The firearm remains removed from the Respondent's custody, control, possession, etc.
 - Owner agrees to store it so Respondent does not have access
 - Firearm is not unlawfully possessed by actual owner

RESPONDENT'S OBLIGATIONS

- Within 48 hours after issuance of ERPO, may either:
 - file proof of relinquishment to or removal by a L.E. agency and attesting they have no others, or
 - Attest that when ERPO was issued, they did not have firearms and did not have a permit and do not now have either.
- If not done within these 2 days, the Court shall inform the L.E. agency this was not received and the L.E. shall make a good faith effort to determine whether evidence exists that Respondent failed to comply with the ERPO
 - (To what effect?)

POST

- Peace Officers Standards and Training Board is required to:
 - Develop model policies and procedures for acceptance, storage, and return of firearms surrendered pursuant to an ERPO
 - Post deadline by statute is Dec. 1, 2019
- All L.E. agencies must adopt the model policies and procedures or adopt their own by January 1, 2020

RETURN OF FIREARMS

- Upon expiration or termination of an ERPO, the L.E. agency holding firearms must return them to Respondent within three days after confirming (1) through a records check that Respondent is eligible to own or possess firearms, and (2) that the ERPO has terminated or expired without renewal
- Any firearms that remain unclaimed for a year after an ERPO has expired shall dispose of the firearm through the L.E. agency's normal procedures

ADD'L L.E. OBLIGATIONS

- CBI required to enter orders in computer-based systems
- L.E. agencies shall only expunge orders from systems that have expired or terminated and shall promptly remove expired or terminated orders
- Sheriff's Offices – obligation to determine if Respondent has a concealed carry permit within 3 days of receiving materials from court on an order; revocation is then required
- L.E.'s to promptly remove ERPOs from systems upon notice of a termination order
- L.E.'s to promptly remove ERPOs from systems upon termination or expiration

IF RESPONDENT DOES NOT COMPLY

- Penalty: a class 2 misdemeanor

STATE FORMS

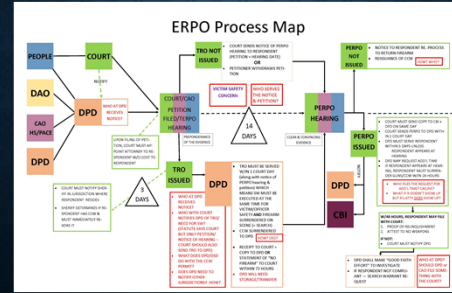
- State to create uniform forms for the courts

INTERNAL PROCESSES

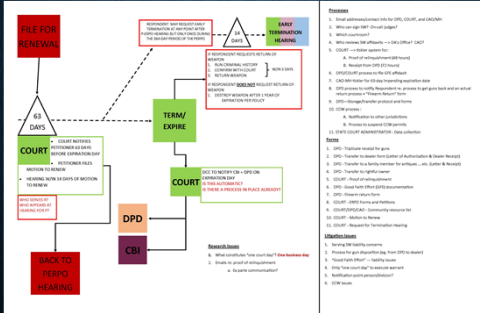
- All these rules and procedures require processes and internal forms for handling court orders
- Each jurisdiction may see this differently depending on its size and resources
- Maybe a simple flow chart will do to guide your police department and administration?

ERPO PROCESS

Diagram compliments of the Denver City Attorney's Office



DON'T FORGET PAGE 2!



WHAT DO I HAVE TO DO?

- Process
- Policy
- Forms
- Notice
- Attend hearings – where L.E. officer or agency is the petitioner

POLICY CONTENT

- Practices and Procedures
 - Definitions
 - Search warrants
 - Service
 - Petitions
 - Hearings
 - Firearm surrender, storage, and return
 - Termination orders, expiration dates